

LEGAL ASPECTS OF THE INSURANCE PREMIUM

by

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To my wife Beana and daughter Azille

Soli Deo Gloria

SUMMARY

The contract of insurance is one of the more frequently concluded commercial contracts. The premium which is undertaken in terms of an insurance contract is one of the essential features of the insurance contract. Notwithstanding the obvious importance of the role of the premium and the legal aspects surrounding it, it has in the past often received but scant treatment in insurance-law materials. In this thesis it is shown that there exist a number of aspects regarding the premium which are unclear and in need of careful scrutiny. In the case of certain other aspects (regarding the premium), although there is certainty as to their contents it is necessary to identify and (re-)define their place in the broader scheme of the insurance law.

The study commences with an investigation into the historical development of the concepts of "insurance" and "premium". This is followed by a study of the relevant principles of Roman-Dutch law. A comparative study is made of the law in a number of countries, namely, the Netherlands, Belgium, England and Australia. The position in South African law is also considered. An introductory study is made regarding those concepts in South African indigenous law which are insurance-like.

Finally, a number of conclusions are drawn and recommendations are made in respect of a selection of aspects regarding the premium which are unclear. These aspects concern the nature of the premium; the question whether "premiumless" or "free" insurance is legally possible; the question whether the parties may agree to insure at a "reasonable premium"; the protection of the insured in the case of the non-payment of the premium; the receipt of the premium by the broker; the return of the premium where the insured has acted fraudulently; the legal tenability of the practice of insuring the premium; the possibility that the contribution in terms of some concepts of our indigenous law may resemble the premium; and finally, the analogous method as a source of law to extend and broaden the pool of legal principles applicable to the insurance contract.

KEY TERMS

Insurance; Insurance contract; Premium; Payment of premium; "Reasonable premium"; Non-payment of premium; The role of brokers in payment of premium; Return of premium; Forfeiture of premium; Insurance of premium; Stokvel; Burial society.

PREFACE

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This thesis reflects the law as at 31 March 1996.

1 June 1996
Erasmuskloof

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CHAPTER 1 INTRODUCTION

1.1 INTRODUCTION

In the chapters that follow, the legal nature of the insurance premium as well as the legal principles surrounding it will be investigated.

The contract of insurance is one of the more frequently concluded commercial contracts and for this reason alone an analysis of the insurance contract and its legal ramifications are of practical as well as theoretical relevance and importance. The premium which is undertaken in terms of an insurance contract is the backbone of the contract. Without the undertaking by the insured to pay a premium there can be no insurance contract. Despite the obvious importance of the role of the insurance premium and the legal aspects surrounding it, it has in the past received only scant treatment in South African insurance law textbooks and other insurance law materials. The nature of the premium and the legal aspects which surround it are deceptively simple. However, on closer investigation it will appear that there are a number of aspects regarding the premium which are far from clear-cut and are in need of careful scrutiny. In the case of certain other aspects, although there is certainty as to their contents, it is necessary to identify and (re-)define their place in the broader scheme of the insurance law.

From the case law it appears that the courts, when confronted by an "insurance law problem", often rely on a mechanical construction of the terms of the policy, instead of trying to find guidelines from other sources, to supplement, understand and construct the terms of the policy. From this approach alone it is clear that there is a need to consider and expound the legal aspects of the premium on the basis of all the relevant external¹ and internal² sources of insurance law. These sources, that is, those other than the terms of the policy, include the historical roots of the concepts of "insurance" and "premium", the common-law principles pertaining to insurance and more particularly the concept of "premium", the general principles of South African insurance law as they have developed to constitute a modern "law of insurance", the general principles of the South African law of contract, and finally, those principles of other legal systems which may prove to be of relevance to the South African insurance law. Thus, in order to supplement and develop the existing insurance law materials as regards the premium, all possible sources of insurance law must be investigated and expounded.

1 The external sources of insurance law are those sources which are not traditionally regarded as sources which contain principles exclusive to insurance law, but are nevertheless relevant to insurance law, eg, the general principles of the law of contract and particular principles of other types of contract which may prove to have tangencies with the insurance contract.

2 The internal sources of insurance law are those sources which deal directly with the principles of insurance law, eg, the historical development of the concept of insurance and all its ramifications, the principles of Roman-Dutch insurance law, and the general principles of insurance law.

1.2 THE CHOICE IN DIFFERENT LEGAL SYSTEMS

1.2.1 The Historical Method of Legal Research³

1.2.1.1 *The Origin and Development of the Insurance Contract*

The study of the legal aspects of the insurance premium⁴ will commence with a brief historical conspectus of the origin and development of the insurance contract, as well as the role of the "price" or "premium" in some early forms of contract which might have been antecedents of the genuine insurance contract.⁵ It is necessary to investigate the historical development of a legal concept (for example, in the present instance, the insurance contract) in its broader societal context. If the historiography relating to a particular legal concept is restricted to an "internal" legal history, as if it had no connection with political, social and economic history, it will usually leave gaps in the exposition of the broader historical context of a particular legal concept.⁶ The history of insurance law, and for that matter any branch of the law, need not be a grim and uninspiring subject dissociated from the broader social context in which it has developed. By studying the broader historical social context of a legal concept it may well be revealed that a legal figure or concept was created by real people (merchants, in the case of the insurance contract) for a variety of reasons and influenced by a bewildering number of factors. An external historiographical survey will definitely not always provide watertight solutions and all the answers to a modern-day problem, but it may generate the necessary thought-provoking comments to inspire the beginning of creative responses to an old way of thinking on a particular subject.⁷ Thus, it is suggested that in expounding the historical origin of the insurance contract, and in particular the origin of the premium, it is not sufficient to merely state *what* the legal principles surrounding the insurance contract and the premium provided, but also the reasons *why* a particular principle developed. It is a truism to say that the better one's grasp of the historical development of an area of the law, in the present case that of the insurance premium, the better

3 The historical method of legal research is, of course, simply one of the methods which can be used by lawyers, either on its own or in conjunction with other methods of legal research, to create order out of the mass of legal material at their disposal and to test the validity of judicial pronouncements. As to the history of the development of legal methodology, as well as its importance in the evolution of law, see Van der Merwe *Regsmetodologie* 2 et seq.

4 For an explanation of the different aspects of the insurance premium which will be investigated in each legal system, as well as the reasons for choosing them, see par 1.3 below.

5 See further ch 2 par 2.2 below.

6 For a discussion of the importance of the connection between the "internal" legal history of a particular concept on the one hand, and its "external" legal history on the other hand, see Van Zyl *Regsgesiedenis* 2; Visser *History* v 8 et seq; Venter et al 161-162. This approach applies, of course, with equal force to comparative law as a method of legal research. It has been said that "when evaluating a system of legal principles or rules ... [one must] take into account their 'natural' socio-economic environment. [This underlines] the importance of the individuality of the *social* and *political* environment, for the understanding and efficient function of legal institutions and principles" (my insertions): see Banakas 292-293. As to comparative law as a method of legal research, see further par 1.2.2 below.

7 See Visser "Legal Historian" 19 et seq.

one's understanding of the modern law regarding such area of the law. This historical survey forms the first part of the exposition of the historical origin and development of the insurance contract and the premium.

The chapter dealing with the origin and historical development of the insurance contract and the premium includes a brief discussion of some of the similarities and differences between the payment of the premium in terms of an insurance contract, and some equivalents in the broader contractual context.⁸ Thus, by way of the analogous method of legal research, the premium is compared with some concepts from other types of contract which fulfill the same function as the premium. The reason for this inter-contractual comparison is twofold. First, from the historical conspectus of the origin and development of the insurance contract it appears that the insurance contract may well have developed from either the maritime loan, or the simulated loan, or the simulated sale, or, and perhaps more likely, from a combination of these contracts together with the particular commercial needs of that time.⁹

Secondly, and in accordance with the general approach that the insurance contract is simply another type of contract, it is necessary to consider the general principles of the law of contract. In particular the principles of those contracts which show some resemblance to the insurance contract should be considered. Such consideration is particularly necessary as regards the aspect of the "price", being the payment of a sum of money or other commodity in terms of other types of contract, as it may correspond with the payment of the premium in terms of an insurance contract. Two types of contract, namely sale and lease, have been chosen for this inter-contractual comparison with the insurance contract.¹⁰ The relevant principles of the contracts of sale and lease may find application where the general principles of the insurance contract do not provide a suitable solution. Thus, the general principles of the South African law of contract is another source to supplement the lacunas of the South African insurance law.

This inter-contractual comparison between, on the one hand, the premium which is payable in terms of an insurance contract, and, on the other hand, the price or rent payable in terms of the contracts of sale and lease respectively, does not constitute an example of the historical method of legal research, but is in essence an example of the analogous method of legal research.¹¹ The analogous method operates alongside the historical and comparative methods of research.¹² The analogous

8 See ch 2 par 2.3 below.

9 This first reason for the inclusion of an inter-contractual comparison became apparent, of course, only after the section on the historical origin and development of the insurance contract had been completed.

10 See further ch 2 par 2.3 below for the reasons why sale and lease have been chosen for this analogous study.

11 The analogous method is what Venter et al at 74 et seq apparently have in mind where they refer to the "metode van verbandleggende identifikasie".

12 For a comparison between the different methods of legal research, see Venter et al 54. See also Van Niekerk *Decline* 70.

method of legal research is a technique, rather than a method, in conducting a tertiary method of legal research.¹³ It aims at comparing *different concepts* (for example, the insurance contract with the contract of sale) within the same, but sometimes in different, legal systems. By contrast, the comparative method, for example, aims at comparing the *same concept* in different, but sometimes within the same,¹⁴ legal systems.¹⁵ It will be shown that the insurance contract has developed historically from other types of contract, in particular the contracts of sale and loan. As a result of this historical link between the insurance contract and the contract of sale, it seems apt to follow the discussion of the historical development of the concepts of "insurance" and "premium" with a comparison, using the analogous method or technique, of the modern contracts of insurance and sale. The contracts of sale and lease, in turn, also share a close relationship.¹⁶ As the rent which is payable in terms of a contract of lease is subject to very much the same rules as the price in terms of a sale, the principles regarding the payment of rent are also compared with those pertaining to the payment of the premium in terms of an insurance contract.¹⁷

The analogous method of legal research has been recognised in our case law as a valid and commendable way to develop South African law in general.¹⁸ It has also been argued that the application of the general principles of the South African law of contract and delict can fruitfully be relied upon and applied to develop the South African insurance law as an integral part of our law in general.¹⁹ By applying the analogous method, so it is suggested, the general principles of our law of contract and delict which, of course, include the general principles of the Roman-Dutch law,²⁰ should be

¹³ For a discussion of the tertiary method of legal research and the different techniques (which include the analogous technique) involved in this method, see Venter et al 72 et seq.

¹⁴ If the same concepts within one legal system are compared, usually in the case of a so-called mixed legal system, it is also referred to as internal comparative law. For a discussion and example of internal comparative law as a method of legal research, see par 1.2.2.7 note 47 below.

¹⁵ The analogous method should be applied with caution. It has been said that "[t]hough analogy cannot prove the truth of a statement, it can add wonderful life and light to it. But there is a danger in arguing by analogy, for, though it may be used to suggest a conclusion, it cannot establish one. Careful testing is called for, with different cases, to ensure that there is a relevant likeness between the things compared": see Hahlo & Kahn 309. For a discussion of the comparative method of legal research, see par 1.2.2.1 below.

¹⁶ See Zimmermann *Obligations* 354n86 and the authorities referred to there.

¹⁷ For a discussion of the similarities between the principles which govern the payment of the price and rent respectively, see Zimmermann *Obligations* 354-355.

¹⁸ See the decision in *Government of RSA v Ngubane* 1972 (2) SA 601 (A) at 605G-606A where the Court, albeit obiter, referred with approval to the examination of analogous materials as a useful method to develop and supplement comparable concepts in our law. For a discussion of how the analogous method may be used by the courts to extend the application of a legal rule or principle from one type of contract or situation to another in the process of judicial law-making, see Hahlo & Kahn 308-309 and the authorities referred to there.

¹⁹ See Van Niekerk *Decline* 71n286-288 and the authorities referred to there.

²⁰ The application of the analogous method involves, of course, a further consideration in addition to the purely historical or comparative approach which has been followed by our courts in the past: see Van Niekerk *Decline* 70-71 and his comments in this regard concerning the approach by the Court in the decision in *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A).

applied in insurance cases. Such analogous application of relevant principles will further the eradication of those rules from English law which have under the guise of "matters peculiar to insurance" been incorporated into our insurance law as if it were a separate compartment of the law with an existence divorced from the general principles.²¹

1.2.1.2 Roman-Dutch Law

The investigation into the development of the concepts of "insurance contract" and "premium" is followed by a chapter which contains an analysis of the relevant principles of Roman-Dutch insurance law. While the investigation into the origin and historical development of the concepts of "insurance" and "premium" forms the first part of the historical exposition of the principles surrounding the premium, the analysis of the principles of Roman-Dutch law forms the second part of what may be referred to in methodological jargon as the historical method of legal research.²² Roman-Dutch law is the common law of South Africa and an investigation into the principles of South African law can ill afford to brush aside the principles of Roman-Dutch law.²³ It must be emphasised, however, that Roman-Dutch law is not the South African law of insurance. It is merely our common law and therefore the system with reference to which the South African insurance law should be developed.

An investigation into the principles of Roman-Dutch insurance law will show that it provides different results in different circumstances. First, in some cases it may provide a direct, appropriate answer to or principle for a modern-day insurance law problem. In such a case the answer or principle can be applied to the South African law. Secondly, it may provide an indirect (that is, an adaptable), acceptable answer to or principle for a modern-day insurance law problem. In such a case the Roman-Dutch-law principle can be applied to the South African law with the necessary changes in points of detail. Thirdly, it may provide an unacceptable solution or principle, for example, the principle may be in conflict with South African legislation or in conflict with the legal conviction of the community, or it may simply no longer be relevant to modern-day South African insurance law. In such a case the principle applied in Roman-Dutch law must be repudiated. Fourthly, it may happen that the Roman-Dutch law provides no

21 See Van Niekerk *Decline* 71 for examples of such rules from English law which can and should be replaced with the general principles of South African law of contract and delict.

22 As to the nature, value and necessity of the historical method of legal research, see Van Zyl "Regshistories" 19 et seq; Van Zyl *Regsgeskiedenis* 3-4; Visser "Legal Historian" 8 et seq; and Venter et al 161 et seq. The historical method usually entails an analysis which commences with an investigation of Roman law, followed by an exposition of the relevant works of the Medieval Glossators, Ultramontani, Commentators, Humanists, and the development in law leading to the respective codifications in France, Germany and the Netherlands: see Van Zyl 21 et seq. A "complete" survey of the historical sources sometimes includes references to the law of virtually all the Western and Central European countries, as it developed after the sixteenth century: see, eg, Van Zyl *Regsgeskiedenis* 265 et seq; Venter et al 184 et seq. As the concept of "insurance" was unknown to the Romans and the earliest examples of true insurance contracts date only from the fourteenth century, this classification is, for obvious reasons, not followed here.

23 See ch 3 below.

answer or principle at all. In such a case the other sources of South African insurance law must be investigated for a suitable solution.²⁴

The concept of "Roman-Dutch law" entails, of course, much more than the mere elucidation of the Roman law as received in the province of Holland in the Netherlands. The concept of "Roman-Dutch law", being the South African common law, is simply the common reference to the European *ius commune*, which is the true common law of South Africa. In terms of this European *ius commune*, the countries of Western and Central Europe have a common law and a common legal science dating back to the Middle Ages and subject to cross-cultural influences. This entails, for example, that the insurance law materials of other parts of Europe need to be considered when considering the "Roman-Dutch insurance law".²⁵

1.2.2 The Comparative Method of Legal Research

1.2.2.1 Introduction

The historical method of legal research is followed by a comparative study of the law in a number of countries.²⁶ The need to employ comparative law as a method of legal research is twofold. First, comparative law may provide answers to legal questions where neither Roman-Dutch insurance law, nor modern South African insurance law, nor the general principles of modern law of contract provides any. Secondly, comparative law may provide answers to legal questions where South African insurance law is out of touch with recent developments elsewhere. A few general reasons to illustrate the importance of comparative law as a method of legal research will suffice. First, comparative law could result in the acquisition of knowledge of and insight into a wide range of legal and cultural issues.²⁷ Secondly, the ultimate aim of comparative law is the improvement of one's own legal system.²⁸ For comparative law to achieve this aim it is important to *apply* the knowledge which is gained from a foreign legal system to one's own system.²⁹ *Applied comparative law* stands in stark contrast to *descriptive com-*

24 See also Van Niekerk *Decline* 70. These other sources include, of course, the general principles of the modern South African law of contract: see again par 1.2.1.1 above.

25 See further ch 3 par 3.1 below and the authorities referred to there.

26 Comparative law is concerned with law as a supra-national phenomenon: see Rheinstein 415. As to the science of comparative law in general, see Schmitthoff 94 et seq; David & Brierly 1 et seq; Van Zyl *Regsvergelyking* 3 et seq; Venter et al 206 et seq. As to the uses, misuses and non-uses of comparative law as a method of legal research, see Stein 198 et seq. For a discussion of some of the methodological problems which are encountered in comparative law, see Zweigert 465 et seq; Van Zyl *Regsvergelyking* 34 et seq.

27 See Van Zyl *Regsvergelyking* 17. This reason constitutes, of course, an important link between an "external" historical method of legal research on the one hand, and comparative law as a method of legal research on the other hand: see again par 1.2 above.

28 See Schmitthoff 100.

29 See Schmitthoff 96 where he states that "the subject of comparison is always an individual legal problem. The question is always how several legal systems react to the same legal problem." See also Von Mehren 625 628; and Banakas 289 where he puts this principle of applied comparative law as follows: "[T]he institutions of different legal systems can be meaningfully compared only if they perform the same task, if they serve the same function."

parative law. In the latter form of comparative law, the legal researcher merely states the position in terms of a foreign legal system, without actually applying it to (or at least comparing it with) his own legal system.³⁰

The legal systems chosen for the comparative part of the study include those of the Netherlands,³¹ Belgium,³² England,³³ and Australia.³⁴ There were specific reasons for choosing these systems. These reasons will be explained in the paragraphs which follow.

1.2.2.2 Dutch Law

The choice of Dutch law, reflecting as it does a development based upon Roman-Dutch law, is obvious. Although Dutch law, through the process of codification,³⁵ confirmed some of the principles of Roman-Dutch law, almost 200 years ago others were already considered to be out of touch with the then current insurance practice and consequently rejected by the Dutch legislature. Thus, Dutch law is studied for a number of reasons. First, it is studied to ascertain which of the Roman-Dutch law principles were taken over by the Dutch legislature in the different Codes and also how these principles were incorporated in modern Dutch law. Secondly, it is studied to determine which principles were adopted by the Dutch legislature to replace those principles of Roman-Dutch law which were rejected. Thirdly, and in conjunction with the first two reasons, it is studied to determine which principles of the modern Dutch insurance law can be adopted and applied to South African law, where our own law does not provide an acceptable answer to an insurance problem.

1.2.2.3 Belgian Law

Belgium and the Netherlands, being two of the Low Countries,³⁶ share a natural cross-influence of language, law, and culture in general.³⁷ The choice of Belgian law as comparative material may be justified on a number of grounds. First, it provides an interesting example of a legal system which shows a number of similarities with Dutch law, but simultaneously illustrates how two legal systems, although geographically close to each other, developed disparately. Secondly, Belgian law provides an example

30 See Van Zyl *Regsvergelyking* 17.

31 See ch 4 below.

32 See ch 5 below.

33 See ch 6 below.

34 See ch 7 below.

35 The Dutch Civil Code (*Burgerlijk Wetboek*) appeared in 1838 and the Dutch Code of Commerce (*Wetboek van Koophandel*) in 1838. The Civil Code is currently being revised. Some of the titles of the New Civil Code (*Nieuw Burgerlijk Wetboek*) have already come into operation while other titles will come into operation only at a later date: see further ch 4 par 4.1 notes 4 and 7 below.

36 The "Low Countries" refer to the lowland region of Western Europe on the North Sea. It consists of Belgium, Luxemburg, and the Netherlands: see Collins 679.

37 For a discussion of the similarities between the legal systems of Belgium and the Netherlands, see Spanoghe & Feenstra xi et seq. For a similar discussion concerning mercantile law, see Fredericq & Merchiers 201 et seq.

of the most recent legislative activity on the insurance contract because its Insurance Code, contained in the Law of 1992, is the latest European code on the topic. Thirdly, because of its close relationship with the Dutch and Roman-Dutch law, Belgian law is probably closer to South African law than a number of other European legal systems which are sometimes referred to in comparative studies and makes for a more logical comparison. Fourthly, one of the official languages in which the sources of Belgian law are recorded, namely, Flemish (the other being French) is likely to be more accessible to more South African jurists than the respective languages of most if not all other European jurisdictions which are not canvassed in this study. Fifthly, although there are, of course, a number of other European legal systems which could also have formed the basis of a fruitful comparative study, such as French, Italian and even German law, a choice had of necessity to be made. A study of Belgian law hopefully presents a desirable if not welcome deviation from the beaten track as far as the usual choice in comparative materials is concerned.

1.2.2.4 *English Law*

English law was influential in the development of South African law, including our insurance law. By way of a broad generalisation it may be stated that Roman-Dutch law (as the law which obtained in the Netherlands at the time of Jan van Riebeeck's landing at the Cape) was transplanted to the Cape. Roman-Dutch insurance law was part of this transplant. After the first and second occupation by the British in 1795 and 1806 respectively, an informal infiltration of English law and English insurance law in particular followed. This was followed by a formal introduction of English insurance law at the Cape by way of the enactment of the General Law Amendment Act 8 of 1879.³⁸ Section 2 of this Act provided as follows:

"[I]n every suit, action, and cause having reference to questions of fire, life and marine assurance ... which shall henceforth be brought in the Supreme Court, or in any other competent court of this Colony, the law administered by the High Court of Justice in England for the time being, so far as the same shall not be repugnant to, or in conflict with, any Ordinance, Act of Parliament, or other statute having the force of law in this Colony, shall be the law to be administered by the said Supreme Court or other competent court."³⁹

The Orange Free State followed suit with the enactment of the General Law Amendment Ordinance 5 of 1902. This resulted in the law of the Cape Province being applied in the Orange Free State. The English life, fire and marine insurance law was consequently not only of a directory nature, but authoritative in the Cape and Orange Free State. There were no similar legislative instruments present in the Transvaal and Natal, and Roman-Dutch law was regarded, at least in theory, as the common law for purposes of insurance disputes in those two provinces.

38 See Van Niekerk *Decline* 2 et seq; Reinecke & Van der Merwe par 8; Gordon & Getz 1 et seq; Hosten et al 337 et seq.

39 For a discussion of the effect of s 2 on the South African law of insurance, see Van Niekerk *Decline* 15 et seq; Reinecke & Van der Merwe par 8; Gordon & Getz 2 et seq.

In 1977 the General Law Amendment Act 8 of 1879 was repealed by the Pre-Union Statute Law Revision Act 43 of 1977. Although the latter aimed at the uniformity of insurance law throughout South Africa, it has been suggested that such uniformity had for all practical purposes already been attained in an informal way as a result of judicial activity.⁴⁰ The result of the 1977 legislation, it was thought, would be that English law, although no longer binding authority in the Cape and Free State after 1977, would still enjoy strong persuasive authority, and would still, from a comparative law point of view, be the most relevant insurance system.⁴¹ This conclusion is supported by insurance decisions which were handed down after the introduction of the Pre-Union Statute Law Revision Act.⁴² In conclusion then, and by way of a rather sweeping statement, it may be stated that although English insurance law no longer has any binding authority in South Africa, its influence, either through the effect of earlier decisions in which it was referred to as authoritative for South African law, or by reason of its role as an important secondary source of South African insurance law, will remain.⁴³ Through the informal as well as the formal introduction of English insurance law to South African insurance law, certain principles of English insurance law have become part and parcel of South African insurance law. To deny this reality would be short-sighted. For this reason an investigation into English insurance law forms an indispensable part of any comparative research into South African insurance law.

1.2.2.5 *Australian Law*

Australian insurance law provides an example of a legal system which was originally modelled on the English common-law system, but which has in the recent past been the subject of intense research and innovative legislation. Just as Belgian law has been chosen as being the most recently overhauled civil-law system, so too Australian law has been selected as representing the latest version of a common-law system. There are obvious advantages of a familiarity with the statutory developments in Australian insurance law, being as they are an improvement on and a supplement to the deficiencies of English insurance law. The ultimate aim of a knowledge of these developments and improvements in Australian insurance law is to consider them with a view to making recommendations to remove deficiencies and clarify uncertain areas in respect of one's own insurance law system. Just as a number of possible civil-law systems had to be excluded from this investigation, so too American, Canadian and Nigerian law, to mention but some of the other possibly relevant common-law systems, could not be accommodated in this study.

1.2.2.6 *South African Law*

The legal aspects of the premium in the South African insurance law are considered along the same lines as the investigation which is launched in respect of the

40 See Van Niekerk *Decline* 55n221 and the authorities referred to there.

41 See Van Niekerk *Decline* 55.

42 See Van Niekerk *Decline* 56n227 and the decisions referred to there.

43 See further ch 8 par 8.1 note 3 below.

other legal systems.⁴⁴ For the purposes of applied comparative law, the same topics had to be investigated in South African law as had been investigated in the other legal systems (chapters) to facilitate the application of the comparative materials.

It will be shown that, as far as certain aspects of the premium are concerned, there are a number of lacunas or grey areas in the South African insurance law. Some of these were evident from the outset of the research, either from existing South African insurance law materials in which these unsolved issues are identified, or from a preliminary bird's-eye survey during which certain issues, although not problem-posing issues at first glance, were nevertheless tagged as potential problem areas.⁴⁵ Others were identified with reference to other legal systems. Thus, if seen from one's own legal system's point of view, comparative law serves yet another function, namely to identify previously unidentified gaps and shortcomings in one's own legal system.

1.2.2.7 *South African Indigenous Law*

An introductory investigation is also conducted into certain financial and social concepts from the South African indigenous law⁴⁶ which resemble the concept of "insurance".⁴⁷ It will be shown that these concepts are in fact insurance-like contracts

44 See ch 8 below.

45 As to the choice of the different aspects which will be discussed in the chapters below, as well as the reasons for such choice, see par 1.3 below.

46 The concept of "South African indigenous law" connotes the "informal" South African law which regulates some of the legal relationships between Black South Africans, eg, black customary marriages. Indigenous law is sometimes also referred to as autochthonous, customary or African customary law, or people's law: see Hosten et al 1248 et seq; Van Niekerk *Indigenous Law* 1-2. Indigenous law may be regarded as a body of customary law which, in certain cases, is applied instead of the "formal" South African law. But it is incorrect to say that the South African indigenous law is in competition with the "formal" South African law. It has been suggested that there is only one legal system operative in South Africa, ie, the "formal" South African law and that in certain instances involving black customary law, the customary rules may be enforced at the expense of the former: see Hosten et al 525 et seq; 535 et seq; 1249n9. It is submitted that instead of applying either the "formal" South African law or the South African indigenous law, one should rather try and create, if possible, a fusion between the two systems. In short, where possible the best of both legal systems should be taken to create an inclusive South African insurance law. For a discussion of a similar approach in respect of the re-writing of the South African legal history, see Du Flessis 302 et seq. As to the interaction between indigenous law and "formal" South African law in the light of the new constitutional dispensation, see Van Niekerk *Indigenous Law* 259 et seq.

47 See ch 9 below. The cultural diversity which underlies the South African legal system is illustrated by a comparative study of the "formal" South African insurance law and the South African indigenous law. A study of the relevant concepts of the South African indigenous law therefore entails the "internal" comparative method of research. In this sense the South African legal system can be referred to as a "mixed legal system". Comparative law is, of course, not restricted to a comparison of the legal systems of different countries (jurisdictions). A comparative study of the law can be conducted in respect of different systems within the same jurisdiction. For a discussion of the role of comparative law in a mixed (South African) legal system, see Baxter 92 et seq. This discussion by Baxter centres on the comparison of Roman-Dutch law and English law. For a discussion of the role and function of comparative law within a mixed South African legal system consisting of a "Western system" on the one hand and an "African system" on the other hand, see Hosten et al 1248 et seq.

and should be treated as such by the law. The contribution which is payable in terms of some of these indigenous contracts may, for all practical purposes, be regarded as the equivalent of the premium in terms of an ordinary insurance contract. This equation paves the way for interesting and necessary comparative remarks about the contribution on the one hand, and the premium on the other hand.⁴⁸ A few introductory remarks are made in this regard.⁴⁹

Important consequences arise from the fact that some indigenous contracts resemble insurance contracts. First, this resemblance allows for an important exchange and cross-application of legal principles between these contracts and ordinary insurance contracts. Such cross-application may provide answers to and guidelines for problem-areas of the "formal" South African insurance law, as well as those concepts from the South African indigenous law which resemble ordinary insurance contracts. Secondly, the resemblance and subsequent cross-application of principles will result in the development and enlargement of a South African insurance law which takes cognisance of and provides for all types of insurance contract. Such inclusion and recognition of indigenous "insurance-like contracts" will enhance the acceptability and legitimacy of the "formal" South African insurance law. This will be beneficial to South African insurance law in particular, as well as to the South African legal system in general, both being social instruments which serve the needs of the community.⁵⁰

1.3 THE CONTENT AND STRUCTURE OF THE HISTORICAL AND COMPARATIVE CHAPTERS

The nature of the premium and the legal aspects surrounding it will be investigated and compared in the legal systems discussed in paragraph 1.2 above. Each legal system will be dealt with in a separate chapter. Generally, all the chapters in which the different legal systems are investigated follow the same arrangement. This is necessary (and, in fact, indispensable) to do justice to comparative law as a method of legal research. Without a basic similarity in the structure of the different chapters, the applied comparative method⁵¹ would be difficult, if not impossible to execute.

Generally the content of each of the different chapters is arranged as follows.⁵² First, each chapter commences with a short introduction in which the different insurance law sources of the particular legal system are identified, and in which the

48 It will be argued in this thesis, when and where applicable, that the premium in terms of an insurance contract may take the form of something other than money. Because of the insurance-like nature of many of the indigenous concepts and the fact that the contribution in terms of these concepts often consists of something other than money, these contributions may therefore serve as interesting examples of premium-like contributions which consist of something other than money.

49 See ch 9 par 9.1.2.1 and 9.2 below.

50 For a discussion of the compatibility of indigenous law with Western perceptions of human rights, see Van Niekerk *Indigenous Law* 261 et seq.

51 As to the meaning of the concept of "applied comparative law", see again par 1.2 above.

52 As the legal concepts and contracts which are discussed in chapter 2 were not necessarily true examples of the insurance contract, a different arrangement is followed there: see ch 2 below.

place and role of the insurance contract in the broader context of that particular legal system are identified.⁵³

Secondly, the role of the premium in the contract of insurance is discussed. This discussion includes, for example, an investigation into the definition of the insurance contract and the premium in that particular legal system, the nature of the premium, and the legal consequences which arise if the parties do not agree on the payment of the premium. It is important to establish what the definition of the concepts of insurance and premium are, as it may be necessary to determine whether or not a particular type of performance by a party qualifies as a premium, especially where the performance takes the form of something other than money. Whether or not a particular type of performance qualifies as a premium is, in turn, important to establish whether or not the contract qualifies as an insurance contract. And whether or not a particular contract is an insurance contract is important to establish, for example, whether legislation which pertains to insurance is applicable to the contract, or whether the natural consequences which are peculiar to the insurance contract, apply to the particular contract.⁵⁴

Thirdly, the actual payment of the premium is investigated on the basis of the time, mode and place of payment, by whom and to whom the premium is to be paid, and the amount of the premium. These aspects go to the root of the premium as the counter-performance by the insured, in return for the undertaking by the insurer to bear the risk of the materialisation of the uncertain event. For example, if the insured pays the premium but payment has not taken place at the agreed time or place, can one say that payment has in fact taken place in a legal sense of the word? The amount or rate of the premium is important in that it is directly linked with the question about the extent (if any) of the cover provided by the insurer in terms of the insurance contract.⁵⁵

Fourthly, the effect of the non-payment of the premium is discussed. As the non-payment of the premium may have far-reaching consequences for the parties, especially the insured (for example, it can lead to the cancellation of the contract and consequently the cover in terms of it), it is important to establish the legal consequences of non-payment.⁵⁶

Fifthly, the role of brokers (and other insurance intermediaries) in the payment and receipt of the premium is investigated. In particular the question concerning on whose behalf the broker receives the premium is considered. This has an important bearing on, for example, the situation where the broker or the insurer goes insolvent after the premium has been paid to the broker by the insured. If the broker receives the premium on behalf of the insured, the latter can instruct the broker or intermediary not to pay it over to the insurer in the case where the insured becomes aware of the

53 See the first paragraph of chapters 3 to 9 below.

54 See the second paragraph of chapters 3 to 9 below.

55 See the third paragraph of chapters 3 to 9 below.

56 See the fourth paragraph of chapters 3 to 9 below.

imminent insolvency of the insurer. However, if the broker receives it on behalf of the insurer, the insured cannot prevent the broker from paying it over to the (liquidator of the) insurer once payment has been made to the broker.⁵⁷

Sixthly, the different circumstances in which the premium must be returned are explained. As the insured's right to a return of the premium and the insurer's right to claim the premium are usually two sides of the same coin, it coincides with the question of whether or not the respective performances of the parties have been rendered. For example, if the insurer has not been at risk, it should, as a matter of general principle, not be entitled to claim (or keep) the premium. If, by contrast, the insurer has been at risk, it should, as a matter of general principle, be entitled to claim (or keep) the premium.⁵⁸ Closely associated with the aspect of the return of the premium is the question concerning the forfeiture of the premium by the insured.⁵⁹

Finally, the legal tenability of the practice of insuring the premium is investigated. This is an aspect which receives little if any consideration in the textbooks on insurance law, but which is, it is submitted, important from a practical as well as a theoretical point of view.⁶⁰ At the end of each chapter conclusions are drawn in respect of certain aspects of the premium which appear to be not yet settled law, or where an interesting or innovative answer is proposed by the particular legal system, mention is made of such proposal.⁶¹

The selection of different aspects concerning the premium which were singled out to be investigated and discussed in the various chapters, was based on a preliminary list of potentially problem-posing or contentious issues which were identified in the different materials on the legal systems which were investigated. This list was supplemented by a number of aspects which, although not treated in the materials itself, nevertheless appeared to be worth investigating.

1.4 APPLICATION OF THE RESULTS OF THE HISTORICAL AND COMPARATIVE CHAPTERS

Finally, on the strength of the research done in respect of the historical development of the insurance contract, the principles of Roman-Dutch insurance law, general principles of the South African law of contract, general principles of the South African insurance law, general principles of some South African indigenous law concepts, and the development of and solutions to particular problems which have been identified in and implemented by other legal systems, conclusions are drawn for South African insurance law and a number of recommendations are made regarding certain aspects of the premium in the South African insurance law.⁶²

57 See the fifth paragraph of chapters 3 to 9 below.

58 See the sixth paragraph of chapters 3 to 9 below.

59 See the seventh paragraph of chapters 3 to 9 below.

60 See the eighth paragraph of chapters 3 to 9 below.

61 See the ninth paragraph of chapters 3 to 9 below.

62 See ch 10 below.

CHAPTER 2

THE HISTORICAL DEVELOPMENT OF THE CONCEPTS OF "INSURANCE" AND "PREMIUM" AND SOME EQUIVALENTS OF PREMIUM IN THE BROADER CONTRACTUAL CONTEXT

2.1 INTRODUCTION

Risks are inevitable concomitants of life. By way of a broad general description, the concept of "risk"¹ may be defined as "the possibility of incurring misfortune or loss".² There is no consensus on an acceptable legal definition of the concept of "risk". In general "peril" may be described as "an uncertain event, the occurrence of which may cause an undesirable change", and "risk", in turn, as "the possibility that such change may take place".³ The materialisation of the risk, that is, the actual suffering of loss or damage, may result in different forms of loss, for example, emotional loss or economic loss. Various types of risk exist.⁴ For present purposes the discussion will be restricted to one or two comments concerning economic risks. The economic risk in the insurance context involves the occurrence of a change which is not merely undesirable in general, but which is prejudicial or detrimental to the estate or estate planning of the person concerned. Over the centuries man has devised various means and methods to deal with such risks.

First, risks may be avoided. Thus, it is possible to avoid involvement in an aeroplane accident by not travelling by air. Carried to its logical conclusion, the avoidance of the risk would make life unbearable if not impossible as life inevitably and constantly involves different types of risk. Total avoidance of risk is therefore not a realistic and feasible method of dealing with the possibility of the materialisation of the risk.⁵

1 The term "risk" originates from the seventeenth century and is a derivation via French of the Italian "rischiare" which means "to be in peril", which, in turn, is derived from the Greek "rhiza", meaning cliff. The latter word was used in maritime jargon to indicate the hazards of sailing along rocky coasts (cliffs): see Collins 998. It is interesting to note that the term "risk", which of course plays an important role in insurance law, has its origin in the maritime milieu, as the earliest examples of insurance policies concerned the spreading of marine risks: see further par 2.2.3.2 below.

2 See Collins 998.

3 See Van der Merwe *Versekeringsbegrip* 269; Reinecke & Van der Merwe par 170 and 171. Although the concept of "risk" connotes, as a matter of general principle, the possibility of an undesirable change, it is, of course, also possible that the materialisation of risk may have a positive result, eg, if one wins a wager.

4 Uncertainty in one or the other form is always linked with every risk. The uncertainty may relate to either the materialisation or not of the risk, or the moment of materialisation, or the extent of the change, ie, damage which the materialisation brings about: see Van der Merwe *Versekeringsbegrip* 270.

5 See Dinsdale & McMurdie 2-3; Van der Merwe *Versekeringsbegrip* 12-18; Reinecke & Van der Merwe par 1.

Secondly, the possibility of risk may be accepted and acquiesced in. For example, the bread-winner of the family may decide not to make provision for his family in the event of his premature death, or a person may decide to bear the risk of the destruction of his property himself. This method is also referred to as self-insurance.⁶ The disadvantages of this method are obvious. It can be a dangerous and not very scientific form of protection. If a heavy loss occurs during the early years of the self-insurance scheme, the funds accumulated may well be inadequate to meet the loss.⁷

Thirdly, the possibility of risk may be averaged or spread. This method involves the pooling of risks of many individuals who band together to contribute to protection against each other's losses. This community of equally exposed persons,⁸ who are covered against risks, share the predictable loss⁹ (or the risk) by all those who elect to be part of the community. The underlying idea of this method is the spreading of the risk. The concept of spreading of the risk may be illustrated by the following example. Suppose 100 people each own a house worth R100 000. If one of these houses were to be damaged beyond repair its owner would suffer a serious loss. However, if each of

6 But see Van Barneveld 8 who is adamant that self-insurance is a contradiction in terms and that the phenomenon where an individual (or group of individuals or a juristic person for that matter) creates a private reserve fund from which losses may be met, should be referred to as an arithmetical reserve, not as insurance. He argues that as self-insurance does not entail the spreading of the risk amongst a community of (equally) exposed persons, it does not amount to insurance. He therefore regards the spreading of the risk as an essential element of insurance. He further argues that self-insurance is not proper insurance because in addition to there being *no spreading* of the risk, there is *not even a transfer* of the risk from one person to another. Thus Van Barneveld's argument is that if an insurer concludes only one insurance contract, so that it only takes over and bear a single insured's risk without *spreading* it, it is not proper insurance, at least not in economic terms. It is submitted that the concept of the spreading of the risk is indeed a requirement of insurance. But the concept of "spreading of the risk" is a requirement for insurance in the economic sense of the word. In the legal sense of the word the insurance contract entails that the one party (the insurer) undertakes to bear (ie, to take over) the risk of the materialisation of the uncertain event, in return for the undertaking by the other party (the insured) to pay a premium.

7 See Dinsdale & McMurdie 3; Van der Merwe *Versekeringsbegrip* 18-20; Reinecke & Van der Merwe par 1.

8 See Van der Merwe *Versekeringsbegrip* 165 et seq.

9 The meaning of the concept of "predictable loss" is best illustrated by the definition of insurance which is advanced by Dinsdale & McMurdie (at 4) where they state that "[insurance is] a social device for reducing risk by combining a sufficient number of exposure units to make their individual losses collectively predictable. The predictable loss is then shared proportionately by all those in combination". They further argue that one of the essential features of insurance (in its function as a social device in contrast with, eg, insurance as a legal phenomenon) is the fact that it must be possible to calculate the chance of loss. They argue that the likelihood of an event or loss occurring may be mathematically calculated or it may be based on the statistical results of past experience. If the incidence of loss cannot be calculated statistically, so they argue, it is impossible to determine the amount of the premiums that would be required to accumulate a common fund, or pool, to meet the losses which arise from the materialisation of the uncertain event(s). In the case of certain modern types of risk, eg, the possibility of the destruction by space debris of a satellite which is placed in an orbit around the earth, the calculation of the amount of the premium depends, of course, to a certain extent on a good measure of speculation, as statistical results in this regard are either non-existent, or not relevant in respect of the particular risk.

the owners were to contribute R1 000 towards a common fund the damaged house could be rebuilt with relatively minimal expense to any one member of the particular community. This phenomenon is known as insurance.¹⁰ Insurance may be broadly classified as either mutual insurance or insurance for profit.¹¹ By way of a broad generalisation the following guidelines for distinguishing between insurance for profit and mutual insurance are offered.¹² If the common fund, which consists of the pool of promised premiums, is administered by the members themselves, or a society on their behalf, and where the surplus funds, if any, are returned to the members, it is usually a case of mutual insurance. However, if the fund is administered by a separate body, of which the members are not part, that is, the insurer, and if the surplus funds are not returned to the members but kept by the insurer, it is usually a case of insurance for profit.

The existence of a community of equally exposed and covered persons is a characteristic of both mutual insurance and insurance for profit. However, the privilege of belonging to the community of equally exposed and covered persons comes at a price. In the case of mutual insurance each member of the particular community must make a contribution, usually only if and when one of the other members suffers a loss. This contribution may take the form of money or something else, for example, the liability to provide labour or food to the other members if one or more of them suffer a loss. In the case of insurance for profit the members who elected to form part of the particular community (that is, the policyholders or insured) pay, usually in advance, contributions into a common pool, out of which those who suffer a loss are compensated. In commercial parlance this contribution is known as the premium.¹³ The term "premium" originates from the seventeenth century and is a derivation of the Latin

10 The concept of insurance is crisply defined as "[the] means whereby the losses of the few are distributed over the many": see Dinsdale & McMurdie 245. As to the different theories regarding the essence of insurance, see Van der Merwe *Versekeringsbegrip* 156 et seq.

11 Insurance in general and insurance for profit in particular are, of course, not the only way of effecting a distribution of the risk of the materialisation of an uncertain event. In earlier times Dutch merchants in particular showed some ingenuity in spreading the risk without taking out insurance for profit. A common practice was the distribution of investments in shipping, the investor buying but a small share in any one vessel. Although his total of shares might be considerable, the loss of a single ship in which he was interested, would not financially cripple him. Shippers also used to divide goods to be sent to a single destination into small consignments over several vessels. Closely related to these two methods of reducing the risk was that by which merchants interested in a certain trade agreed to share pro rata on another's losses caused by the perils of sea. These methods were, of course, examples of self- or mutual insurance: see Barbour 569-570. For an argument as to why the concept of "self-insurance" is a contradiction in terms, and should not be regarded as insurance in the true sense of the word, see again note 6 above.

12 For a more detailed discussion of the different criteria for distinguishing between mutual insurance, on the one hand, and insurance for profit, on the other hand, see, eg, ch 4 par 4.2 below.

13 See Dinsdale & McMurdie 4-5; Van der Merwe *Versekeringsbegrip* 20-24; Reinecke & Van der Merwe par 1.

word "praemium", which means "prize".¹⁴ In the case of insurance for profit the premium usually but not necessarily consists of money.

It may be argued that in the case of mutual insurance the risk is spread amongst a community of equally exposed and covered persons who have undertaken to form part of this community by agreeing to indemnify each other in the event of the materialisation of an uncertain event. If the uncertain event does not materialise, the members are, of course, and as a matter of general principle, not liable to pay any contribution. In the case of mutual insurance the members' liability to actually pay the contribution therefore depends on the question of whether or not the uncertain event has materialised. In the case of insurance for profit, by contrast, the risk is transferred from the insured to the insurer. The insured are expected to pay the premium irrespective of whether or not the uncertain event has materialised. The insurer directly bears the risk of the materialisation of the uncertain event. However, indirectly the risk is still borne by the community of equally exposed and covered persons as it is their contributions or premiums which constitute the common pool from which individual losses are made good. It is therefore submitted that the risk for the insurer in the case of insurance for profit does not lie so much in the possibility of the materialisation of the risk as in the extent of its materialisation. Although the insurer has, technically speaking, made financial provision for the risk of the materialisation of the risk by stipulating for the payment of the premiums by the insured, it runs the risk of its calculations of the expected loss being incorrect and of the total amount of premiums received from insured being insufficient to cover the total amount of claims. If the aggregate amount of claims by the insured exceeds the aggregate of premiums received by the insurer, it has to make up for the shortfall from its own pocket. If the amount of the claims does not exceed the aggregate of premiums received by the insurer, the insurer is, of course, entitled to retain the residual of premiums after it has met all claims.¹⁵

It would further appear that in the case of insurance for profit risk is transferred and spread. In the case of mutual insurance, by contrast, risk is not transferred in the true sense of the word as the members are simultaneously insured and insurer. The risk is merely spread amongst themselves.

In broad terms, insurance may therefore be defined as a social device providing financial compensation for the effects of the materialisation of an uncertain event, the payment of which is made from the contributions of all the parties who participate in the

14 Other meanings which are ascribed to the term "praemium" includes, "profit, advantage, gain, prerogative, distinction, reward, recompense, exploit and booty": see Handford & Herberg 249. There are indications that the word "praemium" was, at least initially, used in conjunction with the Latin word "pecuniae", which means money, thereby indicating that a praemium was (initially) paid in money, and not, eg, in another type of commodity: see Fuchs 486. It would appear that the term "premium" was, at least initially, not restricted to insurance premiums but connoted any payment of money.

15 For a discussion of the economic and financial considerations which underlie the concept of insurance for profit, including the role of statistics in determining the rate for different types of insurance, see Dinsdale & McMurdie 230 et seq.

insurance scheme.¹⁶ Thus, insurance may be regarded as a type of pool into which all who are insured pay or undertake to pay an assessed contribution or premium.¹⁷ The rate or amount of the premium is influenced by a number of factors.¹⁸

In the study that follows, the legal nature of the contribution or premium in terms of an insurance contract will be investigated.

To evaluate the different historical contracts and concepts which will be referred to in the following paragraphs and which may resemble the contract and concepts of "insurance" and "premium", it is necessary to establish, by way of a broad generalisation, what the *essence* of the concepts of "insurance" and "premium" are. It is not intended at this stage to provide all-encompassing definitions of the concepts of "insurance" and "premium". From the above it would appear that in *essence* insurance entails an agreement in terms of which the transfer or spreading of risk is the *primary function or intention* of the parties. If the transfer of risk is merely accidental to the contract, it cannot be regarded as insurance as the parties' intention is not aimed at the *essence* of transferring or spreading risk. From this it follows that the amount of money or other performance undertaken by the transferor of risk for it to be regarded as an insurance premium, must also *primarily* be aimed as compensation or counter-performance for the transfer or spreading of risk. These basic descriptions of the concepts of "insurance" and "premium" will serve as points of departure for the following discussion.

2.2 THE HISTORICAL DEVELOPMENT OF INSURANCE¹⁹

2.2.1 Introduction

The earliest form of insurance as it is known today was mutual insurance.²⁰ Mutual insurance should be contrasted with insurance for profit. In the case of mutual insurance the aim of the insurer, that is, the members of the mutual society in their capacity as insurer, is usually not to make a profit from the premiums paid by the insured, but merely to administer the contributions or premiums of the participating

¹⁶ See Hansell 1.

¹⁷ See Dinsdale & McMurdie 7-8.

¹⁸ Eg, in the case of mutual insurance the mutual society usually has no intention of making a profit from the contribution (ie, the premium) which it levied upon its members. In the case of insurance for profit, by contrast, the rate of the premium includes a portion which serves as a margin of profit for the insurer. The rate or amount of the premium for the same risk is therefore generally higher in the case of insurance for profit than in the case of mutual insurance.

¹⁹ The discussion in par 2.2, which relies to a large extent on existing research, forms a basis for deductions and conclusions relevant to the topic of this thesis, namely the insurance premium. The detail of the concepts which are discussed here and which may resemble the concepts of "insurance" and "premium" are, largely, clouded in uncertainty and even ambiguity. In an attempt to illuminate those concepts which may resemble the premium, as well as the principles and circumstances relevant in the development of those concepts, it is necessary to discuss in detail also those concepts which may resemble the concept of "insurance".

²⁰ See again par 2.1 above and further par 2.2.2 below.

members or insured paid to the mutual society.²¹ In the case of insurance for profit, by contrast, the aim of the insurer is usually to make a profit from the premiums by charging a higher premium than is necessary to merely cover the expected losses.²² If the aggregate of the premiums which the insurer has levelled and received, exceeds the aggregate of claims by the insured for a particular period, the surplus or profit is not returned to the insured. This surplus is the insurer's profit for administering the pool of money as well as compensation for its undertaking to bear the risk of the materialisation of the uncertain events. In both types of insurance, the insured undertakes to pay a premium. It is therefore a misnomer to employ the concept "premium insurance" to distinguish between mutual insurance on the one hand, and insurance for profit on the other hand. All insurance is in essence premium insurance. An "insurance contract" in terms of which no premium is payable is not an insurance contract but some other type of contract, for example, a contract of gratuitous indemnity.²³ The concepts "insurance for profit" and "mutual insurance" should therefore rather be used in this regard.²⁴

Whether the insurance contract was known to the Phoenicians, Rhodians, Romans and other ancients depends to a large extent on the meaning attached to the concept of "insurance". If a narrow meaning is ascribed to the concept of "insurance"²⁵ and it is taken to mean an enforceable reciprocal obligation in terms of which the trans-

21 See Van Barneveld 7 who describes the activities of a mutual insurer as "in werkelijkheid niet meer dan de premie (d.i. de koopkracht) van velen verzamelen om deze vervolgens ter beschikking te stellen van degenen, die daaraan wegens "verlies of schade door een onzeker voorval" behoefte hebben. Kort gezegd: hij collecteert en hij distribueert."

22 For an explanation of how and by whom the contributions are administered in the case of mutual and profit insurance respectively, see again par 2.1 above.

23 See Schulze "Premium" 109.

24 See Van der Merwe *Versekeringsbegrip* 129 et seq; Van der Merwe "Herkoms" 189-194; Reinecke & Van der Merwe par 4.

25 Insurance, in its so-called "narrow meaning", entails a reciprocal agreement in terms of which one party (the insurer) undertakes to bear the risk of the materialisation of an uncertain event, and another party (the insured) undertakes to pay a premium or undertake another type of liability as counter-performance for the undertaking given by the insurer. Thus, in its narrow meaning "insurance" entails an enforceable reciprocal obligation, which has as its essence the spreading of the risk amongst a community of persons who are equally exposed and covered against the same type of risk, and who undertake to pay or give something in return for the privilege of being covered. The narrow meaning of "insurance" should be contrasted with its "broad meaning". In terms of the latter, "[insurance includes] any kind of conventional arrangement by which one or more persons assume the risk of perils to which others are exposed -- that is, an arrangement for aiding the unfortunate": see Vance 3. This broad meaning of the concept of "insurance" does not qualify as insurance in the narrow, ie, in the economic or legal, sense of the word, for a number of reasons. First, it is clear from this broad meaning of "insurance" that *the aim* of the arrangement in terms of that meaning of insurance is *not to spread the risk among a community of equally exposed and covered persons*, but merely entails a promise of (mutual) assistance in times of hardship to another party. Secondly, from this it follows that this type of arrangement entails a promise which is not necessarily legally enforceable against the promisor (ie, it does not constitute an obligation). Thus, in its broader context, "insurance" entails an unenforceable promise of aid, with or without an undertaking of a counter-performance. By way of a broad generalisation it may therefore be stated that the requirement of reciprocity is absent in the case of the broad meaning of "insurance". Furthermore, the spreading of the risk is accidental and not central to the arrangement between the parties in the case of the broad meaning of "insurance".

fer or spreading of risk is the *primary function or intention* of the parties, no trace of insurance has thus far been found in the laws of Rome or any of the other ancient peoples.²⁶ But if the term "insurance" is given a broader meaning²⁷ and taken to include any kind of arrangement by which one or more persons assume the risk of loss to which others are exposed, then it would appear that there is irrefutable proof that such "insurance" was known to the ancients.²⁸ It is uncertain whether the concept of "insurance" in its narrow meaning was known to the ancients but what is clear is that mutual assistance in times of need was known to them. Be that as it may, what may be stated with certainty is that the concept of "insurance" as it is known today²⁹ was unknown to the Romans and other ancients. This view was echoed by the common-law writers.³⁰ It is also true that these early legal institutions which constituted schemes of mutual assistance, may well have formed the foundation for the eventual development and creation of the concept of "mutual insurance".

From the early examples of legal institutions which resembled mutual insurance,³¹ marine practices developed during the Middle Ages.³² They displayed the first traces of marine insurance³³ which, in turn, was the prelude of what is known today as insurance for profit.³⁴ But the intentions of the parties in those early forms of "marine insurance" were not to spread risk among a community of equally exposed

26 See Vance 2-3.

27 For a comparison between the narrow and the broad meaning of the concept of "insurance", see again note 25 above.

28 See Vance 1-2 and the examples of schemes of mutual assistance referred to there by ancient writers such as Livy, Suetonius and Cicero. Some of these examples even include a reference which could well be interpreted as an early example of state insurance. He refers to an example where Suetonius, who wrote on the life of Claudius, stated that the emperor, in order to encourage the importation of corn, assumed the risk of loss that might befall corn merchants through perils of the sea.

29 See again note 25 above.

30 See Vance at 3 where he refers to the opinions of Grotius (*De Jure Belli et Pacis* ii 12 3 5); Van Bynkershoek (*Quaestiones Juris Publicae* i 21), as well as those of writers on English common law such as Park (*System of the Law of Marine Insurance* (1786)), Marshall and Hopkins.

31 See par 2.2.2 below. See also Sanborn 234n680 237 who mentions that mutual insurance groups were formed by companies and groups against certain risks of the sea, such as those arising from letters of marque and from the use of reprisals. A letter of marque was a licence granted by a state to a private citizen to arm a ship and seize merchant vessels of another nation. Such licence was sometimes referred to as "a letter of marque and reprisal": see Collins 656. For a discussion of the meaning and relevance of the concept of "reprisals" in the European Medieval commercial law, see Sanborn 144-146 224 et seq.

32 In the fourteenth century there existed along the Mediterranean, side by side, two quite different types of mutual insurance. The older and more primitive type consisted of a fund raised as a result of mutual promises. Sometimes these associations were legally compulsory. The second type entailed the payment of fixed sums by the members at regular intervals as a true insurance premium. Although the latter form developed in a speculative manner, it borrowed from the earlier type the principle of a common fund or reserve. At Genoa a government Office (the *Officium Robarie*) was established to give redress to merchants who were robbed by Genoese citizens. Merchants were compelled to pay commissions or a share of their profits to this Office, and these payments were in reality premiums for the risk ran by the Office. This may have been an early example of state insurance: see Sanborn 237.

33 See par 2.2.3 below.

34 See Holdsworth 85-86. See further par 2.2.3 below.

persons by the payment of a premium. Their intentions were much rather to arrange the granting of credit or, in some cases, speculation or wagering on the outcome of an uncertain event.³⁵ In terms of a risks clause, the party who granted the credit, that is, the creditor would, for the duration of a journey, bear the risk of damage to or the destruction of the object of the risk. It is correct to say that the mere incidental transfer of the risk in a contract which is in substance aimed at the granting of credit, will not turn it into an insurance contract.³⁶ It is clear that the risks clause in these types of contract was therefore merely ancillary. In the case of an insurance contract, by contrast, the transfer of the risk, and consequently, the spreading of the risk are central.³⁷ The speculative nature of the credit agreement between the parties was amplified by the fact that few, if any, of the parties' decisions on whether or not to accept the risk, or at what price (premium) to accept it, were based on any actuarial principles whatsoever.³⁸ The lack of actuarial principles in determining the rate of the premium does not, of course, affect the *legal* nature of the insurance contract, but merely its *economic* nature. The fact that a contract does not qualify as insurance from an economic point of view, does not affect the fact that it will be regarded as such by the law.

2.2.2 The Development of Mutual Insurance from Mutual Assistance Contracts

2.2.2.1 *Roman Societies*

The Romans knew different types of society, such as societies for religious,³⁹ military and entertainment purposes.⁴⁰ These societies provided their members with benefits such as a financial contribution towards burial costs⁴¹ or towards the traveling

35 Van der Merwe *Versekeringsbegrip* 33-34.

36 See Reinecke & Van der Merwe par 30.

37 See Van der Merwe *Versekeringsbegrip* 31 et seq; Reinecke & Van der Merwe par 5.

38 See Barbour 591 et seq; Van Niekerk *Sources* 27.

39 Most of the burial clubs or associations which were tolerated by the Roman government had some religious connection. The burial clubs were of the lower orders of society, mainly slaves and freedmen, whose members met only once a month for the payment of the contributions that they made to provide for their funerals. In practice the members also engaged in social activities such as dining together on certain occasions. The members were sometimes men who all practised the same craft or trade, or they were all dependents of some great family. The remains of members of the same group were often laid to rest in communal graves or columbaria: see Toynbee 54-55. The columbarium was a large tomb, either partly or wholly underground, whose walls contained hundreds of niches which contained the ashes of the dead in urns or chests: see Toynbee 113 et seq.

40 See Trenerry 209; Van der Merwe *Versekeringsbegrip* 130 et seq. Societies also existed in China, Greece and India, some of them as early as the third century before Christ: see Vance 3-4.

41 As to the importance of burial ceremonies in the ancient world in general, see Morris 44 et seq. The importance of funerals was closely linked with the ancients' beliefs about the after-life. As to the Roman and Etruscan beliefs about the after-life, see Toynbee 33 et seq. As to the burial rites in Ancient Greece, see MacDowell 109. As to the different military burial rights of the different ranks in the ancient world, see Morris 46. Eg, at Troy, the rank and file soldiers were cremated, leaders received a lavish funeral, some funerals ceremonies continuing for up to seventeen days! In Rome a general could be honoured by a *decursio* (ie, a military rite) in the form of a ride or march round his funeral pyre or cenotaph: see Toynbee 55. Burial rites in Rome included both cremations and inhumations: see Toynbee 39 et seq.

expenses of members of the army.⁴² In exchange the members had to make contributions to the society.⁴³ Although the activities of these societies can hardly be regarded as insurance practices as they were not primarily aimed at the spreading of the risk, they nevertheless contained the notion of mutual assistance in the case of the materialisation of a risk.⁴⁴ Likewise, the contributions which were made by the members of the societies were not premiums in the strict sense of the word,⁴⁵ but it is likely that they did embody an early forerunner of the modern-day concept of a premium.⁴⁶

42 The payment of benefits took place in the Roman currency of that time, namely, the denarius. The denarius was a silver coin of ancient Rome, also referred to in translation as a penny. A denarius could also be a gold coin worth 25 silver denarii: see Collins 294. These benefits to soldiers included lump sum payments of 500 denarii to soldiers when they became veterans at the age of 46 (see Trenerry 213), or when they were promoted to a superior rank, or on the death of a member, when payment was made to his heir or agent. If a member of the society who was transferred to another legion, had to cross the sea, he received 200 denarii if he was a foot soldier and 500 denarii if he was a trooper: see Trenerry 210-211.

43 The funeral expenses of those soldiers who died while on service were paid by their comrades, from a fund contributed to by comrades. Regular contributions from the soldiers' pay were set aside for this purpose: see Toynbee 55.

44 Van der Merwe is of the opinion that the Roman societies cannot be regarded as examples of mutual insurance. His conclusion is based on two reasons. First, according to him, there was no intentional attempt to fix a meaningful proportion between, on the one hand, the benefit payable to the member or his estate in the case, eg, of his death, and on the other hand, the amount of the contribution which was paid by the member. The so-called Roman mortality tables which were referred to in D 35 2 68 were in actual fact not mortality tables used to provide actuarial guidance in determining the rate of a "life insurance premium", but were used to determine the duration of a legacy where such legacy consisted of an annuity: see Van der Merwe *Versekeringsbegrip* 132-133. But this first conclusion of Van der Merwe is, of course, correct only in that it indicates that these contracts were not insurance in an economic sense of the word. The *actuarial* fixing of the premium is not a requirement for a contract to be classified as one of insurance in a legal sense of the word. Van der Merwe *Versekeringsbegrip* at 45 et seq himself emphasises the truism that a rational calculation of probabilities (in fixing the premium) should not be regarded as a necessary element of the *legal* concept of insurance. He consequently rejects the idea that an insurance contract has to comply with certain economic principles before it can be regarded as insurance in the legal sense of the word: see Van der Merwe *Versekeringsbegrip* 46n110. Van der Merwe's second reason why the activities of these societies were not insurance as it is understood today, is more convincing. According to him the parties' *intention* was not aimed at concluding an insurance contract, mainly because the undertaking to pay the contribution was not given in return for an undertaking by the society to bear the risk of the materialisation of the uncertain event. Thus, the *intention to insure*, ie, to spread the risk, was absent in these societies: see Van der Merwe *Versekeringsbegrip* 133. Van der Merwe *Versekeringsbegrip* at 133-135 lists a number of other socio-political reasons why the activities of the Roman societies could not be regarded as insurance. These reasons are not important for the present discussion.

45 The contributions were paid in return for the expectation to be assisted in a time of need, but they were not paid as the object of a *reciprocal (enforceable) obligation*, being the counter-performance by one party (the insured) in return for the undertaking by the other party to bear the risk of the materialisation of the uncertain event. These contributions were in all probability *not enforceable* against the members.

46 These contributions resembled the premium in that they served as the "price" for belonging to the society. But as these contributions were probably not enforceable by the society, they were not premiums in the true sense of the word.

Although the nature of the contribution which was paid by members of these societies differed, it is clear that members did make a contribution in return for the privilege of being part of the society. If the contributions consisted of money, they were usually made in advance, that is, before the materialisation of the uncertain event.⁴⁷ But if the contribution consisted of something other than money, for example, the liability to render assistance to a fellow-member who was in need, the contribution could only be made in arrears. In terms of some military societies, the members made regular voluntary contributions, while in others it would appear that the communal fund was made up from a levy raised on the military bonuses received by the soldiers.⁴⁸ In the latter type of society the payment of the contribution resembled an early type of compulsory state-insurance scheme.

Members did not have a right to enforce their right to assistance against other members or the society.⁴⁹ As the society was not a legal entity, members did not have a right to enforce their right against the society either. The contribution was therefore not an enforceable performance in terms of a reciprocal agreement. For this reason alone the contribution in terms of the agreement between the members of the ancient societies was not the true equivalent of the premium in terms of an insurance contract, which is the object of an enforceable obligation owed by the insured to the insurer.⁵⁰

2.2.2.2 *Societies in Europe and England*

In post-Roman Europe and England, societies were established to assist their members or their dependents in the case of loss caused by perils such as fire, shipwreck, theft, sickness or death.⁵¹ Initially these societies were formed on a family basis,⁵² but gradually they developed to include outsiders, that is, persons who were

47 Eg, in terms of the religious societies members contributed on a monthly basis: Van der Merwe "Herkoms" 183. In terms of the religious societies the non-recurrent entrance fee was 100 sesterces (approximately f10) while the monthly contribution was one "kwartje" (the Dutch equivalent of a five-penny-piece): see Van Barneveld 29.

48 See Toynbee 55; Van der Merwe "Herkoms" 183n33; Havenga *Life Insurance* 10-11. For examples of the amount of the contribution required in terms of some of the military societies, see Trenerry 210. Trenerry mentions that in the society of Cornicines at Lambaesa AD 203, an entrance fee of 750 denarii was paid. A monthly contribution, the amount of which is not known, was probably required from each member: see Trenerry 210-211.

49 See Van der Merwe *Versekeringsbegrip* 133-135 for an exposition of the socio-political reasons why the activities of the societies were regarded as illegal. The performances in terms of the agreement between the members of the society were consequently unenforceable as the underlying contract was illegal and therefore invalid. See also Van der Merwe "Herkoms" 187.

50 The primary reason why the contribution did not qualify as a premium was, of course, the fact that it was not made in terms of an *insurance contract*.

51 See Van der Merwe *Versekeringsbegrip* 136 et seq; Van der Merwe "Herkoms" 185; Reinecke & Van der Merwe par 4.

52 Ie, the membership of the societies was restricted to those family members who were part of the so-called extended family. The concept of an "extended family" is defined as "the nuclear family together with blood relatives, often spanning three or more generations": see Collins 398. It would appear that if someone was part of an extended family, he was automatically regarded as a member of the family's society. See Van der Merwe *Versekeringsbegrip* 136; Van der Merwe "Herkoms" 185-186.

not part of the family who were allowed to join the society by paying a membership fee.⁵³

Apart from the initial membership fee paid by outsiders, there was apparently no other regular contribution which members had to make in advance. They were, however, expected to contribute to the losses of other members after the occurrence of a loss in respect of which the society provided assistance. This contribution often consisted of labour (for example, in assisting a fellow-member to rebuild a damaged house) or of a financial contribution.⁵⁴ The extent of the assistance was often determined by the financial means of the member who suffered the loss, and not by the extent of the damage. A member who was a man of substance therefore seldom received a full indemnity from the other members.⁵⁵ From this it would appear that the size of the contribution was influenced by at least two factors. First, the extent of the damage or loss suffered by a member, and secondly, the financial means of that member. To a certain extent these two factors were, of course, related to each other. It is possible that the contributions which were paid (or rendered where they took the form of something other than money) by the members of the societies, were the forerunners of the modern insurance premium in terms of a mutual insurance contract.⁵⁶

Numerous guilds⁵⁷ were also established in England and included merchant and maritime guilds.⁵⁸ Members of these guilds assisted one another or their dependents in the event of misfortunes such as illness, death, fire, theft and shipwreck. It may appear that mutual insurance could have developed from these guilds.⁵⁹

Just like the Roman societies, these guilds, although not true (early) examples of mutual insurance, appear to be the forerunners of the concept of mutual insurance.⁶⁰ In the case of the Roman societies there was no duty on individual members to assist one another. In the case of the Roman societies the contribution, which could be construed as a forerunner of the premium in terms of a genuine insurance contract could therefore not be claimed from a member. The members did therefore not intend to con-

53 The development to allow outsiders, ie, non-family members, to join the society could apparently be ascribed to the influence of the Christian concept of fellowship which was aimed at the enhancement of a general fraternity of co-believers: see Van der Merwe *Versekeringsbegrip* 136; Van der Merwe "Herkoms" 186.

54 Van der Merwe "Herkoms" 186.

55 Van der Merwe "Herkoms" 186n51.

56 As these contributions were not legally enforceable, they were, of course, not true examples of an insurance premium.

57 The term "guild" is used here to generally indicate societies which were formed between persons who were not related to each other, and to distinguish "guilds" from "societies" which were usually formed on a family basis. This basis of distinguishing between the terms "societies" and "guilds" respectively is also used by Van der Merwe "Herkoms" 186n53.

58 See Vance 4-5; Dover 8.

59 Van der Merwe "Herkoms" 187.

60 Both the Roman societies and the guilds did not qualify as true examples of mutual insurance as the transfer or spreading of the risk was accidental and not central to their activities. Both nevertheless contained the germ of members' assisting each other in times of need.

clude an obligatory agreement.⁶¹ In the case of the guilds, other than in the case of the societies, though, individual members were under an obligation to assist each other in the event of the materialisation of the risk. But it is true that *before the sixteenth century* the guilds could not have qualified as true examples of mutual insurance either, since the contributions were then not enforceable against members.

From the sixteenth century onwards, societies and guilds were adapted to give their members the right to enforce assistance against fellow members. In return for this enforceable assistance, members had to pay contributions, in advance, to their society or guild.⁶² This enforceable undertaking by the members of the societies and guilds to pay a contribution was the forerunner of the modern undertaking and obligation to pay a contribution or premium in terms of a mutual insurance contract. Guilds and societies therefore represent an important link in the chain of the development of the premium, being the object of an independent reciprocally enforceable obligation, in terms of a mutual insurance contract.

2.2.3 The Development of Insurance for Profit from Contracts for the Spreading of Risk on a Commercial Basis

2.2.3.1 Land Loans, Maritime Loans, and Simulated Contracts

2.2.3.1.1 The Babylonian Contract of Loan

The origin of the transfer and acceptance of risk against payment can be found in the Babylonian contract of loan and the maritime loan contract of ancient Greece. In terms of the Babylonian contract of loan, a wealthy person lent money or merchandise to another person (the merchant) who undertook to trade with the money or goods. This contract was concluded in respect of ventures of commerce where the route followed by the merchant was by land.⁶³ The money-lender received a certain percentage of the profits which were made by the merchant by trading with the borrowed money or goods. However, if the merchant was robbed en route, he was exempted from having to re-pay the money or the goods.

The high rate of interest payable on this loan indicates that the practice of transferring the risk from one person to another for payment was not unknown to the Babylonians.⁶⁴ In return for the undertaking to bear the risk, the creditor usually expected, in addition to the normal interest on the loan, some separate consideration. The higher interest paid by the borrower represented a premium in consideration of which he was relieved of the liability to repay if the goods or money were lost. This

61 See again par 2.2.2.1 above.

62 See Van der Merwe *Versekeringsbegrip* 143-144; Van der Merwe "Herkoms" 187-188.

63 As to the aspects of trade routes by land and the development of a contract of "land loan", see Sanborn 242.

64 See Sanborn 235 who refers to the fact that the risk of loss was the subject of a special stipulation. See also Van der Merwe *Versekeringsbegrip* 31-34.

explained the exceptionally high rate of interest payable by the debtor to the creditor.⁶⁵ As a result the goods or money were "insured".⁶⁶ Thus, the high rate of interest included compensation (premium) for bearing the risk in addition to the normal compensation for the use of the money or the goods. But this excess portion of interest did not represent a true (independent) premium as the excess portion was merely incidental to the transfer of the risk and not central to it. This was a result of the fact that the intention of the parties was not to insure, that is, to transfer and spread risk, but rather to effect a loan. Thus, because there was no intention to insure the contract was not one of insurance and consequently the excess portion of the interest could not be regarded as an insurance premium.

2.2.3.1.2 The Maritime Loan of Ancient Greece

The maritime loan contract of ancient Greece was a modification of the Babylonian contract of loan. The latter came to be applied in the maritime sphere. In terms of this contract, a money-lender lent an amount of money to the captain of a ship or to a merchant who planned a sea-voyage. The money was paid over to the borrower who used the money to repair the ship or to buy merchandise.⁶⁷ The ship and the merchandise were subjected to the perils of the sea and the parties agreed that the loan, as well as the interest on it, were to be repaid by the borrower only on condition that the ship or the merchandise reached the port of destination safely. The importance of the concept of a maritime loan, which was devised by Greek traders,⁶⁸ was that the interest levied on the loan was generally not repayable in the event of the loss of the vessel or her freight. Repayment was therefore contingent upon the successful conclusion of the venture. In short, the lender assumed the risk of loss en route.⁶⁹ Due to the extent of the perils of the seas, a very high rate of interest, called maritime interest, was charged.⁷⁰ The ship or the merchandise was therefore used as security for the loan.⁷¹

65 See Holdsworth 86. See further par 2.2.3.1.2 below.

66 See Sanborn 235.

67 According to MacDowell this kind of loan often gave rise to disputes. Disputes were heard once a month in the Athenian Maritime Courts: see MacDowell 231. This contract was, in the later stages of its development, almost without exception put in writing. The reason for the maritime loan contract being reduced to writing had its origin in the dissatisfaction of foreign shippers about the slow legal process in Athens. Maritime disputes often took months to be resolved in the Athenian Maritime Courts. This would be particularly annoying to foreign shipmasters during the summer, as they would want to make the most of the good sailing weather and not be detained in Athens by a prosecutor. The conditions of the maritime loans were often so complicated that a written statement of them was necessary. Producing a written document could cut short a long argument, and so the insistence on written contracts was one of the means by which trials were speeded up: see MacDowell 232-234.

68 For more detail on the role of retail and wholesale trade in ancient Greece, see MacDowell 155 et seq. The first duty of an Athenian man was to support himself and his family, whether by producing food on his own land, by trade or by some other means. There was in fact a law against idleness, contravention of which led to execution of the sluggard!

69 As to the importance of the Greek influence on the later development of insurance, see Forte 394n8.

70 Van der Merwe *Versekeringsbegrip* 34-39.

71 See MacDowell 231. It was also possible to secure the loan on the slaves who formed its crew: see MacDowell 233.

But the intentions of the parties in terms of the maritime loan contract of ancient Greece were to conclude a loan in the first place, and not primarily to insure.⁷² For this reason the interest payable on the loan or the share in the profits cannot be regarded as a true counterpart of the premium as it is known today.⁷³

2.2.3.1.3 The Maritime Loan of Rome

The Roman maritime loan (*pecunia traiecitia*)⁷⁴ was a further continuation of the Babylonian contract of loan and the maritime loan of ancient Greece. In terms of the Roman maritime loan, a man of means lent money to another person who wished to undertake a sea voyage. The money was paid over to the borrower. In terms of this money-lending transaction the loan, as well as the interest on it, had to be returned only if the voyage was completed successfully.⁷⁵ Sea voyages on the Mediterranean were dangerous in Greek and Roman times because of storms and pirates and the average merchant therefore looked for someone with which to share the risk.⁷⁶ Since the risk of the unsuccessful completion of the voyage was borne by the money-lender, the interest rate payable on the loan was higher than on an ordinary loan. The higher interest therefore included a risk premium to compensate the lender for bearing the risk of the unsuccessful completion of the voyage. In principle it was fairly similar to the maritime loan of ancient Greece.⁷⁷

The high rate of interest payable on the maritime loan consisted in effect of two components. First, a portion of it served as compensation for the use of the money (loan), that is, interest proper. Secondly, a further portion of the interest represented special compensation to the money-lender for bearing the risk that the voyage would not be completed successfully. This portion of the interest may be referred to as the

72 See Van der Merwe *Versekeringsbegrip* 33-34. See also Sanborn 236 who is of the opinion that "the maritime loan was, in reality, only an ordinary loan united to a contract of insurance, whose premium was represented by the higher rate of interest payable ... [i]n consideration of the higher interest (the premium) the borrower was not liable to repay the loan if the ship was lost". MacDowell 233 is of the opinion that a maritime loan could serve as a *kind of insurance* for the merchant but does not elaborate.

73 Although a certain part of the interest (ie, the part to compensate the lender for bearing the risk of the loan) *resembled* the modern insurance premium, it was not an *insurance premium* in the true sense of the word as the parties did not intend to conclude an *insurance contract*.

74 The more accurate post-classical term to connote the concept of *pecunia traiecitia* was *fenus nauticum*: see Zimmermann *Obligations* 182n177. For a detailed discussion of the contract of loan to merchants who were involved in overseas trade, being an example of *mutuum*, see Zimmermann *Obligations* 181 et seq. The Roman maritime loan was a forerunner of the bottomry loan. The latter was a loan to a shipper which was repayable only in the event of a successful voyage, ie, at the risk of the creditor. Bottomry is a North European version of the maritime loan and was not known to the Romans.

75 See De Roover 175; Van der Merwe *Versekeringsbegrip* 130.

76 See Zimmermann *Obligations* 181 et seq. Although Zimmermann refers to *pecunia traiecitia* as "a form of marine insurance", it will be shown that it was not insurance in the true sense of the word.

77 See again par 2.2.3.1.2 above.

risk premium.⁷⁸ The maritime interest was therefore not the equivalent of a premium, but it included a portion which had the same function as the premium.⁷⁹ Although the maritime loan contained a measure of risk-bearing by the money-lender which showed resemblance to insurance, the relationship between the creditor and the debtor was in the first instance based on the granting of credit. The transfer of risk from the debtor to the creditor was merely a secondary arrangement. No real and primary intention to insure was present.⁸⁰ Hence, in the case of the Roman maritime loan there was also no separate premium in the sense of a sum composed primarily as a premium being the counter-performance by one party in return for the undertaking given by the other party to bear the risk of the materialisation of risk.⁸¹

A number of important comments should be made concerning some of the possible similarities and differences between the interest which was payable in terms of the maritime loan, on the one hand, and the premium which is payable in terms of an insurance contract, on the other hand. The interest on the loan, which incorporated an excess portion referred to as the "risk premium", had to be paid only if the risk of robbery or other perils at sea which resulted in a loss, did not materialise. The payment of maritime interest may be compared with the payment of the genuine premium in respect of the following aspects. First, in the case of genuine insurance, the premium is in principle due irrespective of whether or not the risk ever materialises. The conditional obligation to pay the interest in terms of the maritime loan therefore constituted an important *difference* from the premium, as the former was, in contrast with the genuine premium, not paid unconditionally, that is, irrespective of whether or not the risk materialised. Secondly, the maritime interest was not an independent and identifiable premium which served as counter-performance for the taking over or spreading of the risk. In the case of a true insurance premium it is always given primarily for the taking over of the risk by the insurer, although it is not always necessarily an independent or separate amount. The undertaking to pay a premium in the case of insurance is, therefore, always central to the concept of the spreading of the risk, and not merely incidental to it. Thirdly, the fact that the interest was payable in arrears, that is, after the expiry of the agreement, *corresponded* with the common-law principle regarding the time of payment of the premium in terms of the insurance contract. In terms of this principle,

78 See Holdsworth 87.

79 But certain writers are of the opinion (without discussing the issue) that this further portion of the interest was in fact a true premium: see Holdsworth 87 and the authorities referred to there.

80 See Van der Merwe *Versekeringsbegrip* 39-44; Sanborn 238-239.

81 But see Holdsworth 89 who draws the following parallel between the maritime loan and the insurance contract. According to him, the debtor, who had borrowed the money in terms of the maritime loan, acknowledged that he had received the sum advanced, and promised to repay an equivalent sum on the safe arrival of the ship or goods. In the case of insurance, the insurer, who fulfilled the role of the debtor, stated that he received the amount for which the ship or goods were insured, and promised to repay it in the event of the ship or goods not arriving safely. It would therefore appear that Holdsworth compares the repayment of the loan, which included the interest on it, with the indemnity payable by an insurer. This example should therefore not be understood to entail a comparison between the interest payable on the loan, and the premium payable in terms of an insurance contract. If Holdsworth intends to equate the interest payable by the debtor with the indemnity payable by the insurer, he is wrong.

the premium is, in the absence of a contractual term or legislative provision to the contrary, payable in arrears.⁸² Finally, both the maritime interest and the premium were the object of performance in terms of an enforceable obligation.

2.2.3.1.4 The Insurance Loan of the Middle Ages

The Roman maritime loan was taken over in the trade practices of the Middle Ages. However, the high interest rates which abounded in the maritime loans, led, during the thirteenth century, to a papal prohibition on the levying of maritime interest.⁸³ At first this resulted merely in the merchants varying the format of the maritime loan agreement in order to circumvent the prohibition on usury.⁸⁴ Later the reason for the conclusion of the maritime loan contract changed as the debtor was no longer as interested in borrowing money as he was in transferring the risk of his undertaking to the creditor. The borrower did not actually need the money but borrowed it nevertheless because of the transfer of the risk it involved. This led to these transactions being termed "insurance loan contracts", but the contract, although now entered into for a different primary reason from earlier, was in essence still a loan because the transfer of the risk was still merely a consequence of an actual loan of money concluded on particular conditions.⁸⁵ Thus, the primary aim of the parties in the case of the maritime loan was to borrow money. In the case of the insurance loan there was also an actual loan, but the primary aim of the parties was to transfer risk.

The "insurance loan" differed from its predecessors in that the lender in terms of an "insurance loan" was always a shipowner, and the borrower a shipper who was usually a merchant. "Insurance loans" were repayable only upon the safe arrival of the goods shipped and were granted by shipowners to merchants who remained ashore instead of accompanying their merchandise. If the goods did not arrive at their destina-

82 See ch 3 par 3.3.2 below.

83 This prohibition was decreed sometime between 1227-1234 by Pope Gregory IX: see Van Veen *Premie* 14. The Church traditionally regarded commercial profits as a danger to salvation and furthermore, so it was argued, that money, in the nature of things, could not yield fruits in the form of interest. For a discussion of the history of the law relating to usury and the canonical prohibition on it in the Middle Ages, see Van der Merwe *Versekeringsbegrip* 67 et seq; Zimmermann *Obligations* 170 et seq.

84 Eg, by concluding the contracts of insurance loan, simulated loan, and simulated sale. Various other forms of disguise were devised by parties to circumvent the prohibition on usury. Eg, they sometimes agreed on the repayment of a sum at another place, or in a currency different from the loan, into which, in a genuine transaction, the additional costs of transportation and exchange would enter, thus providing a disguise for the interest and the "premium": see Sanborn 239.

85 See Van der Merwe *Versekeringsbegrip* 39-44; Forte 398-399. For an exposition of other differences between the "insurance loan contract" and the genuine insurance contract, see De Roover 177-178.

tion, the shipowner would receive neither the freight nor the money advanced to the shipper before sailing.⁸⁶

The premium in terms of a genuine insurance contract is usually due irrespective of the outcome of the risk. In terms of the insurance loan, the loan, as well as the interest on the loan which included the equivalent of the premium in terms of a genuine insurance contract, were repayable only upon the safe arrival of the ship and her merchandise.⁸⁷ Although the interest in terms of the insurance loan contract resembled the premium in terms of a contract of insurance, it was still not a premium in the true sense of the word.

2.2.3.1.5 Simulated Loans from the Fourteenth Century

During the fourteenth century a further application of the concept of a loan gave rise to the conclusion of so-called "simulated loans". In terms of a simulated loan, one party (A) admitted to having received a certain sum of money from another party (B) whilst, in actual fact, he received no such sum. He then "undertook" to repay the amount within a certain period, the obligation to repay, however, being made subject to *the loss of or damage to*, for instance, a ship or goods belonging to B. This was done by way of a stipulation to the effect that the contract would be void should the ship or goods arrive safely at their destination. If the ship or goods did not arrive safely the "loan" had to be "repaid" by the "debtor" (A) to the "creditor" (B). Thus, in the case of the simulated loan there was no actual loan made to the borrower but the form of the contract was used to transfer risk.

In comparison with the maritime loan,⁸⁸ the position of the contracting parties to the simulated loan was exactly the reverse in so far as the maritime risk was concerned. The "debtor" was only bound to "repay" the simulated loan if the risk materialised. If it did not materialise, the contract was regarded as void and the obligation of the borrower lapsed. From this it followed that the intention was not to borrow money but to provide the "creditor" with some form of security against the maritime risk and to transfer that risk to the "debtor". The transfer of risk from the "creditor" to the "debtor" did not take place gratuitously. The "debtor" in terms of the simulated loan required some compensation in the nature of a premium in return for his bearing the materialisation of the uncertain event, namely the occurrence of the risk. The simulated loan itself contained

⁸⁶ The reasons why the owners increased their risk by granting loans, the repayment of which depended upon the safe arrival of the ship, are twofold. First, they did so because of the high rate of interest they stood to earn on their capital. Secondly, the shipowners distrusted the shipper. By making a loan to the shipper, he (ie, the shipper) acquired an interest in the money-lender's cargo entrusted to his care: De Roover 178. Sanborn 236 is of the opinion that "[i]t was only natural that these "early insurers" of merchandise should be the ship-owners in whose ships the goods were loaded, since they could most easily protect the goods and guarantee safe arrival; and, as they understood best the probability of peril in transport, they could charge the smallest premium." See also Holdsworth 89 for a similar opinion.

⁸⁷ See Van Veen *Premie* 18-21; Sanborn 238.

⁸⁸ See again par 2.2.3.1.2 and 2.2.3.1.3 above.

no reference to a counter-performance by the "creditor" for the taking over of the "debtor's" risk. Van der Merwe suggests that the undertaking by the "creditor" to pay a counter-performance or premium was contained in a contract separate from the simulated loan. He further suggests that this separate contract was most likely concluded and that the counter-performance or premium undertaken by the "creditor" in terms of it, was paid, *before* the actual conclusion of the simulated loan. The "creditor" was therefore unconditionally bound to pay the counter-performance or premium, either in advance or in arrears and irrespective of the outcome of the risk. The counter-performance or premium undertaken by the "creditor" in terms of this separate contract was therefore a genuine insurance premium in the technical sense of the word.⁸⁹

The analogy with the insurance contract is clear and the simulated loan was, in so far as the risk clause was an independent and perhaps even the primary object of the loan, in effect a contract of insurance.⁹⁰

The simulated loan differed from the insurance loan in that there was no actual loan made in terms of the simulated loan. As a result the concept of "interest" did not feature at all in the case of the simulated loan. This may be explained with reference to the fact that in the case of the simulated loan there was no actual loan to be repaid, but a *simulated loan* only. If the simulated loan was "repaid", it represented the equivalent of an indemnity by the "debtor" of the loss suffered by the "creditor". The "loan" in terms of the simulated loan contract was, as in the case of genuine insurance, only due if the risk materialised. If the risk did not materialise, the contract was regarded as void and no money changed hands. The "interest" on the "loan" did not, as in the case of the maritime loan, consist of two components (namely interest proper and a risk premium) but of a risk premium only. This "interest" or premium was undertaken separate from and most likely paid before the conclusion of the simulated loan. Thus, the "interest" or premium was paid irrespective of whether or not the risk had materialised.⁹¹ This represented a further important step in the development of the payment of the premium as the object of an independent and reciprocally enforceable obligation in terms of an insurance contract.

2.2.3.1.6 Simulated Contracts of Sale from the Fourteenth Century

The next stage in the development of the concept of "insurance for profit" took place during the second half of the fourteenth century when so-called "contracts of sale" containing stipulations relating to the risk were entered into in Italy. These contracts took on the following form: Instead of one party (B) buying goods with money lent to him by another person (A), A bought the goods himself and "sold" them to B. These contracts were simulated sales as the parties never intended that goods would be delivered or the ownership of them should pass from the seller to the buyer.⁹² Thus,

89 See Van der Merwe *Versekeringsbegrip* 90.

90 See Van der Merwe *Versekeringsbegrip* 87-88; Sanborn 237-238.

91 See Van der Merwe *Versekeringsbegrip* 89-90. See again the text at note 89 above.

92 See Van der Merwe *Versekeringsbegrip* 100 et seq.

the *intention* to buy and sell was absent in these contracts. The price which B agreed to pay was first, payable at a future date; secondly, contingent upon the safe arrival at the place of payment, either of the original goods or the goods into which they had been converted; and thirdly, sufficient to meet the sum which was paid by A.⁹³

It is clear that the whole transaction, that is, the sale as well as all its legal consequences, only went through if the goods were in fact lost. Neither the actual delivery of the goods, nor the passing of the ownership in them took place in the case of the safe arrival of the goods. Thus, the payment of the "purchase price" was subject to the safe arrival of the goods.⁹⁴ This condition clearly shows that the parties had no real *intention* of buying and selling, but that they merely intended to make a special arrangement regarding the risk.⁹⁵

At first glance it would appear that the "purchase price" was the equivalent of the premium in terms of an insurance contract. But this "purchase price", in contrast to the premium in the case of insurance, was due only if the risk had materialised.⁹⁶ If the risk did not materialise, the contract was regarded as void and neither party had to pay anything. This is in contrast with the insurance contract where the premium is due irrespective of the outcome of the risk, that is, irrespective of whether or not the risk has materialised. Similar to the case of the maritime loan where the interest on the loan was payable only in arrears, but unlike the case of the insurance loan where the loan was payable in advance,⁹⁷ the "purchase price" in terms of the simulated contract of sale was payable in arrears. This corresponds with the common-law rule regarding the time of the payment of the premium.⁹⁸

It is argued that these simulated contracts of sale cannot be regarded as genuine contracts of insurance.⁹⁹ *In form*, so it is argued, they were still contracts of sale

93 See Holdsworth 87-88.

94 As this simulated "sale" was subject to a suspensive condition, it was not perfecta at the time of its conclusion, but only became perfecta after the fulfillment of the condition, ie, when the goods were lost. It may therefore be argued that such "sale" was not perfecta and the risk had not passed to the buyer. However, as it was not the true intention of the parties to buy and sell, it could well be argued that the general legal principles which applied to the contract of sale, eg, the rules pertaining to the question of whether or not a contract was perfecta, did not apply to simulated sales.

95 See also Holdsworth 88 who refers to a similar result which was obtained by way of a contract of exchange, which took the following form: B received coins from A on the terms of paying different coins (which would be of a different value) at another time and place. As the coins were at the risk of the borrower or lender, the value of the coins to be returned would differ. The return of the money was usually made subject to the prosperous termination of a voyage. The difference between the rates of exchange represented a "premium of insurance".

96 See Sanborn 239.

97 See again par 2.2.3.1.4 above.

98 See ch 3 par 3.3.2 below.

99 See Van der Merwe *Versekeringsbegrip* 101n243 who argues that there can be no intention to buy or sell if the "buyer" is only prepared to pay the "purchase price" if the object of the sale is damaged or destroyed, and in the absence of such damage or loss is not prepared to execute the contract. Sanborn 237-238 remarks that "the stipulations in regard to the incidence of risk which were introduced into the ordinary commercial contracts ... were more closely connected with the development of insurance. [S]ome of the loans and contracts of sale of this period were never intended to be what they purport, but rather were contracts of insurance." But because of

and may at best be regarded as an attempt to circumvent the papal prohibition on usury.¹⁰⁰ However, it would appear that the intention to *insure*, that is, to transfer risk, was central to the *actual* agreement and not merely incidental, as the whole aim of the simulated sale was to transfer risk but not possession and ownership of the thing. If this argument is correct the payment in terms of the contract was premium-like.

2.2.3.2 *The Transition from Land Loans, Maritime Loans and Simulated Contracts to Insurance Contracts*

2.2.3.2.1 Introduction

The precise origin of genuine insurance for profit is uncertain. It may well be that the genuine insurance contract, which in form and content effected the independent transfer of risk, developed from the land loan contract, the maritime loan contract, the insurance loan contract, the simulated loan and the simulated contract of sale with their special stipulations relating to risk.¹⁰¹ Of all these contracts, the maritime loan was regarded as probably the archetype of insurance.¹⁰² In these early agreements many of the essentials of the genuine insurance contract were to be found. Although risk transfer was merely accidental to the contract as disguised by the parties, it (that is, risk transfer) was the main aim of the parties in terms of the actual contract. When these agreements are split up into their different elements, and compared with their counterparts in the genuine insurance contract,¹⁰³ the independent contract of insurance

the disguise, these contracts cannot be regarded as insurance: see Van der Merwe *Versekeringsbegrip* 101-102.

100 See Van der Merwe *Versekeringsbegrip* 100-101.

101 See again par 2.2.3.1.2, 2.2.3.1.3, 2.2.3.1.4, 2.2.3.1.5 and 2.2.3.1.6 above. But see De Roover 180 who is of the opinion that it is very doubtful that insurance for profit or premium insurance (as she calls it) developed directly out of any of these earlier contracts which shifted the risk from one party to another. She suggests that the most conceivable explanation appears to be that, early in the fourteenth century, the rising sedentary merchants invented a new type of contract, when they discovered that none of the existing forms were quite satisfactory as a means of transferring and spreading sea risk: see De Roover 180 et seq. But one is inclined to differ from her. The similarities in structure and principle between the earlier contracts discussed and the genuine insurance contract are just too many to brush aside as being accidental. The fact that these earlier contracts and the early forms of insurance contracts were almost without exception concluded between the same type of person (ie, merchants, shipowners and the like) and in the same circumstances, namely in connection with maritime transport, further supports the notion that De Roover is incorrect in suggesting that the insurance contract is an independently and separately invented concept, rather than the final product in a process of natural development.

102 This notion is supported by writers such as Straccha, Santerna and others: see Sanborn 239.

103 This entails, eg, that although the payment of a certain portion of the interest in the case of the maritime loan did not qualify in form as a genuine insurance premium, it did nevertheless provide the basis from which could develop the payment of an independent and separate amount, being a genuine insurance premium.

emerges from it.¹⁰⁴

It has been suggested that insurance for profit was the product of an increase in commerce, on the one hand, and the papal prohibition against usury, on the other hand.¹⁰⁵ This construction supports the notion that the maritime loan, the insurance loan and the simulated contracts of loan and sale were all intermediary stages in the evolution of the modern insurance for profit contract.¹⁰⁶

Marine insurance was the earliest form of insurance for profit.¹⁰⁷ The earliest policies of insurance of which records are extant, are marine insurance policies of Italian origin.¹⁰⁸ These policy documents date back as early as the beginning of the fourteenth century.¹⁰⁹ In form, the earliest of these documents appear to be a promise to pay a real or a fictitious loan or to execute a fictitious sale, the repayment or execution being conditional on the happening of a future contingency, namely any misfortune to the vessel. This "policy" copied the form of the maritime loan, just as the latter had in its own evolution adopted the form of the ordinary loan, the *mutuum*. It was simultaneously a development and a change. In the maritime loan the debtor acknowledged that he had in fact received the money, and that he was obligated to repay it. In contrast, in the case of simulated insurance, the insurer, as debtor, pretended to have received the sum insured and promised to pay it to the insured, as creditor, at a fixed date if the ship or the merchandise did not arrive safely.¹¹⁰ Sanborn indicates that just

104 Sanborn 240 refers to Bensa who summarised this evolution of the independent insurance contract as follows: "In order for the premium and the risk to split apart from the principal contract and to give life to an independent contract, in which the one should be the equivalent of the other, this only need occur, that a third person intervene between the purchaser who intended to purchase goods conditioned on safe arrival, and the vendor who intended to cast upon the other party the risk of the sea and nations, and assume the risk of the cargo in consideration of the payment of the difference which the current rate of trade and of change had plainly established." Sanborn concludes that this separate contract by the third person is the true contract of insurance, which merchants began to conclude in the opening years of the fourteenth century.

105 See Van Veen *Premie* 12. Sanborn 235 refers to the fact that the insurance contract, like many other commercial institutions, was developed in Italy in response to the needs of the merchants. It was therefore the last step in a series of evolutions designed to guard against the risks of commercial transport.

106 See Van Veen *Premie* 16-17.

107 See Sanborn 242. See also Vance 8-9; Holdsworth 108 et seq and the examples given there, being early types of insurance other than marine insurance. Eg, certain documents provide proof of the fact that as early as 1318 Florentine merchants customarily made insurances against loss as a result of dangers incident to land transportation. See also Vance 9n28 for an example of early live-stock insurance; and Holdsworth 109 for examples of early fire insurance.

108 The oldest known disguised policy of insurance still in existence is dated 23 October 1347, and insured the ship *Santa Clara* on a voyage from Genoa to Majorca: see Dover 31. As insurance in Genoa remained disguised until the fifteenth century, this policy could not qualify as a proper insurance policy. For the full wording of this policy, see Sanborn 244n730. There are, however, indications that marine insurance was practised before 1350 in centres such as Pisa, Florence and Venice: see De Roover 183. See also Van Veen *Premie* 29; Vance 6-8; Holdsworth 88-89; and Sanborn 240-242 and the examples of early extant insurance documents referred to there.

109 See Vance 6-7.

110 See Sanborn 244.

as it was natural that those merchants who first assumed the maritime risk were the shipowners,¹¹¹ so it was equally natural that those who first prepared the contracts of insurance were brokers and notaries who were used to drawing up maritime loans and contracts of affreightment. From these latter contracts such technical concepts as "policy" and "premium" were taken.¹¹²

2.2.3.2.2 The Transition from Maritime Loans to Insurance Contracts

For the insurance contract to emerge from the maritime loan, it was necessary to accomplish two things. The first step entailed that the concept of "the transfer of the risk" and not credit transactions such as loans should be central to the contract. Secondly, the insured should be unconditionally bound to pay the premium, either in advance or in arrears. The separation of the concept of insurance, that is, the transfer of the risk, from the credit business, that is, the granting of maritime loans with interest, was aided by the general prohibition of the Church against usury in the form of excessive interest.¹¹³ Through a natural process of development and a relaxation of the prohibition on usury, the simulated contracts of loan and sale assumed a proper risk-transferring function in being a true contract of indemnity *in aim*, although *not yet in form*, instead of being contracts where the aspect of risk-transferring was merely incidental. This development resulted in the so-called disguised insurance contracts.¹¹⁴ The disguised marine insurance contract differed from the genuine insurance contract in that the former was not a genuine insurance contract *in form*. It was a principle, even at this early stage of the insurance contract, that insurance should not be a matter of profit to the owner of the property at risk, but that it should be a matter of indemnity only.¹¹⁵

Although these disguised marine insurance contracts are apparently similar to the maritime loan,¹¹⁶ the time at which the amount which represented the "indemnity" in terms of these contracts was paid, was actually reversed. In the case of the maritime loan it was the debtor, that is, the borrower, who promised to *repay*, if a certain ship *arrived safely*, a sum of money of which he had actually received the greater part. The creditor, that is, the lender, made the loan, that is, in effect indemnified the borrower, in anticipation of the materialisation of the uncertain event. In the case of the disguised marine insurance contract, the insurer, that is, the debtor in respect of the indemnity, promised to pay a sum of money, if a certain ship was *lost*.¹¹⁷

111 See again par 2.2.3.1.4 note 86 above.

112 See Sanborn 244-245.

113 This prohibition was, of course, not extended to the assumption of the risk of the materialisation of the uncertain event: see Sanborn 245.

114 As they all concerned policies of marine insurance, they will be referred to as disguised marine insurance contracts.

115 See Sanborn 248.

116 Sanborn 243 refers to Goldschmidt who is of the opinion that insurance on merchandise and cargo developed out of the maritime loan, and especially from its sister, the "land loan" (ie, the Babylonian contract of loan: see again par 2.2.3.1 above).

117 See De Roover 183-185.

But there were also similarities between the maritime loan and the disguised marine insurance contract. In both types of contract, the creditor, that is, the lender in the case of the maritime loan and the insurer in the case of the insurance contract, was liable in respect of an amount which represented the equivalent of an indemnity. Because this amount was pre-paid in the case of the maritime loan it is, strictly speaking, incorrect to say that the lender *became* liable to pay the loan, which was the equivalent of an indemnity. It is rather a case of the borrower *not being liable* to repay the loan, or, put differently, of the lender losing his claim to a repayment of the loan in the case of the materialisation of the uncertain event.

2.2.3.2.3 The Premium in Terms of the Disguised Marine Insurance Contract

The disguised marine insurance policies usually did not contain any explicit reference to the premium. It was probably handed over by the insured to the insurer before the contract was drawn up by the notary (or at least separately). The insured needed no receipt because the contract did not give the insurer any right to claim a premium. The insurer had the premium in his pocket and needed no written evidence of the premium's payment.¹¹⁸ But Sanborn mentions that some of these disguised policies did fix a premium and frankly stated it as the consideration for the assumption of the risk.¹¹⁹ The premium in terms of these disguised marine insurance contracts was therefore paid irrespective of whether the risk had materialised, and it was therefore comparable with the premium in terms of a genuine insurance contract.

Examples of disguised marine insurance contracts show some development as regards the premium. When the contract of insurance was modelled on the maritime loan, the "premium" had to be paid only after the safe arrival of the ship. But because initially there seems to have been no legal method of enforcing payment of the premium, it was customarily paid in advance. Later, although payment of the premium became legally enforceable, the insurer nevertheless stipulated that it had to be paid in advance. The contract was usually annulled if the premium was not paid. If the voyage was abandoned, so that the risk did not commence, the policy was cancelled and the premium was returned. The insurer was traditionally allowed to retain one or one-half percent of the premium in the case of the return of the premium.¹²⁰

2.2.3.2.4 Conclusion

The concept of (marine) insurance spread beyond Italy's borders to other trading centres in Europe, and eventually also to England.¹²¹ Gradually other forms of insurance not related to the carriage of goods by sea or land also made their

118 See De Roover 185.

119 See Sanborn 250.

120 See Sanborn 256.

121 See Vance 9 11 et seq; Holdsworth 96 et seq.

appearance, for example, life insurance¹²² and fire insurance¹²³ to name but two.¹²⁴ Legislation was enacted by the legislatures of the various European cities to regulate insurance practices.¹²⁵

2.3 A COMPARISON BETWEEN THE PREMIUM IN TERMS OF AN INSURANCE CONTRACT AND ITS EQUIVALENT IN SOME RELATED CONTRACTS

2.3.1 Introduction

A contract is generally referred to as an obligatory agreement. The relationship between parties who have concluded a contract are regulated by the general principles of the law of contract.¹²⁶ The insurance contract is but another type of contract. Put differently, the parties to an insurance contract have concluded an obligatory agreement. As a result, all the general principles of the law of contract apply, or should in principle apply to the insurance contract. The general principles of the law of contract will in certain circumstances not apply to the insurance contract, for example, when the general principles of the law of contract are in conflict with one or more of the principles which are peculiar to insurance. Their application may be excluded in a number of ways. First, they may be excluded from the insurance contract by the parties themselves. Secondly, legislation may also exclude the application of a general principle of the law of contract to the insurance contract.

The *reason* for comparing different types of contract or, rather, specific topics from these contracts, is the fact that within a particular legal system all contracts are governed by the same set of general principles. Thus, it is therefore not only permissible but also necessary to consider the general principles of the law of contract when dealing with the insurance contract. The *benefits* of conducting a comparative study between different types of contract are obvious. Selective topics of the various contracts may be identified and compared to illuminate problem areas or uncertainties

122 For a brief discussion of the development of life insurance, see Holdsworth 110 et seq. Various types of life insurance developed which included tontines and annuity policies. For a discussion of early examples of tontines and annuity policies, see Van Barneveld 31 et seq. A tontine is an annuity scheme by which several subscribers accumulate and invest a common fund out of which they receive an annuity that increases as the subscribers die, until the last survivor takes the whole. This practice was designed by and named after Lorenzo Tonti, a Neapolitan banker of the seventeenth century: see Van Barneveld 31-35; Havenga *Life Insurance* 19-20. An annuity policy (in Dutch, "lijfrente") is a scheme in terms of which a fixed sum is payable at specified intervals over a period, such as the recipient's life, or in perpetuity, in return for a premium paid either in instalments or in a single payment. The legal figure of "lijfrente" has its origin in the fifteenth century. For a discussion of some examples of Dutch annuity policies dating from the fifteenth century, see Van Barneveld 35-37; Havenga *Life Insurance* 15 et seq.

123 See Holdsworth 109; Van der Merwe *Verzekeringsbegrip* 145-154; Van Barneveld 53-57.

124 See, in general, Sanborn 242-243.

125 See Vance 9 et seq; Sanborn 257-260 for a brief discussion of the different instruments of legislation enacted by the cities of Florence, Genoa, Venice and Barcelona. See also Van Niekerk *Sources* 51 et seq for an exposition of the municipal legislation of the Dutch cities from the sixteenth to the eighteenth centuries which dealt with insurance law.

126 See Van der Merwe et al 7.

which may exist in the case of one or more of these different types of contract, for instance, in the present case, the insurance contract. Where insurance law does not provide an answer to a legal problem, analogous principles relating to other types of contract may be applicable to the insurance contract to supplement these deficiencies in insurance law.

In this paragraph the general principles concerning the *object of the performance* in terms of an obligation, as well as the termination of contractual obligations by *way of performance*,¹²⁷ will be investigated and compared.¹²⁸ This comparison is logical as the payment of the premium is regarded as the termination of the insured's obligation in terms of the insurance contract.

The general principles of the law of contract relevant to the study of the legal aspects of the premium will be discussed and compared with the relevant principles of the insurance contract on the basis of two other types of contract, namely sale and lease. The discussion and comparison will proceed on the basis of the analogous method of legal research.¹²⁹

The contracts of sale and lease have been chosen for this analogous study because of their obvious tangencies with the contract of insurance, albeit perhaps only from a subjective or predetermined point of view.¹³⁰ Further, and proceeding from the discussion which dealt with the historical development of the contract of insurance,¹³¹ another link between, on the one hand, the insurance contract, and, on the other hand, the contracts of sale and lease, may be indicated. It has been argued that both the contracts of (simulated) sale¹³² and (maritime) loan,¹³³ which is a type of mutuum,¹³⁴ and

127 "Performance" is, of course, but one of the methods by way of which the obligation in terms of a contract may be terminated. Other methods include, eg, merger, compensation or set-off, release, novation, compromise, judgment of the court and prescription: see Joubert *Contract* 274 et seq; Kerr *Contract* 379 et seq; Christie 481 et seq.

128 Although the term "payment" is usually used to connote performance of an obligation to pay money, and "performance" for any other obligation, eg, to deliver a thing, this usage is not consistent and the two words may be regarded as interchangeable: see Christie 481.

129 In terms of the analogous method of legal research different concepts, and in the instant case, different types of contract, within the same legal system are compared. For a further discussion of the analogous method or technique as a method of legal research, see again ch 1 par 1.2.1.1 above.

130 See further par 2.3.2 and 2.3.3 below. The contracts of sale and lease are, of course, but two examples of types of contract which are comparable with the insurance contract in terms of the analogous method of legal research. Eg, the contracts of exchange and partnership are capable of providing the basis for an interesting if not fruitful comparison with the contract of insurance. Although the number of other contracts which are likely to form the basis of a logical comparison with the insurance contract are not restricted, such comparative contracts must comply with certain minimum requirements. Eg, as the insurance contract is a reciprocal agreement, it may only usefully be compared with other reciprocal contracts.

131 See again par 2.2 above.

132 See again par 2.2.3.1.6 above.

133 See again par 2.2.3.2-2.2.3.4 above.

134 le, a loan for consumption, which is a contract whereby one person delivers some fungible thing (eg, money) to another person, who is bound subsequently to return to the former a thing of the same kind, quality and quantity: see Zimmermann *Obligations* 153 et seq; Wille 576.

which, in turn, is a species of the genus letting and hiring,¹³⁵ played an important role in the evolutionary development of the insurance contract in its modern form.¹³⁶ Finally, a comparison between the contracts of insurance, sale and lease is permissible for another reason. They all were, and still are, types of commercial contract which were concluded at the market place, by merchants, and which developed with due consideration of commercial usages and the needs of merchants. These contracts therefore share common ground as far as the circumstances regarding their development and usages are concerned. For the reasons just mentioned, a brief and selective comparison of aspects of the modern contracts of sale and lease on the one hand, and corresponding aspects of the genuine insurance contract on the other hand, is called for.¹³⁷ This comparison will proceed on the basis of the general principles of the South African law of contract and insurance.

135 See Wille 544. Although no direct authority could be found to support the suspicion that loan and lease are related, albeit only remotely, such notion may not be disregarded for lack of direct authority only. Both loan and lease involve the transfer of possession of a thing from one party to another. In Roman law the contract of loan was regarded as a type of real contract, while lease was regarded as a consensual contract: see Zimmermann *Obligations* 153 et seq and 338 et seq. This distinction has become obsolete and both types of contract are now consensual contracts. But there are also obvious differences between loan and lease. Some of them include the following. Whereas ownership and possession of the thing pass from the lender to the borrower in the case of loan, only possession and not also ownership passes from the lessor to the lessee in the case of lease. This distinction hinges on the fact that the intention of the parties in terms of a loan is for the borrower to consume the (fungible) object of the loan. Although not every loan of fungibles can be classified as a mutuum, non-fungibles cannot be the object of a mutuum. Further, as both ownership and possession pass to the borrower in the case of a loan, problems in respect of risk usually do not arise. If the borrower loses the money or the goods received, it is entirely his own affair and it does not have any effect on his obligation in terms of the loan. This is in accordance with the principle that it is the owner who has to bear the risk of accidental loss or destruction. In the case of lease, any loss or destruction of the thing is, in the absence of a contradicting contractual term, for the account of the lessor who is usually but not necessarily the owner of the thing: see Zimmermann *Obligations* 154. See further note 196 below for a discussion of the question of who bears the risk in the case of a contract of lease.

136 See again par 2.2.3 above.

137 Interesting and thought-provoking comparisons in respect of various contractual aspects may, of course, also be drawn between the insurance contract, on the one hand, and a number of other types of contract, on the other hand. Eg, the aspect of the transfer of risk which is an essential of the contract of insurance is also present in a number of other types of contract. Although not quite relevant to the present discussion, a comparison between, eg, the insurance contract and the contract of partnership, in respect of the transfer or sharing of risk, creates the opportunity for an interesting analysis. So, in passing, one or two comments about the transfer of risk in the case of a contract of partnership. The risk in terms of an insurance contract is usually not transferred in its entirety from the insured to the insurer, and it is possible for the parties to agree that they will share the risk of the materialisation of the uncertain event, eg, in the case of (compulsory) under-insurance or where a fixed portion of the value of the object of the risk remains uninsured (ie, compulsory self-insurance). In the case of the contract of partnership, the risk (eg, the failure of their business concern) is usually shared by the partners. But it is possible for the parties to agree that one or more of the partners will bear a greater portion of the risk than the other partners, or that one or more of the partners will bear no risk at all. In the case of insurance risk usually passes temporarily (ie, for the duration of the contract) from the insured to the insurer. Likewise, in the case of a partnership risk is usually shared temporarily (ie, for the duration of the contract) by the partners. Another similarity between insurance and partnership concerns the premium or contribution which is paid in return for the passing (or rather the sharing) of risk. In the case of the insurance contract risk is transferred (or shared) in return for the payment of a premium. In the case of a partnership risk (or prospect of the viability of the business concern) is transferred (or share) in return for the contribution which each partner must make.

In particular the price or rent which is payable in terms of a sale or lease shows a remarkable resemblance with the premium which is payable in terms of an insurance contract. The contracts of insurance, sale and lease are all characterised by the fact that they are reciprocal contracts in terms of which one party undertakes to pay a sum of money, or to deliver a thing, in return for an undertaking by another party. The terms "bilateral" and "reciprocal" are often used indiscriminately to connote the principle that the one party's performance is rendered in return for the performance undertaken by the other party.¹³⁸ It is submitted that these concepts are not necessarily synonymous and that the term "reciprocity" should be used to connote that one performance is undertaken or actually rendered in return for another performance. The latter's counter-performance may consist of a thing or a sum of money. The "price" in terms of a sale and the "rent" in terms of a lease are usually relative easy to recognise as being the "equivalent" of the premium in the insurance contract. But this is not the case in all types of reciprocal contracts. For example, in the case of the contract of exchange both parties' performance consists of a thing.¹³⁹

The discussion will proceed on the basis of a comparison between, on the one hand, the premium in terms of an insurance contract, and, on the other hand, the price or rent in terms of the contracts of sale and lease respectively. A comparison between the premium, the price and the lease, will be drawn with reference to the following aspects: their role or function as the performance or counter-performance in terms of the contract;¹⁴⁰ the nature of the performance; the question of whether the amount of it must be fixed upon the conclusion of the contract; and the time of payment. It will be shown that the premium constitutes the object of the obligation of the insured as debtor in terms of the insurance contract. Likewise, the price or rent constitutes the object of the obligation of the debtor (that is, the buyer and the lessee respectively) in terms of the contracts of sale and lease respectively.

138 A distinction should be drawn between unilateral legal acts, eg, the making of a will, on the one hand, and, bilateral legal acts, eg, the conclusion of a contract, on the other hand. Contracts, in turn, may be classified as either unilateral, eg, the contract of donation, or as bilateral, eg, the contract of sale: see Maasdorp 10; Van der Merwe et al 4 et seq. Bilateral contracts are either of a reciprocal nature, eg, the contract of sale, or of a non-reciprocal nature, eg, the contract of loan. In the case of reciprocal contracts the performance of each of the parties have to be given *in exchange* (ie, at the same time) for one another. One of the reasons why it is necessary to distinguish between reciprocal contracts on the one hand, and non-reciprocal contracts on the other hand, is the fact the *exceptio non adimpleti contractus* applies to the former but not to the latter. In terms of this adage the defendant is allowed to raise the exception that the plaintiff, too, is in default, and therefore cannot demand performance: see Van der Merwe et al 283 et seq. The reason for this distinction lies in the fact that in the case of bilateral contracts both parties have to perform, whereas in the case of a unilateral contract only one party has to perform: see Joubert *Contract* 22. For obvious reasons the adage under discussion does not apply to unilateral contracts.

139 See note 146 below for a definition of the contract of exchange.

140 Whether the premium, price or lease is regarded as either the performance or the counter-performance in terms of the contract, is irrelevant as both parties to a reciprocal contract are simultaneously debtor and creditor.

2.3.2 The Contract of Sale

2.3.2.1 *Definition*

A contract of sale is a reciprocal contract in terms of which one party, the seller, undertakes to deliver a thing, the object of the sale, to another party, the buyer, and the buyer, in return for this, agrees to pay the seller a certain sum of money, the purchase price.¹⁴¹

2.3.2.2 *The Price in Terms of a Contract of Sale*

An agreement between the parties that a price will be paid by the buyer to the seller is one of the essential characteristics of the contract of sale.¹⁴² In the absence of an undertaking by the buyer to pay a price, the agreement will not constitute a contract of sale, but perhaps a contract of donation.¹⁴³ The price must consist of money.¹⁴⁴ If the price consists entirely of some commodity other than money, the agreement will not

141 See Mackeurtan 5; LAWSA vol 24 par 1; Wille 528.

142 This essential is described as follows: "[T]here can be no valid contract of sale unless the parties have agreed, expressly or by implication, upon a purchase price": see the decision in *Burroughs Machines Ltd v Chenille Corp of SA (Pty) Ltd* 1964 (1) SA 669 (W) at 670C-D.

143 Ie, if all the essentials of the contract of donation are present. One of the essentials of a contract of donation is that the one party (the donor) promises to give something to another person (the donee) without receiving or stipulating for anything in return. The promise of the donation is therefore made gratuitously. If the donor is to receive anything of value in return, the contract is not a donation. As to the requirements of the contract of donation in general, see Wille 624 et seq. The fact that a donation is made gratuitously prevents any further meaningful comparison between the contract of donation on the one hand, and the contracts of sale, lease and insurance on the other hand. It would therefore appear that the contract of donation, unlike the contracts of sale, lease and insurance, is not a reciprocal contract as the donation is given gratuitously. Donation is, of course, a unilateral contract and therefore does not qualify as a reciprocal contract. Although not all bilateral contracts are necessarily also reciprocal, only bilateral contracts are reciprocal: see again note 138 above.

144 See LAWSA vol 24 par 13; Zimmermann *Obligations* 250; Wille 530. Money is a term so frequently used and of such importance that its inherent difficulties and multitude of functions are often overlooked. Although a discussion of the contents of the concept of "money" falls outside the scope of this thesis, it is necessary, if possible, to define it. Although there are not hard and fast rules, it is clear that a distinction must be drawn between money in its concrete form and the abstract concept of money. Eg, the economist's view that "everything is money that functions as money" is unacceptable from a legal point of view. It has therefore been suggested that "in law, the quality of money is to be attributed to all chattels which, issued by the authority of the law and denominated with reference to a unit of account, are meant to serve as universal means of exchange in the State of issue": see Mann 8. For an in-depth analysis and fascinating exploration of the different elements of this definition suggested by him, see Mann 7 et seq. As to the nature of money in South African law, see Burger 225 et seq.

be one of sale but perhaps¹⁴⁵ a contract of exchange or barter.¹⁴⁶ Sale is an example of an obligation in terms of which *money* is given in exchange for *something else*.¹⁴⁷ If the price consists partly of money and partly of goods, the contract may, depending on the intention of the parties,¹⁴⁸ be treated as one of sale.¹⁴⁹

The price must be determined or determinable.¹⁵⁰ But it is not a requirement for a valid contract of sale that the exact amount of the purchase price must be agreed upon and mentioned in the contract. The parties may agree that a specified third party will determine the price, but not that one of them will do so.¹⁵¹ If there is no express agreement on the price, the Court will, where possible, regard the price as the tradesman's usual price, or the market price.¹⁵² If there is no indication as to the amount of the usual selling price of the seller, or if there is no prevailing market price for the object of the sale, it will be taken that the parties intended to buy and sell at a fair and

145 The question of whether or not such a "contract of sale" will be a contract of exchange will depend, eg, on the intention of the parties.

146 See Zimmermann *Obligations* 250 who indicates that the contract of sale had its origin in the contract of exchange and that for that reason the rules relating to sale apply generally to the contract of exchange as well. See also Mann 3n3; Wille 530. Barter or exchange is a contract in terms of which one person gives something in exchange for something given to him by another person. The object of such giving in each case is to transfer the ownership in the thing given, to the person who receives it: see Maasdorp 371; Wille 530n33. If money is given in return for a thing the contract will not be one of exchange, but one of sale. But if money is given as an article in itself, for example, a particular coin or a collection of coins, it may qualify as the performance in terms of a contract of exchange. If a person's performance consists of money and a thing it will be regarded as a contract of exchange, provided that the portion which consists of money does not exceed the value of the thing: see Maasdorp 371.

147 Sale was regarded in Roman law as a nominate contract: see Maasdorp 133 et seq 370; Van Zyl *Privaatreg* 321; Zimmermann *Obligations* 230 et seq. Exchange, in contrast, is an example of an obligation in terms of which *something* is given in exchange for *something else*, ie, "do ut des". In Roman law this was one of four different innominate contracts, ie, contracts without a (specific) name. The other three were the giving of something in consideration of something being done in return ("do ut facias"); doing something in consideration of something being given in return ("facio ut des"); and doing something in consideration of something being done in return ("facio ut facias"): see Maasdorp 370.

148 The relative value of the amount of money and the value of the thing which is paid/given jointly as the purchase price, may give an indication of the intention of the parties. If that portion of the price which consists of money exceeds the value of the thing which forms the other part of the price, the contract will usually be regarded as a sale. But if the price consists of money and a thing, the contract will be regarded as an exchange, provided that the value of the portion which consists of money does not exceed the value of the thing: see Maasdorp 371.

149 See LAWSA vol 24 par 14n9 and the authorities referred to there; Wille 530.

150 See Maasdorp 141; Zimmermann *Obligations* 253; Wille 530.

151 Such agreement will be regarded as against public policy. Zimmermann *Obligations* at 254 explains this rule as follows: "The problem here was not so much that the purchaser might in the end not fix a price at all ... [t]he main objection of the Roman lawyers was probably that the determination of an *essentiale negotii* had been left to one party and that thus the institutional check against the danger of gross and unreasonable imbalance (namely negotiation about the price) had been removed."

152 See Mackeurtan 17.

reasonable price.¹⁵³ The concept of "market price" appears to entail a determination of the price from a purely objective point of view.¹⁵⁴ The concept of "a fair and reasonable price", by contrast, appears to involve a determination of what would be regarded as fair and reasonable in the particular circumstances, and as between the particular parties. In short, it entails a subjective approach in determining the price.

In principle the price is payable when the delivery of the object of the sale takes place. The parties may agree that the price must be paid before delivery of the thing takes place, or that the payment of the price is due only after delivery of the thing, such as in the case of a sale on credit.¹⁵⁵ The pre-payment of the price, that is, before the delivery of the thing is therefore not a requirement for the contract of sale to take effect.

The undertaking by the buyer to pay a price (also) has a bearing on the question who bears the risk of the depreciation in value or the destruction of the object of the sale, or, in the alternative, who stands to gain by the appreciation in value or to enjoy the fruits of the object of the sale.¹⁵⁶ The common-law rule regarding the risk in terms of a contract of sale entails that the risk and benefit of the thing sold pass to the buyer as soon as the contract is concluded or, more accurately, when the contract is perfecta.¹⁵⁷ The common-law rule regarding the passing of the risk will, as a matter of gen-

153 Although it has been held in two decisions in the Transvaal that a contract to sell at a "reasonable price" is invalid as a contract of sale, there are authorities to the contrary: see Mackeurtan 11. Seen against the fact that the principles for determining whether rent is certain are said to be the same as those for determining whether price is certain in sale, the recent decision in *Genac Properties Johannesburg (Pty) Ltd v NBC Administration CC 1992 (1) SA 566 (A)* which dealt with the question of certainty of rent in terms of a contract of lease, is of equal importance to the question of certainty of price in terms of a sale. The Court at 577F-G made the following instructive comments: "There is no general agreement that a lease for a reasonable rent is invalid. It is difficult to see on what principle a *sale for a reasonable price*, or a lease for a reasonable rent, should be regarded as invalid" (my italics). It has been suggested that in deciding whether or not the formula of "a reasonable price" is acceptable, the best approach is to consider what the parties meant by the words they used. It the final instance it has then to be considered whether evidence is available to establish the amount of the price in the circumstances of the case in question: see *LAWSA* vol 24 par 16. This approach seems to be correct.

154 The concept of "market price" is described as: "The prevailing price, as determined by supply and demand, at which goods, services, etc, may be bought or sold": see Collins 700.

155 See Mackeurtan 202; Wille 542.

156 The risk includes disadvantages such as the liability to pay taxes or excise duty, as well advantages such as the right to the fruits of the thing, eg, an unharvested crop on a farm: see Wille 530n60-61.

157 This is the famous risk rule, also expressed in the words "periculum rei venditae statim ad emptorem pertinet". This rule is concerned with the period between conclusion of the contract of sale and the transfer of ownership from the seller to the buyer. This rule regulates the situation where the object of the sale has been lost or damaged or, alternatively, where it has increased in value. The question arises of whether or not the loss affects the buyer's obligation to pay the purchase price. The crisp answer to this question is that it depends whether the contract is perfecta. Although perfection and conclusion of the contract usually coincide, this is not always the case. Likewise, although the delivery of the thing, the transfer of the ownership in it, and the payment of the purchase price coincide in most sales, this is not always the case. The risk rule provides answers to problems which may arise in this regard: see Zimmermann *Obligations* 281 et seq. The matter is discussed in more detail below.

eral principle, determine who bears the risk of loss or profit of the object of the sale. It determines that a contract of sale is perfecta when the following criteria have been met.¹⁵⁸ First, the object of the sale must be certain or identifiable.¹⁵⁹ Secondly, the purchase price must be determined or determinable by way of a simple calculation. Thirdly, the contract must not be subject to a unfulfilled suspensive condition. If the contract is perfecta, the risk of the destruction or depreciation in value, or, conversely, the fruits or the benefit of an appreciation in value, of the object of the sale passes from the seller to the buyer.¹⁶⁰ The perfecta rule is usually crisply expressed in the words "periculum est emptoris", that is, the risk of a thing sold but not yet delivered is borne by the buyer. But if one or more of these criteria have not been satisfied, the risk of the destruction of the object remains with the seller, that is, if the seller is also the owner, or with the owner, if the seller is not also the owner.

The fact that the purchase price is due but unpaid does therefore not affect the passing of the risk.¹⁶¹ As long as the amount of the price is certain or determinable, risk passes to the buyer in the absence of a contractual term to the contrary. The passing of risk does not, of course, always coincide with the passing of the ownership in the object of the sale. For example, although the contract is perfecta, that is, although risk has passed to the buyer, the seller may still be in possession of the object of the sale. As delivery has not taken place, the buyer has not yet become the owner of the object although he already bears the risk of the destruction of it.¹⁶²

The parties are, of course, entitled to agree that risk will pass to the buyer notwithstanding the fact that the contract is not yet perfecta.¹⁶³ This agreement is best described by the maxim of "periculum rei venditae statim ad emptorem pertinet", that is, the risk of property sold is immediately borne by the buyer.

2.3.2.3 *A Comparison Between the Price and the Premium*

2.3.2.3.1 Introduction

It has been shown that a strong argument can be made out for the contract of sale being an important interim form in the evolution of the insurance contract.¹⁶⁴ One has a strong suspicion that on form alone the contracts of sale and insurance share common ground. A comparison between the concepts of the "price" in terms of a contract of sale and the "premium" in terms of an insurance contract will show that there is a large degree of similarity between the two types of contract. This extensive overlapping, it is submitted, justifies the application of those principles peculiar to the price in terms of a sale to the premium in terms of insurance, if and when necessary and pro-

158 See Mackeurtan 178 et seq; Zimmermann *Obligations* 283 et seq.

159 See Wille 533n59.

160 See Wille 533.

161 See Mackeurtan 180; Wille 533n59.

162 See again note 157 above.

163 See Mackeurtan 178; Wille 533.

164 See again par 2.2.3.1.6 above.

vided that they are not incompatible with the general principles of the law of insurance. It should be emphasised from the very start that although contracts of sale and insurance are not identical, they are nevertheless sufficiently similar in respect of the price and the premium in particular that the relative principles covering price may be investigated with a view to their possible application to the premium, if and when necessary.

2.3.2.3.2 The Price and Premium As Essentials of Their Respective Contracts

Both the price and the premium are the counter-performance in terms of a reciprocal agreement. Both are examples of an obligation to pay an amount of money in return for the performance of the other party.¹⁶⁵

The price is the (monetary) counter-performance by the buyer in return for the seller's performance. In terms of both types of contract the agreement that a price or premium will be paid is an essential element of the contract. Just as a contract in terms of which no price is payable cannot be regarded as a contract of sale, so a contract in terms of which no premium is payable cannot be regarded as an insurance contract.¹⁶⁶

2.3.2.3.3 The Amount of the Price and Premium

In the case of both sale and insurance, it is not necessary for the conclusion of a valid contract for the parties to agree beforehand on the exact amount of the price or premium, provided that they agree on some method of determining it at a later stage. Neither the price nor the premium need be paid for the contract to take effect. Consequently the pre-payment of the price or premium is, in the absence of a term to the contrary, not required. It has been shown that an agreement to sell at a reasonable price is in principle valid.¹⁶⁷ It is submitted that an agreement to insure at a reasonable premium should, in principle, also be regarded as valid. The issue of whether an insurance contract in terms of which the parties agree to pay a reasonable premium is valid in our law, an issue not yet settled, is considered at a later stage.¹⁶⁸

2.3.2.3.4 The Interaction Between the Concepts of Risk, Price and Premium

The indemnity insurance contract contains an element of sale. It may be seen as a sale where the insured "buys" insurance cover (to ensure peace of mind in respect of the possible destruction or loss of the object of the risk) from the insurer.¹⁶⁹ The premium is the "price" which the insured pays in return for the insurance cover provided

165 An obligation to pay is the opposite of an obligation to give or do something.

166 See Reinecke & Van der Merwe par 21.

167 See again par 2.3.2.2 above.

168 See further ch 8 par 8.3.7 below.

169 It is, of course, possible to argue that this construction of the aim of an insurance contract also applies to non-indemnity insurance contracts, ie, where the insured, who may be the breadwinner of his family, *buys* life insurance cover to make provision for his family in the event of his premature death.

by the insurer. Thus, the premium is paid by the insured to the insurer in return for the insurer's undertaking to temporarily (that is, for the duration of the contract) relieve the insured of the risk of the materialisation of the uncertain event.

The parties agree that if the risk does not materialise during the duration of the contract, the insurer will not be liable to indemnify the insured. If the risk does materialise during the duration of the contract, the insurer is liable to indemnify the insured.¹⁷⁰ But the liability of the insured to pay the premium is unconditional. The insured is liable to pay the premium irrespective of whether or not the risk has materialised.

It has been shown that the actual payment of the price in terms of a contract of sale does not affect the transfer of the risk.¹⁷¹ Generally the risk passes from the seller to the buyer irrespective of whether or not the price has been paid. The same principle can be applied to the insurance contract. It was argued that the insured "buys" the insurance cover from the insurer for the duration of the insurance contract. If the parties to the insurance contract have reached agreement that a premium of a determinable amount will be paid (as well as an agreement on the other essentials of the insurance contract), the risk of the loss or destruction of the object of the insurance passes from the insured to the insurer. Thus, the peace of mind or insurance cover which the insurer "sells" to the insured passes as a rule, irrespective of whether or not the premium has been paid.¹⁷² In the case of the contract of sale, the general rule provides that once the risk has passed from the seller to the buyer it is borne by the latter and does not, or is at least not intended to, return to the seller. But in the case of the insurance contract the risk passes only *temporarily* to the insurer.¹⁷³ The risk passes back to the insured

170 The question whether or not the materialisation of the risk must be outside the control of the insurer, has been raised in connection with the distinction between insurance contracts and other contracts or clauses containing an arrangement for the transfer of the risk. In particular the distinction has been considered with regard to contracts of sale and contracts for the rendering of services, or contracts which contain warranties and service or maintenance clauses: see Reinecke & Van der Merwe par 173n6 and the authorities and examples referred to there.

171 See again par 2.3.2.2 above.

172 See Reinecke & Van der Merwe par 30, 43 and 173 for a discussion of the risk-bearing part of the insurer's obligations.

173 The contract of insurance is, of course, not the only example of a contract in terms of which the risk passes only *temporarily* from one party to another. Two further examples spring to mind, namely the contracts of carriage and deposit. The contract of carriage is described as a contract whereby one person undertakes, either *gratuitously* or for reward, to carry or convey the person or goods of another person from one place to another. In the case of the contract of carriage (which forms part of the branch of law of letting and hiring (see also par 2.3.3 below)), the risk of damage or loss to the goods is usually transferred from the person who consigns the goods to the carrier. But the parties frequently insert a term in their contract to limit the carrier's liability for the loss or damage to the goods in certain events. As to the contract of carriage in general, see Wille 584 et seq. Likewise, in the case of the contract of deposit, the risk is only transferred temporarily from the depositor to the depositary. In terms of the contract of deposit the one party (the depositor) hands over a movable thing to another person (the depositary) to keep for him *gratuitously* or for reward, on the condition that the depositor is to get it back at his wish in the same condition. If the thing is returned to the depositor, the risk simultaneously passes back to him. The parties are of course free to limit or exclude the depositary's liability as to the risk of damage to the thing. As to the contract of deposit in general, see Wille 581 et seq. The fact that the carriage or deposit *may* take place *gratuitously* rules out any further meaningful comparison

the moment the insurance contract lapses. It is only after the duration of the contract of insurance that it can be said with certainty that the risk has not materialised and that the insurer is not liable to the insured.

Generally, the full premium is earned by the insurer as soon as it has been at risk. But sometimes the insured is entitled to a return of a portion of the premium.¹⁷⁴ Thus, it is only after the insurance contract has lapsed that it can finally be stated that the insurer is entitled to the full premium, as it is certain at that stage that the insured does not have a counter-claim for an indemnity, which may exceed the amount of the premium.¹⁷⁵ The application of the principles of the contract of sale concerning the passing of the risk to the insurance contract further supports the notion that the prepayment of the premium is not a condition for the insurance contract to take effect. The application of these principles also accords with the common-law position in terms of a contract of insurance which provides that in the absence of an agreement between the parties providing otherwise, the premium is payable in arrears.¹⁷⁶

between the contracts of carriage and deposit on the one hand, and the insurance contract on the other hand, at least as far as the aspect of a counter-performance (ie, the price or premium) is concerned. The fact that the parties to the contracts of carriage and deposit are in principle free to agree on the exclusion of the carrier or the depositary's liability in the case of damage to or loss of the thing (ie, they *may* exclude the transfer of the risk of the destruction of the thing), embodies a further radical divergence from the contract of insurance where this is never possible. If the parties in terms of what purports to be a contract of insurance agree that the insurer will not bear the risk of the loss or destruction of the risk object, the contract is simply not an insurance contract. This is so because the agreement on the transfer of the risk in terms of the insurance contract is an essential of the contract: see Reinecke & Van der Merwe par 30 where it is stated that "[a] contract can only be classified as an insurance contract if the bearing of the risk by the one party [ie, the insurer] is a substantial part of the contract" (my insertion).

174 See further ch 8 par 8.6 below for examples of when this will be the case.

175 The fact that the premium is, as a matter of general principle, only payable in arrears, may perhaps support the (theoretical) possibility that the insurance contract may also be construed as an agreement to sell and repurchase the transfer of the risk. If the premium is payable in arrears, it is in actual fact the "price" paid by the insured for "buying back" the risk (ie, for re-transferring the risk) from the insurer, *after* the contract (and therefore also the insurance cover in terms of it) has lapsed. Such notion may at first blush appear to be far-fetched, but it may be interpreted as the completion of the argument (and reality) that insurance is nothing more than the (temporary) taking-over of the risk by one party from another, at a price. The payment of the premium (in arrears) therefore constitutes the last link in the chain of events or parts that form a connected whole, namely the concept of insurance. On the basis of this possibility it may be speculated that where the premium is payable in arrears, it (the premium) will often be due only if the risk has not materialised. Where the risk has materialised the application of the concept of set-off may result in the insured not owing anything to the insurer, and the latter has to indemnify the insured. This highly hypothetical and alternative construction of the nature of the contract of insurance is, it is conceded, of academic interest only. It will only be a viable construction if certain circumstances are present, eg, the premium must be payable in arrears, a loss should have occurred and the amount of the indemnity as a result of the loss must exceed the amount of the premium. Likewise, this construction is, strictly speaking, in conflict with the basic function of the premium, namely to serve as (unconditional) counter-performance by the insured in return for the temporary transfer of the risk from the insured to the insurer.

176 See ch 3 par 3.3.2 below.

2.3.2.3.5 Dissimilarities Between the Price and the Premium

As far as the price and the premium are concerned, there are also certain dissimilarities. First, there is a dissimilarity concerning the *nature* of the price and the premium respectively. The price must consist, entirely or at least predominantly, of money. If the price consists of something other than money, the contract will not be a sale but most likely an exchange. However, the premium may, and sometimes does consist entirely of something other than money. For example, in the case of mutual insurance the contribution or premium may consist of the liability of a member to assist fellow-members (for example, by providing his labour) in the event of the materialisation of the uncertain event.

Secondly, in the case of the contract of sale the transfer of the ownership, or at least the undertaking to transfer ownership of the object of the sale, is central and inevitable. It may be regarded as a consequence of the conclusion of the contract.¹⁷⁷ However, this is not the case in terms of an insurance contract. In those cases where the ownership in respect of the object of the risk does pass from the insured to the insurer, this is incidental and occurs usually only in the case of the loss of the object. For example, the ownership in respect of the object of the risk, also referred to as the insurer's right to salvage passes only to the insurer if it has indemnified the insured for loss of or damage suffered in respect of the object of the risk.¹⁷⁸

In conclusion it may be stated that, in view of the possibility that the insurance contract might well have developed by analogy to the contract of sale,¹⁷⁹ a large number of obvious similarities between these two types of contract are expected. Particularly in so far as price and premium are concerned, the application of the relevant principles from the contract of sale to the contract of insurance seems logical. Where the contract of insurance has developed its own peculiar principles, or where the parties to the insurance contract have expressly or impliedly reached a particular agreement on a particular aspect, these principles or terms do, of course, govern the contract. But where the law of insurance lacks certain principles, the application of the relevant principles of sale is not only permissible but necessary. The reasons for this analogous application of the principles concerning the price in terms of the contract of sale to the premium in terms of the contract of insurance are twofold. First, both sale and insurance are but different types of contract, and as such are subject to the same general principles of the law of contract. Secondly, because of the role of the contract of

177 See Mackeurtan 2-3 where it is explained that, contrary to modern notion, the contract of sale does not necessarily involve the passing of ownership as an essential element. Mackeurtan does not expand on this possibility and one must assume that the point he tries to make is that it is not the actual transfer of ownership of the object of the sale which is an essential of the sale, but rather the undertaking to transfer ownership. But there is common-law authority that a contract of sale in terms of which the ownership does not pass from one person to another is unusual, if not impossible: see Mackeurtan 3n14-18 and the authorities referred to there.

178 The insurer's right to take the salvage is inherent in the doctrine of subrogation: see Reinecke & Van der Merwe par 222; Gordon & Getz 252n41.

179 See again par 2.2.3.1.6 above.

sale in the evolutionary development of the contract of insurance, these two contracts and the respective principles which govern them share a natural analogy.

2.3.3 The Contract of Lease

2.3.3.1 Definition

A contract of lease is a reciprocal contract in terms of which one party, the lessor, undertakes to make temporarily available to another party, the lessee, the use and enjoyment of a movable or immovable object in return for the undertaking by the other party to pay rent.¹⁸⁰

Lease is an example of an obligation in terms of which *something* is temporarily given to another person for the latter's use and enjoyment in exchange for *something else, usually money*.¹⁸¹

2.3.3.2 The Rent in Terms of a Contract of Lease

The agreement that the lessee will pay rent is an essential element of a contract of lease. Without an undertaking by the lessee to pay rent there can be no contract of lease. An agreement in terms of which the one party, the lessee, enjoys the gratuitous use of another party's, the lessor's, property, does not constitute a contract of lease,¹⁸² but more likely a contract of commodatum.¹⁸³ It is not a requirement for a valid lease that the lessor has to be the owner of the property.¹⁸⁴

The agreement that the lessee will pay rent is therefore part of a bilateral, reciprocal undertaking. As the rent may consist of money or a share in the fruits of the

180 See Cooper 2-3.

181 Lease was regarded in Roman law as a nominate contract: see Van Zyl *Privaatreg* 321; Zimmermann *Obligations* 338. As to the difference between, on the one hand, nominate contracts, and, on the other hand, innominate contracts, see again note 145 above.

182 See Zimmermann *Obligations* 354n87; Cooper 42. The fact that it does not constitute a contract of lease entails, among other things, that the natural consequences of a contract of lease (eg, the maxim of "huur gaat voor koop") will not apply to the agreement.

183 Commodatum, or loan for use, is a contract whereby one person, the lender, *gratuitously* delivers property to another person, the borrower, to be used for a certain purpose and to be returned to the lender upon the expiration of the period of time, or after it has served the purpose for which it was lent. Akin to commodatum (loan for use) is precarium, which is a *gratuitous* grant by one person (the precario dans) of property to another person (the precario habens or tenens). The grant of the property is revocable at the will of the precario dans. Commodatum and precario differ, therefore, from lease in that the borrower (precario habens) pays no remuneration for the use of the property: see Cooper 7 et seq.

184 Eg, the following non-owners who are the holder of a *ius in re aliena* in respect of the leased property are generally regarded as being entitled to let it: an usufructuary, an usury, an habitator, a mortgagee, and a lessee: see Cooper 26-27. It is also possible for someone with no title at all to the property to conclude a valid contract of lease: see Cooper 27 et seq.

object of the lease,¹⁸⁵ the obligation of the lessee may either consist of the *payment* of money, or of *giving* a thing, depending on the agreement between the parties. It is trite law that if the rent takes the form of something other than money, it must consist of a share in the fruits of the object of the lease.¹⁸⁶ But rent may not consist of services.¹⁸⁷ There is considerable dispute as to whether Roman law recognised a further exception, namely that the rent must consist of money or fruits of the object of the lease. It may be excepted that current law restricts the nature of the rent to either money or fruits of the object of the lease.¹⁸⁸

The rent agreed upon by the parties must be certain.¹⁸⁹ Rent is certain when the parties agree either upon a definite sum of money (or, in the case of other fungibles, a definite quantity of the fungible in question), or upon a definite method whereby the rent can be fixed.¹⁹⁰ It appears that an agreement to let property at a "fair" or "reasonable" rent is sufficiently ascertainable to constitute a valid contract of lease.¹⁹¹ In the recent decision in *Genac Properties Johannesburg (Pty) Ltd v NBC Administration CC*¹⁹² the Court considered the question of whether or not an agreement to lease "for a reasonable rent" satisfies the requirement of certainty of rent. It was decided, albeit obiter, that

185 See Cooper 44. This arrangement was referred to in Roman law as *colonia partiaria*. The reason for this exception to the rule that rent must consist of money, appears to be the fact that the lessee (*colonus*) in the case of agricultural tenancies in the Roman period was notoriously destitute and usually struggled to pay his rent. *Colonia partiaria*, under these circumstances, was favourable for the lessor in that it gave him an income in kind where he might well have lost out otherwise: see Zimmermann *Obligations* 354-355.

186 See Cooper 44. However, there are writers who have criticised the rule that rent cannot be in something other than money or fruit: see Wille 545n10 and the authorities referred to there.

187 See Wille 545. An objection to allowing rent to be in services is that it may be difficult to ascertain which party is the lessor and which party is the lessee. Eg, A and B enter into an agreement whereby A gives the use and enjoyment of his property to B in return for the services of the latter. This agreement is capable of the construction that A is letting and B is hiring A's property, in which case the contract would be *locatio conductio rei*, the *merces* (ie, the object of the "lease") being the use of A's property. As such contract does not qualify as a contract of lease, B will, eg, not be entitled to rely on the protection provided by the maxim of "huur gaat voor koop" if A decides to sell the property to a third party during the duration of the contract and the third party evicts B from the property: see Cooper 48 et seq and the different examples from case law referred to there which illustrate the difficulties where the rent consisted of services.

188 Zimmermann *Obligations* 355 refers to various examples of contract which apparently constitute a "lease" where both parties' performance consist of something other than money. Eg, two small holders own one ox each. In order to pool their assets, they agree that each of them may in turn use both oxen for a period of ten days. Although there were conflicting views about whether this type of use-exchange transactions constituted a contract of lease, the majority of authorities appeared to favour the view that the rent had to be in money: see Zimmermann *Obligations* 355n100 and the authorities referred to there.

189 For a discussion of the conflicting views in Roman law on the question as to whether the rent had to be certain, see Zimmermann *Obligations* 354.

190 See Zimmermann *Obligations* 354-355; Wille 544; Cooper 54-55.

191 See Cooper 56-57.

192 *Supra*.

"[t]here is no general agreement that a lease for a reasonable rent is invalid. It is difficult to see on what principle a sale for a reasonable price, or a lease for a reasonable rent, should be regarded as invalid."¹⁹³

In the absence of an agreement to the contrary, the rent is payable on the expiration of the lease or in the case of a periodic lease, on expiration of each period.¹⁹⁴ Thus, generally, rent is payable in arrears.¹⁹⁵

In the case of a contract of lease, the risk (of loss or damage to the object of the lease) does not, as a matter of general principle, pass from the lessor to the lessee.¹⁹⁶ But the parties sometimes agree that the lessee will bear the risk of loss or damage of the object. For example, they may agree that the lessor will not be liable to return a certain portion of the rent should the lessee not enjoy the undisturbed use of the object, that is, that the lessee will bear the risk of disturbed use of the leased property.¹⁹⁷ In terms of the common law, the lessee is entitled to a complete remission, or to a proportionate reduction of the rent, if he has been deprived in whole or in part of the use of the object of the lease for the purpose for which it was let to him.¹⁹⁸

A lessee must use the property let to him with reasonable care. But this does not impose a duty to repair and maintain the object of the lease in a fit condition for the purpose for which it was let. The parties are, of course, free to provide that the lessee will bear the responsibility to repair and maintain the object of the lease, even where the damage to it has been caused by vis maior.¹⁹⁹

Upon the termination of the lease, the lessee is under an obligation to restore the object of the lease in the same condition in which it was delivered to him, fair or reasonable wear and tear excepted.²⁰⁰ Should the lessee fail to fulfil his obligation in

193 At 577F-G. See also Hawthorne 644-646.

194 See LAWSA vol 14 par 155; Wille 551; Cooper 154.

195 See Zimmermann *Obligations* 374-375.

196 Thus, as a rule the risk is on the lessor. This rule is embodied in the maxim of periculum locatoris: see Zimmermann *Obligations* 370. The range of incidents for which the lessor had to carry the risk is tantamount to what may be referred to as vis maior. But not every incident for which neither of the parties could be blamed (ie, vis maior) falls under periculum locatoris. Eg, if the crops on the leased property are destroyed by worms or weeds, it will be a type of risk which is intrinsically related to the process of cultivation and therefore has to be borne by the person responsible for and entitled to the cultivation, namely the lessee: see Zimmermann *Obligations* 370 et seq; Cooper 200.

197 As to the obligation of the lessor to guarantee the lessee the undisturbed use and enjoyment of the property for the purpose for which it was leased, see Wille 548-549. As this obligation of the lessor is a natural consequence of the contract of lease (in contrast with, eg, an essential) the parties are entitled to exclude this guarantee from their contract.

198 See Zimmermann *Obligations* 371 et seq; Cooper 200 et seq.

199 See Cooper 209 et seq.

200 By fair or reasonable wear and tear is usually meant deterioration due to the ravages of time, age, the elements and normal use: see Cooper 217-218.

this regard, the aggrieved lessor has the usual remedies at his disposal, that is, a claim for specific performance, or alternatively for damages.²⁰¹

2.3.3.3 A Comparison Between the Rent and the Premium

2.3.3.3.1 Introduction

The rent payable in terms of a contract of lease resembles the premium due in terms of an insurance contract in a number of ways.²⁰² The application of most of the principles in respect of the rent in terms of the contract of lease are, therefore, with the necessary adaptation in points of detail, applicable to the premium in terms of an insurance contract.

2.3.3.3.2 The Rent and Premium As Essentials of Their Respective Contracts

In terms of both types of contract the agreement that rent or a premium will be paid is an essential of the contract. A contract in terms of which no rent is payable, cannot be regarded as a contract of lease. Likewise a contract in terms of which no premium is payable, cannot be regarded as an insurance contract.²⁰³ The rent is the counter-performance by the lessee in return for the (temporary) use of the object of the lease. The premium is the counter-performance by the insured in return for the (temporary) cover which he enjoys in terms of the insurance contract.

Both the rent and the premium are the counter-performance in terms of a reciprocal agreement. Both are examples of an obligation to pay (an amount of money) in return for the performance by the other party. If the rent consists of the fruits of the object of the lease (that is, not of the payment of money but the delivery of a thing), the rent is comparable with the contribution (premium) in terms of a mutual insurance contract, which sometimes consists of something other than money.²⁰⁴

2.3.3.3.3 The Amount of the Rent and Premium

In the case of both lease and insurance it is not necessary for the conclusion of a valid contract for the parties to agree beforehand on the exact amount of the rent or premium, provided that they agree on some method to determine the amount of it at a later stage. It is therefore submitted that just as an agreement "to lease an object at a reasonable rent" can be regarded as valid,²⁰⁵ an agreement "to insure at a reasonable premium" is valid.

201 See Cooper 218 et seq for a discussion of the lessor's remedies on the basis of relevant case law, where the lessee fails to return the leased property in the same condition in which it was delivered to him.

202 Similarly, rent resembles the price in terms of a contract of sale. For a comparison between the contracts of lease and sale, see Cooper 4 et seq.

203 See Reinecke & Van der Merwe par 21.

204 See, eg, ch 3 par 3.2; ch 4 par 4.2; ch 4 par 4.2 below.

205 See again par 2.3.3.2 above.

Neither the rent nor the premium need to be (actually) paid for the contract to take effect. Consequently the pre-payment of the rent or premium is, in the absence of a contradicting term, not a requirement for the contract to take effect.

2.3.3.3.4 The Principle of Temporariness

The temporary use and enjoyment of the object of the lease which the lessee "buys" (leases) with the payment of the rent, correspond with the temporary insurance cover which the insured "buys" and enjoys in return for the payment of the premium. If the lessee has been deprived in whole or in part of the use and enjoyment of the object of the lease,²⁰⁶ he is, depending on the circumstances, entitled under common law to a complete or proportionate return of the rent.²⁰⁷ If the insured has not enjoyed insurance cover for the whole of the period of insurance or for a part of it, he is, as a matter of general principle, and depending on the circumstances, entitled to a return of the premium or of a portion of it.²⁰⁸

The principle of temporariness, which is part and parcel of the contracts of lease and insurance, also has a bearing on the divisibility of both types of contract. This, in turn, concerns the question of whether or not the lessee or insured is entitled to the return of a portion of the rent or premium where the contract is terminated prematurely.²⁰⁹

2.4 CONCLUSION

It is difficult to pinpoint the precise origin of the contract of insurance. The reason for this appears to be the fact that the insurance contract was not devised or

206 See Cooper 38.

207 See Cooper 124.

208 See, eg, ch 8 par 8.6 below. Eg, if the insured insures his house against fire for a period of one year and he prefers to pay the full premium for that year at the conclusion of the contract, he will usually be entitled to a return of 50 percent of the premium where he sells the house six months after the conclusion of the contract. This will be the case where the contract and the premium are regarded as divisible. But where the contract and the premium are regarded as indivisible the premium will not be returned.

209 For a discussion of the effect of the divisibility of the insurance contract, see Gordon & Getz 142 224. In the case of lease, the concept of divisibility is usually expressed by referring to periodicity. As rent is invariably expressed in relation to a period of time, ie, a day, a week, a month, it is known as a periodic lease: see Cooper 65. However, Cooper (at 65n43) refers to the fact that some leases are not concluded temporarily, but indefinitely. According to him a lease with no terminal point may be called an open-end lease. It is submitted that if the parties intended that the lessee should have use and enjoyment permanently it will not be a contract of lease, but perhaps be a contract of instalment sale. However, it is perhaps more correct to argue that if the parties to a contract of lease have not expressly determined the period of lease, it should be construed that the lease was concluded for a reasonable period of time. What is reasonable will then be determined by the nature of the object of the lease, previous dealings between the parties, and the usual period of lease for similar types of object. In the end the intention of the parties should be conclusive.

discovered all at once, but that it developed or evolved from a number of concepts, contracts and the commercial usages.²¹⁰ First, there were the societies where the risk was divided among all the members.²¹¹ Secondly, Greek and Roman merchants employed a number of different contracts in which the transfer of risk played a role, albeit in varying degrees and mostly incidentally to the main purpose of the contract.²¹² Thirdly, there was the insurance loan, which endeavored to evade the Church's prohibition on usury. In terms of this agreement the loan was not repayable in the case of an accident to the ship or the merchandise, in return for a deduction made from the sum nominally advanced. It can be assumed that this deduction included ordinary interest and a further amount which would fulfil the function of a premium of insurance.²¹³ Fourthly, there were the contracts of simulated sale and loan. These contracts of sale and loan were used to transfer risk in return for the payment of a "purchase price" or a separate amount respectively, the latter being a premium in consideration for the bearing of the risk by the "creditor".²¹⁴

It is clear that the development of the insurance contract as well as that of the concept of "premium" as a separate, independent and enforceable undertaking in terms of an insurance contract, were of an evolutionary nature. The insurance contract in its modern form, and by implication also the function of and legal aspects concerning the premium in terms of such contract, were not instantaneously drafted, devised or discovered by legislatures or merchants. They developed over many decades and centuries and remained disguised as other contract forms and undertakings until they were accepted as a *sui generis* and lawful contract, on the one hand, and a separate undertaking, on the other hand. In the early stages of the development of the premium as an essential of the contract of insurance, it was not a separate and independent undertaking in terms of the different types of contract which resembled insurance. The factors which influenced the evolutionary process of the development of the contract of insurance and, for purposes of this thesis in particular, the undertaking to pay a premium as a separate, independent and enforceable performance in terms of the contract, remain relevant for the study of modern insurance law and practice.²¹⁵

Finally, and by way of a broad generalisation, it seems possible to suggest that the historical link which existed between the contract of sale on the one hand, and the contract of insurance on the other hand, is still visible in the modern forms of these types of contract.²¹⁶ The common ground which was historically shared by the contracts of insurance and sale (and lease through its resemblance with the contract of sale) is highlighted by the resemblance between the premium and the price and rent respectively. It is, of course, true that an insurance contract, like any other type of contract, is an obligatory agreement and that the general principles of the law of con-

210 See again par 2.2.3.2 above.

211 See again par 2.2.2 above.

212 See again par 2.2.3.1.2 and 2.2.3.1.3 above.

213 See again par 2.2.3.1.4 above.

214 See again par 2.2.3.1.5 and 2.2.3.1.6 above.

215 See again par 2.2.3.2 above.

216 See again par 2.3.1 above.

tract is therefore also applicable to insurance contracts.²¹⁷ It is further suggested that the close resemblance which the premium in terms of an insurance contract shows with the price in terms of a sale, and the rent in terms of a lease respectively, justifies and necessitates the analogous application of the general principles regarding the payment of the price or rent to those aspects regarding the premium, if and when the circumstances demand or permit it, or whenever the law of insurance is silent or wrong on a particular point of law.²¹⁸

217 See again par 2.3.1 above.

218 See again par 2.3.2.3 and 2.3.3.3 above.

CHAPTER 3 ROMAN-DUTCH LAW

3.1 INTRODUCTION

Traditionally Roman-Dutch law in the narrow sense is regarded as constituting the South African common law. In terms of this approach only those materials dating from the golden age of Dutch jurisprudence¹ and originating from the province of Holland in the Netherlands² are regarded as authoritative for the purpose of determining the South African common law.³ This approach may be criticised. It is antiquated for a South African jurist to regard only Dutch writers as authoritative. Jurists from elsewhere in Europe have more than just persuasive value.⁴ The existence of a European *ius commune* (in stark contrast with the narrowly defined Roman-Dutch "*ius commune*") is generally accepted in South African law.⁵ The countries of Western and Central Europe have a common law and a common legal science dating back to the Middle Ages. It is this European *ius commune* which is the true common law of South Africa.⁶ The relevance of the European jurists (other than those of the province of Holland in the Netherlands) lies in the fact that these jurists shared a communal law and a common legal science. It is this common ground which justifies, and requires, an investigation into the

1 Generally taken as the period between 1600-1800: see Klompmaker 7-17.

2 De Wet "Perspektief" 10.

3 See, eg, the decisions in *Tjollo Ateljees (Eins) Bpk v Small* 1949 (1) SA 856 (A) at 856; *Du Plessis NO v Strauss* 1988 (2) SA 105 (A) at 133B-136H; *Bank of Lisbon and South Africa Ltd v De Ornelas & another* 1988 (3) SA 580 (A) at 604F.

4 For an example of a recent South African case where reliance was placed on the writings of R.J. Pothier (1699-1772), a French jurist, see *Bouwer NO v Saambou Bank Bpk* 1993 (4) SA 492 (T). Hartzenberg J 501A nevertheless found it necessary to "excuse" his reliance on Pothier by saying that "[a]lhoewel Pothier nie 'n Hollandse skrywer was nie, is sy werke tog van groot oorendende waarde ["persuasive value"] en het die Hollandse skrywers deeglik met sy menings rekening gehou" (my insertion). But it is common cause that Pothier published his major writings (in 1748 and 1761 respectively) only after the "old writers", except Godefridus van der Keessel and Joannes van der Linden, have disappeared from the scene. It is rather a case of Pothier being influenced by them. This fact underpins the true relevance of Pothier and other European Romanists. It is the common law and the common legal science being shared by European legal systems which justify reliance on the writings of Pothier and his ilk. For a discussion of the relevance and influence of French law on Dutch law, see Van den Brink 128-129.

5 See, eg, Pauw "Romeins-Hollandse reg" 35-36; Van Zyl *Geskiedenis* 41-43 489-494; Kahn "Old Authorities" 22; Van der Merwe "Authorities" 47; Zimmermann "Synthesis" 259 259-260n1-8 and the authorities cited there; Visser "Daedalus" 135; Van Wyk 48; Van Reenen 278-280; as well as the decision in *Blesbok Eiendomsagentskap v Cantemessa* 1991 (2) SA 712 (T) at 716H where reference is made to the concept of "Roman-European law".

6 See Zimmermann "Synthesis" 266. See also *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A) at 426H-432H for a useful example of the practical application of the sources of the Roman-Dutch law in their wider connotation of Roman-European law. See also in this regard Van Niekerk *Decline* 70 et seq.

insurance legislation as well as writings of jurists of other parts of Europe.⁷ The concept "Roman-Dutch law" as used in this chapter should therefore be taken to bear a wide rather than a narrow connotation.

Roman-Dutch law played a leading role in the development of insurance law in Europe. Its role as a catalyst was partly based on the coincidence of important stages in the development of three institutions, namely the business of insurance in Europe, Dutch economic and maritime power,⁸ and last but not least, the importance and widespread application of Roman-Dutch law itself.⁹ In Roman-Dutch law, marine insurance was the dominant form of insurance.¹⁰

The principles of Roman-Dutch insurance law are found in insurance legislation, treaties dealing with insurance law, decisions and opinions on insurance disputes, and extant policies.

In this chapter the following sources of Roman-Dutch insurance law will be surveyed: legislation, treatises and collections of judgments and opinions.¹¹ First, some of the relevant Roman-Dutch insurance legislation will be examined in sequence of enactment.¹² Roman-Dutch insurance legislation may be divided into three different periods of development: first, the period represented by legislation passed during the Spanish occupation of the Low Countries; secondly, the period after the formation of the United Provinces of the Netherlands in 1579 and up to the end of the seventeenth century, during which municipal legislation was passed; and thirdly, the period of municipal

7 For an example of the phenomenon where a writer of one European territory cited with approval the work of another writer, who had written on the law of a second European territory, see Van Leeuwen *RHR* 71-72. Decker, a Dutchman, referred with approval in his notes to Van Leeuwen's work to Roccus and Straccha, who were both Italians.

8 On the Dutch economic and maritime powers of the Dutch golden age, see in general Klompmaker 7 et seq 87 et seq.

9 See Van Niekerk "Insurance Law" 305.

10 See, eg, the definition of insurance advanced by Lybreghts *Redenerend verhoog* vol II at 17 1: "Een Contract, waarby d'een den ander, voor zeker gewin, de Goederen en Koopmanschappen ter Zee, voor alle van buiten aankomende periculen en schade, die dezelve in de heen of wederom Reize mochte overkomen, verzekert; en ingevalle van schade, 't zelve te remedieëren tot eenen zekeren pryze."

See also Wassenaer *Practyk* 44. See again ch 2 par 2.2.3.2.1 above.

11 This classification in the exposition of the sources of Roman-Dutch insurance law, namely legislation, treatises and collections of judgments and opinions is also followed by Van Niekerk *Sources*; Van Niekerk "Insurance Law" and Havenga *Life Insurance*. My classification, however, will be less obvious since this chapter will follow the format of the other chapters and the different sources will be explained simultaneously, within the various paragraphs.

12 The following Roman-Dutch insurance laws were canvassed: the Placcaat of 20 January 1550; the Placcaat of 31 October 1563; the Placcaat of 20 January 1571; the Amsterdam Keur of 31 January 1598; the amendments to and amplifications of the Amsterdam Keur of 1598 from 1601 until 1733; the Amsterdam Keur of 1744; the amendments to and amplifications to the Amsterdam Keur of 1744 from 1745 until 1775; the Rotterdam Keur of 12 March 1604; the Rotterdam Keur of 28 January 1721; the Middelburg Keur of 30 September 1600; and the Middelburg Keur of 4 February 1719. All these legislative measures are contained in Van Niekerk *Sources* Appendices A-K 100-261. Reference has also been made to the *Statuten, Ordonnantien, Reglementen, en Costumen van Rechte van Frieslandt* Book 1 Title XXVIII Insurance (1716).

legislation passed in the eighteenth century until the process of codification¹³ commenced in the earlier part of the nineteenth century.¹⁴

Secondly, reference will be made to various relevant legal treatises dealing with insurance law which were written in Europe during the sixteenth to nineteenth centuries. These treatises will indicate, amongst other things, the conflict which prevailed between the *ius strictum* (in the form of legislation) and the *ius practicum* (the customary law of insurance practice). In accordance with a *ius commune* approach, the treatises dealt with will also include the works of writers who were not Dutch (and who did not write on the law of the province of Holland in the Netherlands). References to works of so-called "foreign writers" have been restricted to those works which were, in fact, referred to by the Dutch jurists themselves. The jurists who will be examined are (in chronological order): Pedro Santerna,¹⁵ Benvenuto Straccha,¹⁶ Sigismundus Scaccia,¹⁷ Hugo Grotius,¹⁸ Gerard van Wassenaer,¹⁹ Simon van Groenewegen van der

13 On Dutch law, see ch 4 below.

14 See Van Niekerk "Insurance Law" 311 et seq; Van Niekerk *Sources* 31 et seq for a historical background to Roman-Dutch legislation; Havenga *Life Insurance* 31 et seq. See also Van Niekerk *Sources* 91 et seq for appendices which contain the more important Roman-Dutch insurance laws.

15 (c1460-c1540). On the life and work of Santerna (or De Santerém), see Goldschmidt 5-6; Maffei 703 et seq; Van Houdt 16-17. Santerna was born in Santarém, a town situated north-east of Lissabon. He studied law at the University of Perugia and was thereafter commissioned by king John II of Portugal to act as commercial agent at Leghorn, Pisa and Florence. A cosmopolite, he was exposed to the maritime practices of various southern European territories. One practice in particular tickled his fancy. The intriguing nature of the Italian marine insurance practices prompted him to write his *De assecurationibus et sponsionibus*. This work was completed around 1488 but only published in 1552, some years after his death. This work has seen numerous editions, the latest of which appeared in 1971, together with translations in Portuguese, English and French. The importance of this work lies in the fact that it was the first recording of insurance practices, and took into account the divergence which existed between the *ius strictum* and the *ius practicum*.

16 (1509-1578). On the life and work of Straccha, see Goldschmidt 1-2; De Wet *Ou skrywers* 89; De Vos *Regsgeschiedenis* 93; and Van Houdt 16-17. Straccha, an Italian, was the first jurist to treat mercantile law as a separate branch of the law. Apart from his own work, *Tractatus duo de assecurationibus et proxenetis atque proxenetis* (1569), Straccha also "discovered" and edited the unpublished text of Santerna's *De assecurationibus* by adding explanatory and supplementary notes.

17 (1568-1618). On the life and works of the Italian Scaccia, see De Vos *Regsgeschiedenis* 93. He was an advocate in Rome. His *Tractatus de commerciis et cambio* was published in 1619 and deals, amongst other things, with the law of insurance.

18 (1583-1645). For a discussion on the life and works of Grotius, see Wessels *History* 262-281; Van Zyl *Geschiedenis* 346-352; De Wet *Ou skrywers* 128-132; De Vos *Regsgeschiedenis* 171-180. Grotius' most important work, at least for present purposes, is his *Inleidinge tot de Hollandsche rechts-geleerdheid*. This work, which was published in 1631, reflects in Book 3 Section 24, amongst other things, the Dutch insurance legislation of the Spanish period and municipal legislation passed up to that time: see Havenga *Life Insurance* 41. The *Inleidinge* has experienced various editions. The most recent edition is the one by Doving, Fischer and Meijers, originally published in 1952 with a later edition in 1965. The edition of 1952 is based on a 1636 text of the *Inleidinge*, which was discovered by Doving in Lund in 1948, and on which Grotius had made improvements, additions and comments in his own hand. The *Inleidinge* has on various occasions been translated in English. In 1845 Charles Herbert edited a poor translation (see De Vos 178) and in 1878 Sir Andries Maasdorp's translation appeared (a third edition of which appeared in 1903). RW Lee's translation appeared in 1926 as volume I, while volume II, which consists of a commentary by Lee on the *Inleidinge*, appeared in 1936. The oldest, but

Made,²⁰ Francesco Roccus,²¹ Simon van Leeuwen,²² Johannes Voet,²³ Eduard van

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- most recently published translation, by Joannes van der Linden, in Latin, appeared in 1962. Another important modern commentary is the one by SJ Fockema Andreae, of which a third edition by LJ van Apeldoorn appeared in 1926.
- 19 (c1589-1664). On the life and works of Wassenaer, see Wessels *History* 235; Van Zyl *Geskiedenis* 378-379; *De Wet Ou skrywers* 150; *De Vos Regsgeskiedenis* 190. He studied at Utrecht, and after obtaining his degree practised as an advocate in that city. He later became mayor of Utrecht. Wassenaer published a number of works, all of a practical nature. His most important work for present purposes is *Practyk notariael ofte instructie tot het maken ende instellen van de voornaemste instrumenten en allerley contracten, acten, handelingen en dispositien* (1650). The importance of this work (as in the case with all of Wassenaer's works), lies in the fact that despite its procedural approach, a fair portion of it nevertheless dealt with the substantive law of its day. Although Wassenaer intended to write about the law of Utrecht, his works contained also numerous references to jurists of other European territories (eg Santerna) and the whole of the Netherlands in general: *De Wet Ou skrywers* 150.
- 20 (1613-1652). On the life and works of Groenewegen, see Wessels *History* 301-305; Van Zyl *Geskiedenis* 356-357; *De Wet Ou skrywers* 135-136; *De Vos Regsgeskiedenis* 181-182. He was born at Delft, studied law at the University of Leiden, practiced as advocate at The Hague and wrote three works in all, of which *Tractatus de legibus abrogatis* (1649) and his annotations on Grotius' *Inleidinge* (1667) are the most important. His commentary on Grotius' *Inleidinge* 3 24 (which contains the section on insurance law), unfortunately does not add anything of significance to Grotius' exposition of the insurance law but merely refers to legislation which provides authority for it.
- 21 (1605-1676). On the life and works of Roccus (an Italian), see *De Vos Regsgeskiedenis* 93. Roccus made an important contribution to insurance law in his work entitled *Responsorum legalium cum decisionibus centuria secunda ac mercatorium notabilia* which was published in 1655 in Florence. Insurance law is therein dealt with in the second volume under the title *De navibus et naulo, de assecurationibus, de decoctione mercatorum*.
- 22 (1626-1682). On the life and works of Van Leeuwen, see Wessels *History* 306-315; Van Zyl *Geskiedenis* 357-359; *De Wet Ou skrywers* 139-140; *De Vos Regsgeskiedenis* 182-184. Van Leeuwen was born and educated at Leiden and practiced as an advocate at The Hague. His first work was *Paratitula juris novissimi, dat is een kort begrip van het Rooms-Hollandts-recht* (1652), in which the phrase "Roman-Dutch law" was coined. In the preface to this work, Van Leeuwen pointed out that the law of Holland is a substantive system of law, based upon the Roman law but also ever growing and adapting itself to the needs and circumstances of society. This he followed up with *Censura forensis* (1662) and *Het Rooms Hollandsch recht* (1664), the latter arguably the most important of the three, at least for present purposes. The value of *Het Rooms Hollandsch recht* (RHR) lies in the fact that it deals at great length with the historical development of the law and with the various decisions that have contributed to establish the customary law of the Netherlands, something which is lacking from, eg, Grotius' *Inleidinge*: Wessels *History* 311-313. The translation by Sir JG Kotze of *Het Rooms Hollandsch recht* with notes by CW Decker, under the title, *Simon van Leeuwen's Commentaries on Roman-Dutch Law* (1881) (in two volumes), is the one used in this chapter.
- 23 (1647-1713). On the life and works of Voet, see Wessels *History* 320-331; Van Zyl *Geskiedenis* 362-365; *De Wet Ou skrywers* 154-156; *De Vos Regsgeskiedenis* 184-189. Voet's major work is the *Commentarius ad Pandectas* in two volumes (published in 1698 and 1704 respectively). This work was translated by Gane as *The Selective Voet* in eight volumes (1955-1958). A second noteworthy publication of Voet, is his notes to Grotius' *Inleidinge*. A translation in Afrikaans by P van Warmelo and CJ Visser of Voet's notes on the *Inleidinge* of Grotius appeared in 1987. The Afrikaans translation of this notes was used in this chapter.

Zurck,²⁴ Cornelis van Bynkershoek,²⁵ Gerlach Scheltinga,²⁶ Arent Lybreghts,²⁷ Willem Schorer,²⁸ Franciscus Lievens Kersteman,²⁹ Cornelis Willem Decker,³⁰ Dionysius

- 24 (c1656-1725). On the life and works of Van Zurck, see Van Zyl *Geskiedenis* 389; De Wet *Ou skrywers* 157-158; De Vos *Regsgeskiedenis* 189. Van Zurck was born at The Hague, educated at Leiden and practiced before the Court of Holland: on the status of this Court, see Wessels *History* 167-170. Van Zurck's major work was *Codex Batavus* (1711), a dictionary on the civil law and public law, as applied in Holland, Zeeland and the Generality countries in general. Van Zurck not only relied on legislation to formulate his opinions, but also referred to the works of other writers.
- 25 (1673-1743). On the life and works of Van Bynkershoek, see Wessels *History* 332-341; Van Zyl *Geskiedenis* 367-370; Van Niekerk "Van Bynkershoek" 26-33; De Wet *Ou skrywers* 160-162; De Vos *Regsgeskiedenis* 200-204. Van Bynkershoek was born at Middelburg in the province of Zeeland, as the son of a merchant with a considerable interest in ships and overseas expeditions. He studied at the University of Franeker, and practiced as an advocate at The Hague. He was elected president of the Supreme Court in 1724, a position he held until his death. He published a number of treaties, amongst others, the *Observationes juris romani* (1710-1733), the *Quaestiones juris privati* (1744) (which includes an extensive discussion of the insurance contract) and the *Quaestiones juris publici* (1737). The *Quaestiones juris privati* was translated by Isaak Tirion into Dutch as *Verhandelingen over burgerlyke rechts-zaaken* in 1747. An English translation by RA Whitaker of the first two volumes of the *Quaestiones juris privati* appeared in 1987. The Dutch translation (referred to as *Verhandelingen*) was used in the writing of this chapter. The most important publication of Van Bynkershoek, at least from a practical point of view, is his *Observationes Tumultuariae (Obs tum)* in four volumes (1926-1962), published in spite of a prohibition on the publication of it by Van Bynkershoek. This work consists of notes by Van Bynkershoek on cases served before him during his term as president of the Supreme Court. It consists of 3317 cases presided by Van Bynkershoek and served as inspiration to a similar type of work by his son-in-law, Pieter Pauw. As to the (re-)discovery and publication of these collections, see Meijers "Rechtspraak" 412-421.
- 26 (1708-1765). On the life and works of Scheltinga, see Wessels *History* 342; Van Zyl *Geskiedenis* 406-407; De Wet *Ou skrywers* 165-166; De Vos *Regsgeskiedenis* 206-207. He was born in Leeuwaarden and studied at Franeker and Leiden. He was a professor in law at the University of Leiden where Van der Kessel was one of his students. He wrote several learned works, but his only work of importance for present purposes is a *Commentary on the Introduction of Grotius*.
- 27 (1687-1758): but see Wessels *History* 345, who mentions that Lybreghts was still alive in 1780. On the life and works of Lybreghts, see Wessels *History* 345-346; Van Zyl *Geskiedenis* 401; De Wet *Ou skrywers* 163-164; De Vos *Regsgeskiedenis* 205. He was not an advocate but a notary at The Hague and therefore lacked the theoretical training usually associated with members of the Dutch Bar. At the same time he had a very good knowledge of the Roman-Dutch law, particularly of those parts of it with which a notary should have been acquainted. The insurance contract is briefly discussed by Lybreghts in two of his works: *Redenerend vertoog over 't notaris ampt* (1734) and *Burgerlyk, rechtsgeleerd, notariaal en koopmans handboek* (1761). Both these works are rather superficial expositions of the law although the latter did inspire Joannes van der Linden to write his *Regtsgeleerd, practicaal en koopmans handboek*.
- 28 (1717-1800). On the life and works of Schorer, see Wessels *History* 342; Van Zyl *Geskiedenis* 408-409; De Wet *Ou skrywers* 166-168; De Vos *Regsgeskiedenis* 207-208. Schorer was born at Middelburg, studied at Leiden and became a judge and President of the Court of Flanders. Schorer's main contribution to the Roman-Dutch law was a further edition of Groenewegen's comments on Grotius in 1767, to which he added his own notes. This edition was translated into Dutch by JE Austen in 1784.
- 29 (1728-c1793). On the rather vicissitudinous life and works of Kersteman, see Wessels *History* 342-343; Van Zyl *Geskiedenis* 411-413; De Wet *Ou skrywers* 168-170; De Vos *Regsgeskiedenis* 208-209. Apart from a number of works of an elementary nature (which include his *Academie der jonge practizyns of beredeneerde consideratien over de theorie en de practycq* (1765)), Kersteman also published a legal lexicon called *Hollandsch rechtsgeleerd woordenboek* (1768). However, this was so badly written that the subscribers demanded that the publishers add a supplement to it. This supplement was published as the *Aanhangzel tot het Hollandsch rechtsgeleerd woordenboek* (1772-1773). The *Aanhangzel* appeared under a pseudonym, but apparently the author was Lucas Willem Kramp, a notary of Amsterdam: see Wessels *History*

Godefridus van der Keessel,³¹ and Joannes van der Linden.³²

Finally, judgments and opinions on insurance law originating during the period under discussion will be considered. The collections compiled by the following jurists will be referred to: Jan van Sande,³³ Isaak van den Berg,³⁴ Cornelis van Bynkershoek,³⁵ Joannes Loenius,³⁶ Willem Pauw,³⁷ and Nassau la Leck.³⁸

3.2 THE PREMIUM AS AN ESSENTIAL FEATURE OF THE CONTRACT OF INSURANCE

The insurance contract was described as

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- 343; *De Vos Regsgeskiedenis* 209.
- 30 (Latter half of the eighteenth century). On the life and works of Decker, see *Wessels History* 348; *Van Zyl Geskiedenis* 358; *De Wet Ou skrywers* 170n72; *De Vos Regsgeskiedenis* 210. Decker practised as an advocate at Amsterdam. His works of note are his commentary on Van Leeuwen's *Het Roomsche Hollandsche Recht* (1780-1783) and a treatise on divorce.
- 31 (1738-1816). On the life and works of Van der Keessel, see *Wessels History* 349-351; *Van Zyl Geskiedenis* 392-394; *De Wet Ou skrywers* 172-173; *De Vos Regsgeskiedenis* 211-213. His most influential work, at least for present purposes, is his *Theses selectae* (1800), which is a commentary on Grotius' *Inleidinge*. Not only may he be regarded as the last of the great Dutch exponents of the Roman-Dutch law, but his influence on the development of the Roman-Dutch law in South Africa has been immense, partly because he is the last commentator on Grotius but largely also in the light of the accessibility of his works.
- 32 (1756-1835). On the life and works of Van der Linden, see *Wessels History* 351-354; *Van Zyl Geskiedenis* 395-399; *De Wet Ou skrywers* 173-176; *De Vos Regsgeskiedenis* 213-215. He was educated at Leiden, where he was taught, amongst others, by Van der Keessel. Of the numerous works published by Van der Linden, two are of particular importance for present purposes. First, his supplement to Johannes Voet's *Commentarius ad Pandectas*, published in 1793. Secondly, his *Regtsgeleerd, practicaal en koopmans handboek* (1806), a concise manual treating the Dutch private law, criminal law, procedural law and mercantile law. Of this work a number of translations in English exist, of which the one by George T Morice *Legal, Practical and Mercantile Manual* (1922) was used in this chapter.
- 33 (1568-1638). On the life and works of Van Sande, see *Wessels History* 239-240; *Van Zyl Geskiedenis* 376; *De Wet Ou skrywers* 143-144; *De Vos Regsgeskiedenis* 194.
- 34 (Unknown-c1695). On the life and works of Van den Berg, see *Wessels History* 245-246; *Van Zyl Geskiedenis* 325; *De Wet Ou skrywers* 187-188; *De Vos Regsgeskiedenis* 218.
- 35 See again note 25 above.
- 36 (Unknown-1641). Very little is known on the life and works of Loenius, see *Wessels History* 240; Meijers "Rechtspraak" 405-406; *Van Zyl Geskiedenis* 322 376-377; *De Wet Ou skrywers* 158 182; *De Vos Regsgeskiedenis* 222.
- 37 (1712-1787). On the life and works of Pauw, see *Van Holk* 358-362; *Van Zyl Geskiedenis* 407-408; *De Wet Ou skrywers* 182-183; *De Vos Regsgeskiedenis* 202-203. Pauw was the son-in-law of Van Bynkershoek. Both of them served as President of the Supreme Court and kept records of their decisions of the cases which came before them. Both Van Bynkershoek and Pauw placed a prohibition on the publication of their court records. With the (re-)discovery of these documents in the early part of this century, the reasons for the prohibition had lapsed, and Pauw's records were published as the *Observationes tumultuariae novae (Obs tum nov)* in three volumes (1964-1972). On the tracking down and publication of these collections, see Meijers "Rechtspraak" 412-421. See also note 25 above.
- 38 (1741-1795). On the life and works of La Leck, see *Wessels History* 248; *Van Zyl Regsgeskiedenis* 326; *De Wet Ou skrywers* 190; *De Vos* 219-220.

"een overkoming, waer door iemand op hem neemt het onzoecker gevaer dat een ander had te verwachten: den welcke wederom daer voor gehouden is loon te geven".³⁹

The premium was described as

"[e]en zekere Prys, Belooning, of gewin die den Affurateur voor de gedane verzeekering van Schip en Lading bedingt, en welke den Reeder by de Acte van Affurantie zig verpligt hem onmiddelyk na de ondertekening derzelve, te zullen betalen ...".⁴⁰

The premium was often referred to in Roman-Dutch law as the "kost" or "prijs" of the insurance. Santerna equated the insurance contract with the contract of sale.⁴¹ Even at later stages in the development of the law of insurance, the connection between the concepts of "price" (as, for example, in terms of a contract of sale) and "premium" (being the "price" in terms of an insurance contract) remained.⁴²

In Roman-Dutch law the insurance contract was regarded as a reciprocal contract in that the undertaking by the insured to pay a premium was given in return for the insurer's undertaking to bear the risk of the materialisation of the uncertain event. A consequence of the insurer's undertaking to bear the risk, was to indemnify the insured on the occurrence of such uncertain event.⁴³ It appears that the insurance contract was

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- 39 Grotius *Inleidinge* 3 24 1. An English translation of this paragraph reads as follows:
 "[A] contract, whereby one person takes upon himself an uncertain risk apprehended by another: the other in return is bound to pay him a premium": Lee *Introduction* 3 24 1.
- 40 Kersteman *Academie* 275. A translation of this definition reads as follows: "[A] certain price or remuneration, or profit stipulated by the insurer for the concluded insurance contract on the ship and its cargo, and which must in terms of the contract be paid by [the insured] immediately after the signing of the policy ...". As to the development of the role and function of the premium, see in general ch 2 par 2.2 above.
- 41 See Santerna 3 13 where he said that "[insurance] is similar to purchase ... by virtue of the premium that is paid, since that person who makes an insurance for a premium is said to buy the event of the risk."
- 42 See, eg, s 2 and 14 of the Placcaat of 31 October 1563; Van Niekerk *Sources* Appendix B 106-107; Santerna 1 2; Roccus *Aanmerkingen* no 156: "[Z]odanig een Contract is wettig en geoorloft dewyl het is een koop en verkoop van't gevaer der zelvev ..."; Mesritz 9. But see Van der Keessel *Praelectiones* 3 24 1 (1428) where he indicated that insurance does not amount to sale and that the insurance premium is consequently not subject to, eg, the principle of *laesio enormis*. Van der Keessel mentioned elsewhere that the premium is not subject to the principle of *laesio enormis* for another reason also, namely, because both parties had to reach consensus on the amount of the premium: *Theses selectae* th 712. But this statement is true only in so far as the parties negotiated as equals at the conclusion of the contract. See again ch 2 par 2.3.2 above.
- 43 Grotius *Inleidinge* 3 24 1 described the obligations in terms of an insurance contract as an agreement whereby the insurer takes upon himself the risk of an uncertain event in return for an undertaking by the insured to pay a premium to the insurer. See also Kersteman *Woorden-boek* 29, who described the obligations in terms of the insurance contract as "welke wederzydsch obligatoir zyn"; but see Anon *Aanhangzel* 36, who refers to a case mentioned by Suetonius, where the one party undertook to bear the risk of an uncertain event, without receiving any premium in return. Anon referred to this agreement as "een soort van assurantie". This was probably a case of suretyship. In view of the unilateral nature of the contract of suretyship, in contrast with the reciprocal nature of the insurance contract, this was not "een soort van assurantie". In terms of a unilateral contract only one party is bound to perform, in contrast with a reciprocal contract, in terms of which both parties are bound to perform.

regarded in Roman-Dutch law simply as another type of contract. Van der Keessel argued that an insurance contract was a contract *bona fidei*, and that the principles which applied to other contracts (*bona fidei*) therefore applied with equal force to insurance contracts.⁴⁴ This paved the way for the application of the principles of other types of contract (where applicable) to the contract of insurance. For example, an insurance contract, like other types of contract, was governed by the law of the place where the contract was concluded,⁴⁵ interest on late payment of the premium was levied at the same rate as interest in the case of late payment under other types of contract,⁴⁶ and the general principles regarding personal actions were applied to insurance contracts.⁴⁷

In terms of the principles of Roman law, the contract of insurance was initially regarded by Roman-Dutch writers as an innominate contract.⁴⁸ An innominate contract was a contract which, unlike the standard type of contract (for example, the contract of sale), did not have a specific name. However, an innominate contract displayed some similarities with the real contract in so far as it was usually concomitant with the delivery of some type of performance.⁴⁹ Based on the assumption that the insurance contract was an innominate contract, the actual payment of the premium was a *conditio sine qua non* for the coming into being of the insurance contract. Grotius, however, mentioned that according to trade usages of his time, the pre-payment of the premium was not a requirement for the contract to come into being.⁵⁰ Van der Keessel was of the opinion that since the insurance contract derived its origin and usages from mercantile practice, it had to be regarded as a nominate contract.⁵¹ The logical consequence of this construction was that the actual (pre-)payment of the premium was not a prerequisite for the conclusion of a valid insurance contract.⁵² The payment of the premium

44 Van der Keessel *Praelectiones* 3 24 1 (1428). See also Van der Keessel *Theses selectae* th 713; Van der Linden *Koopmans handboek* 1 14 9n2.

45 The *lex loci contractus*; Van der Keessel *Praelectiones* 3 24 pr (1427).

46 Van der Keessel *Praelectiones* 3 24 pr (1427); Van der Keessel *Theses selectae* th 767; Van der Linden *Koopmans handboek* 4 6 11.

47 Van Bynkershoek *Verhandelingen* 4 2 (780).

48 "Do ut facias", "I give in order for you to do something". In the context of the insurance contract this maxim entails that "I give the insurance premium in order for you (the insurer) to bear the risk involved in the sea-voyage or any other related peril". See also Holdsworth 91.

49 See Van Zyl *Regsgeschiedenis* 321.

50 Grotius *Inleidinge* 3 24 2. See also Kersteman *Woorden-boek* 29 which mentioned that although the immediate payment of the premium was generally regarded as a requirement for the insurance cover to take effect, in practice it was often not paid immediately; Van der Keessel *Praelectiones* 3 24 18 (1476).

51 A nominate contract was a contract which had a specific name, eg, a contract of sale, and according to Van der Keessel (*Praelectiones* 3 24 18 (1478)) an insurance contract was a nominate contract.

52 See Santerna 3 13; Grotius *Inleidinge* 3 24 2 who mentioned that according to trade usages of his time, the pre-payment of the premium was not a requirement for the contract to come into being; Scheltinga *Dictata ad Gr* 3 24 2. See also Van der Keessel *Praelectiones* 3 24 1 18 (1428 1478); Van der Keessel *Theses selectae* th 712 713; and Kersteman *Woorden-boek* 29 which mentioned that although the immediate payment of the premium was generally regarded as a requirement for the insurance cover to take effect, in practice it was often not paid immediately.

was, however, a suspensive condition for the insured to enforce a claim in terms of the contract.⁵³

The premium was one of the essentials which had to be mentioned in the policy.⁵⁴ This was important to avoid subsequent disputes as regards the premium. Certain sources indicate that the parties should reach agreement on the actual amount of the premium.⁵⁵ From the policy formulas prescribed in the various municipal statutes, it appears that the policy documents invariably provided blank spaces for the insurer to insert the amount of the premium. These policy formulas provided for the amount of the premium to be expressed as a percentage of the sum insured for the object of the risk.⁵⁶ The actual payment of the premium was not a requirement for the contract to take effect⁵⁷ or for the insured to have an enforceable claim. The insurer was therefore bound to an insurance contract where the risk had materialised before the premium had been paid.⁵⁸ Equally, if the parties had concluded an insurance contract, the premium of which was not paid, the insured was also bound to pay the premium where

53 Scheltinga *Dictata ad Gr* 3 24 2.

54 See Van Zurck *Codex Batavus* par XXIV; Lybreghts *Redenerend verhoog* vol II at 17 5E. It appears that Lybreghts was of the opinion that the amount of the premium too had to be mentioned in the policy. If this is indeed his view, Lybreghts was obviously wrong: see par 3.3.7 below. In terms of s 4 of the Statuten, Ordonnantien, Reglementen, en Costumen van Rechte van Frieslandt Book 1 Title XXVIII Insurance (1716), neither the premium nor the amount of it need to be mentioned in the policy for it to be valid.

55 See Kersteman *Woorden-boek* 26: "Dat eerstelyk de Premie zynde een zekere Prys, Beloning, of Gewin ..." (my emphasis). In practice the parties often agreed to insure at a variable premium ("vrije premien"). The amount of the premium was consequently determined according to a number of factors, eg, the season of the year, the ability and experience of the captain of the ship, the condition of the ship etc: see Vergouwen 48.

56 See, eg, the policy formulas which accompanied the Rotterdam Keur of 1721.

57 Grotius *Inleidinge* 3 24 2; Scheltinga *Dictata ad Gr* 3 24 4.

58 In terms of s 19 of the Rotterdam Keur of 1604, the insured had to pay the full amount of the promised premium even though the insured goods arrived at their destination prior to the actual conclusion or signing of the insurance contract. This would have been the case where the parties concluded the insurance contract in respect of goods "lost or not lost", in terms of which the insurer undertook to cover a loss even if unbeknown to the parties the loss had already occurred. This obligation was applicable even where the insured object was insured with two or more insurers (eg, if the insured as well as his agent had insured the goods with two or more insurers), with or without knowledge of the other insurance contract: Van Niekerk *Sources* Appendix H 215. See also Van Leeuwen *RHR* 76 note d; Van der Keessel *Theses selectae* th 713. But see Roccus *Aanmerkingen* no 317: "Een geassureerde, die de beloofde premie, voort doen van de Assurantie, aan de Assuradeurs niet heeft betaalt, kan niet gauderen of voordeel genieten uyt de voornoemde gedane Assurantie ... [m]aar ... wanneer de Assuradeurs de police van Assurantie hebben ondertekent, waar by zy bekennen de premie te hebben ontfangen, de zeiven als dan niet kunnen tegenwerpen de exceptie van onaangetelde gelderen ...". From this quotation two possible conclusions are possible. First, it is possible that the insured was not able to claim in terms of the policy if the premium was not paid. Secondly, it is possible that the insured enjoyed no cover in terms of the policy if the premium was not paid. In view of the second part of the quotation it would appear that non-payment of the premium only suspended the insured's right to claim in terms of the policy, and that the non-payment of the premium did not affect the cover which the insured enjoyed in terms of the policy.

the insured ship or goods had reached their destination before the actual payment of the premium.⁵⁹

Although Roman-Dutch legislation generally referred to the premium as a monetary payment, there are indications that this was not necessarily the case. Van der Keessel argued that the premium could take the form of something other than money, for example, processed gold or silver or other merchandise, since a premium of this nature was not prohibited by legislation. According to Van der Keessel the obligation to give something other than money, was still an obligation to pay in accordance with the maxim of "do ut facias".⁶⁰ If an insured accepted something other than money in payment of the premium, he was in principle liable to the insured.⁶¹ Furthermore, if the insurer accepted something other than money at the conclusion of the contract, this acceptance strengthened the presumption even further that payment in the form of something other than money was regarded as a valid payment.⁶² In the case of mutual insurance this was an important consideration because the performance of the insured in terms of mutual insurance often took the form of something other than the payment of money, for example, the obligation to contribute to the repair of the damage to the property of a co-insured,⁶³ or, for example, the obligation to share a portion of your undamaged load of goods with a co-insured whose goods had been destroyed.⁶⁴

3.3 PAYMENT OF THE PREMIUM

3.3.1 Introduction

In terms of a consensual contract, mere consensus between the parties was required for an obligation to arise from the contract. No formalities were required.⁶⁵ In terms of a real contract, by contrast, the agreement between the parties became effective upon the delivery of ownership or possession of something or money to one of the

⁵⁹ See s 55 of the Rotterdam Keur of 1721. This section provided therefore for the reverse of the situation where the risk materialised before the payment of the premium, namely, where the period of cover or risk expired before the actual payment of the premium.

⁶⁰ In English, "I give in order for you to do something": see Van der Keessel *Praelectiones* 3 24 1 (1429). See again ch 2 par 2.3.2.2 note 145 above.

⁶¹ See Van der Keessel *Theses selectae* th 712 where he stated that "[the] price or *premium* may, it seems, consist of other things besides money, and is fixed by the consent of both parties in proportion to the extent of the risk undertaken [by the insurer]" (my insertions). See also Van der Keessel *Praelectiones* 3 24 1 (1428) who was of the opinion that this argument of his was strengthened by the fact that the premium was usually immediately payable by the insured.

⁶² See Van der Keessel *Praelectiones* 3 24 1 (1429).

⁶³ Which, of course, still consisted of the payment of a sum in money.

⁶⁴ See Mesritz 3; Bom 4 et seq. See also Barbour 569-570 where she describes the different mercantile practices of Dutch shipowners during the seventeenth century to lessen the risks of their maritime adventures. From the different examples given by her, it appears that the mutual sharing of losses of goods were not uncommon to these merchants. From these examples the possibility that the contribution to each other's losses could have consisted of goods, and not necessarily (only) of money, is not totally excluded. Eg, merchants interested in a certain trade often agreed to share pro rata one another's losses at sea.

⁶⁵ As to the concept and for examples of consensual contracts, see Zimmermann *Obligations* 230.

parties.⁶⁶ Scheltinga mentioned that the insurance contract is a consensual contract and that the contract was already perfecta⁶⁷ at the time of the conclusion of the contract.⁶⁸ The insurance contract was therefore not a real contract as neither party had to render performance for the contract to take effect.

Grotius mentioned that the actual payment of the premium was not a requirement for the conclusion of a valid insurance contract.⁶⁹ The reason given for considering the insurance contract to be a consensual contract in effect was that the contract of insurance acquired its validity and peculiarities from trade usages.⁷⁰

Some writers were of the opinion that a properly executed and sealed copy of the policy, signed by the secretary of the Chamber of Insurance, had to be drawn up and executed within fourteen days (presumably after the conclusion of the contract) before the contract was enforceable.⁷¹ Van Zurck mentioned certain formalities which were required by legislation, for example, that the agreement had to be concluded either before a court or by a notary.⁷² But the majority of writers were of the opinion that the contract of insurance came into being irrespective of whether it was made orally or in writing, or tacitly on the payment and acceptance of the premium.⁷³ As general rule neither the pre-payment of the premium nor any other formalities were therefore required for the formation of a valid insurance contract.

66 As to the concept and for examples of real contracts, see Zimmermann *Obligations* 58 153 163 188 205.

67 Scheltinga did not expand on what he meant with the phrase "dat deze handeling is een *contractus consensualis* en dus *praeperfecta* moeten gehouden worden, schoon de betaling van de praemie aan den assuradeur noch niet is geschiedt." The concept of "praeperfecta" in this context probably entails nothing more, than that the obligations of both parties became effective on them reaching consensus on the essentials of the contract.

68 See Scheltinga *Dictata ad Gr* 3 24 2.

69 See par 3.2 above and the authority cited there.

70 See *Inleidinge* 3 24 2. A few reasons can be advanced as to why an insurance contract was treated as a consensual contract. First, the insurance contract was often concluded through the intercession of a broker and the insured and the insurer were not necessarily present at the conclusion of the contract. Secondly, in view of the numerous perils encountered by ships on the high seas, time was often of the essence in reaching an agreement and obtaining insurance cover. Thirdly, merchants may have experienced cash-flow problems and preferred to pay the premium from the profits made on the shipment which formed the object of the risk in terms of the particular insurance contract. Apart from consensus between the parties, consensual contracts did not require any other formalities for the contract to take effect. The nature of a consensual contract was therefore ideally suited to satisfy the practical requirements of the parties (who were usually merchants) to an insurance contract.

71 Van Leeuwen *RHR* 74 note c; Van der Keessel *Praelectiones* 3 24 2 (1430).

72 See Van Zurck *Codex Batavus* par XIII. These formalities stated by Van Zurck must be viewed in the light of the scope and nature of Van Zurck's work, which is, as its title indicates, a register on the edicts, ordinances, placats and resolutions regarding ecclesiastical law and civil law in Holland, Zeeland and the Generality countries: see *De Wet Ou skrywers* 157-158.

73 Grotius *Inleidinge (Maasdorp)* 3 24 6: "Insurance may be effected in any way the contracting parties please, before the Court, before authorized notaries, before witnesses, or under-hand ...". See also Van der Keessel *Praelectiones* 3 24 6 (1446).

The insured's obligation to pay the premium, an obligation which arose from the contract of insurance, was, like most obligations, extinguished by legal dissolution which took place either by discharge or by release. Discharge took the form of either payment or quasi-payment.⁷⁴

The insured was entitled to a receipt for the premium paid.⁷⁵

3.3.2 The Time of Payment of the Premium

Although legislation prescribed the payment of the premium on the conclusion of the contract,⁷⁶ there are strong indications that this provision was not adhered to in practice and that even the Dutch courts did not enforce it.⁷⁷ Be that as it may, it would appear that the requirement of an advance payment of the premium was restricted to the case where the insured was ignorant of the identity of the merchant ship which was to carry his goods, but where he was nevertheless able to provide the insurer with proof that the goods had been loaded. In this instance the insured had to pay the premium in advance and it was not recoverable even if the insured was at a later stage able to prove that the goods had in fact not been consigned to him.⁷⁸

From examples of hull and goods policies, as well as fire policies from the eighteenth century, it is also clear that insurers often required advance payment of the premium.⁷⁹ From insurance practice, too, it is clear that at least a certain portion of the premium had to be paid in advance.⁸⁰

Brokers were not allowed to give credit for those premiums which had to be paid in advance. A violation of this prohibition was punishable with a fine of 25 guilders.⁸¹

74 Grotius *Inleidinge* 3 34 2-6; Van der Linden *Koopmans handboek* 1 18 1. Quasi-payment of a debt consisted of a combination of the payment of a sum of money together with the delivery of a thing.

75 Van Bynkershoek *Verhandelingen* 4 2 (777).

76 See, eg, s 7 of the Rotterdam Keur of 12 March 1604; Van Niekerk *Sources* Appendix H 214.

77 See Van Zurck *Codex Batavus* par XXIV; Loenius *Decisien* 573-574 where, in terms of a decision of the Court of Holland of 24 November 1639, the insurer was kept to his acknowledgement in the policy that the premium was paid while in actual fact not paid. The insurer was therefore not allowed to claim nullity of the policy due to the non-payment of the premium. The reason for this decision seems to be the fact that the expectations of the insured which were created by the insurer's acknowledgement had to be realised. See also Van der Keessel *Praelectiones* 3 24 2 (1430).

78 See s 7 of the Rotterdam Keur of 12 March 1604; Van Niekerk *Sources* Appendix H 214.

79 See, eg, the policy formulas prescribed in the Rotterdam Keur of 28 January 1721; as well as in the Amsterdam Keur of 10 March 1744 and in the amendment and amplification thereto of 31 January 1775; Van Niekerk *Sources* 219 et seq. See also Wassenaer *Practyk* par 12 48.

80 See Wassenaer *Practyk* 46: "[M]oet ook uit-gedrukt worden *de premie* ende *prijs* van de *asseurantien*, te weten, hoe veel den versekeraar ten hondert sal hebben, 't welk gereet betaalt moet worden ..." (my italics); and "ende moet het verseker-loon...de helfte gereet ende d'ander heift na ses maanden betaalt worden": at 48-49.

81 See the amendment of 17 January 1613 of the Amsterdam Keur of 1598; Van Niekerk *Sources* Appendix E(9) 145. Guilders was (and still is) the currency used in the Netherlands. There are one hundred cents in one guilder. The stiver was a Dutch coin of a small amount from the sixteenth century. There were twenty stivers in one guilder. As to the history of Dutch money and banking, see Van Soest 16 et seq.

As a general rule the debtor (insured) was entitled to tender payment before it fell due. But where the due date was fixed for the advantage of the creditor (insurer), the debtor was required to tender compensation⁸² and future interest up to the day fixed for payment.⁸³

In principle it was permissible for an insurer to give credit to the insured for the payment of the premium.⁸⁴ In terms of the general principle regarding the payment of premiums, the premium was due only after the period of cover has lapsed.⁸⁵ If the risk materialised before the payment of the premium, the insurer was not allowed to rely on this "non-payment" of the premium in order to escape his liability in terms of the policy.⁸⁶ This entailed that the insurance cover in terms of the contract was not suspended by the non-payment of the premium.

But in terms of section 1 of the amendment of the Amsterdam Keur of 26 January 1610, and in order to counter the many irregularities⁸⁷ regarding the payment of premiums, all premiums not exceeding seven percent had to be paid upon the conclusion of the contract and payment had to be in cash.⁸⁸ This provision did not,

82 Apparently this compensation served as damages for breach of a material term, ie, the time of payment, in terms of the contract.

83 See *Lee Commentary* 347 and the authorities referred to there. Another exception occurred where money was lent at interest for a fixed time, eg for a year. Since this was regarded as beneficial to both parties, the debtor was not allowed to pay before the date so as to arrest the course of interest: *Van Leeuwen Censura forensis* 1 4 32 16 and 14 4 31. Van Sande, however, reported that this would be the case only where there was an express agreement not to pay ante diem: *Decisiones curiae frisiae* 3 16 1.

84 See the policy formula prescribed by the Amsterdam Keur of 31 January 1598; Van Niekerk *Sources* Appendix D(1) 122 et seq. In terms of this policy formula it was stated that "(gelijk hy [de geasseureerde] belooft mits desen) ons *sal betalen* den prijs deser Asseurantie *over drie eerst-komende Maenden*" (my insertion and italics). From this it appears that the particular insured was given credit for the payment of the premium for a period of three months.

85 Van der Keessel *Praelectiones* 3 24 2 (1430). See the decision in *SA Eagle Verzekeringsmaatskappy Bpk v Steyn* 1991 (4) SA 841 (A) at 846C-D where the Court relied on this common-law principle. See also ch 8 par 8.3.2.1 below.

86 Van Bynkershoek *Verhandelingen* 4 2 (776).

87 Eg, due to the poor and often unreliable channels of communication, ships which were already lost at the time of the conclusion of the contract were nevertheless insured. Poor communication resulted in a lack of reliable records as to the quantity and quality of goods loaded on a ship in a foreign port, as well as the time of shipment. These and other factors led to many irregularities in the insurance industry: see Vergouwen 43-44; Dorhout Mees *Schadeverzekeringsrecht* 25-26; Van Niekerk *Sources* 28-29.

88 See also Voet *Observationes ad Gr* 3 24n36: "Quae hic notat Groenew(egius) in margine, non ita servantur, sed generali mercatorum desuetudine ista praesentis solutionis necessitas abrogata fuit." Anon *Aanhangzel* at 36 admitted that the non-compliance with this provision would have resulted in the contract being void. This, according to him, would be a just result since insured would be discouraged from holding back the premium until the risk had materialised or from refusing to pay the premium if the risk had not materialised. But in the same breath he mentioned that in practice premiums were often not paid in cash and that this diversion from the *ius strictum* was also acknowledged by the courts.

however, affect the coming into existence of the contract but only its execution.⁸⁹ Moreover, it was clear that this prohibition fell into disuse by reason of generally accepted commercial usage.⁹⁰

Section 2 of the amendment of the Amsterdam Keur of 26 January 1610 provided that in the case where the premium exceeded seven percent, payment had to be effected within six months of the signing of the contract. If the premium was less than seven percent, the full premium had to be paid upon the signing of the policy.⁹¹ As regards return voyages, section 2 provided that if the premium was between seven and fourteen percent (both percentages included), one half of the premium had to be paid immediately, while the other half had to be paid only after six months.⁹²

In spite of these amendments, numerous merchants complained that the law was still not observed, and that this was to the detriment of insurers. This inspired the promulgation of the Amsterdam Keur of 5 December 1620, which provided that in future all insurance premiums, irrespective of the rate of the premium, were to be paid in cash upon the signing of the policy. An important exception to this provision was also included in the amendment. In the case of return voyages, only the premium for the outward voyage had to be paid upon the conclusion of the contract but payment still had to be made in cash. Payment for the homeward voyage had to be paid on arrival.⁹³ It is not quite clear from this amendment of 1620 whether the concept of "upon arrival" ("ten arrivement") referred to the time of arrival at the outward destination, or to the time of arrival at the home port. It would appear, therefore, that the insurer bore the risk of non-payment if he did not require the immediate payment of the premium.⁹⁴ On 7 September 1621 a further amendment was made to the Amsterdam Keur of 1598 which was concerned with an interpretation of the earlier amendment of 5 December 1620. In terms of the amendment of 1621, and according to judicial interpretation,⁹⁵ the other half of the premium was payable upon the arrival of the ship at the home port.⁹⁶

89 Van der Keessel *Praelectiones* 3 24 2 (1430). According to Van der Keessel the non-payment of the premium suspended only the right of the insured to claim in terms of the contract but did not affect the cover in terms of the contract.

90 This divergence in practice can be ascribed to the method of the payment of premiums which was in use. Insurance contracts were often concluded by a broker on behalf of the insured. Between the broker and the insurer there existed an arrangement that a settlement of accounts would take place every three months. Payment of the premium was, to a large extent, therefore a matter of book entries. See also par 3.3.3 below.

91 See Vergouwen 47.

92 See also Vergouwen 47. It is not clear what the position was if the premium was more than fourteen percent in the case of the return voyage. If seen against the relaxation of the prohibition against credit for the premium in the case where the premium was between seven and fourteen percent, it would appear logical that where the premium exceeded fourteen percent, it had to be paid only after six months.

93 See Van Niekerk *Sources* Appendix E(12) 149 where the amendment is reproduced. See also Van Bynkershoek *Verhandelingen* 4 2 (778); Van der Keessel *Praelectiones* 3 24 18 (1477).

94 See Anon *Aanhangzel* 36.

95 The "Heeren van der Gerechte".

96 See Van Niekerk *Sources* Appendix E(13) 150 where the amendment is reproduced. See also Scheltinga *Dictata ad Gr* 3 24 18n110.

In summary: if the premium was less than seven percent, it was deemed to be paid even if payment did not take place on the conclusion of the contract.⁹⁷ If the premium was between seven percent and fourteen percent,⁹⁸ one half had to be paid immediately and the other half upon the expiration of six months.⁹⁹

The penalty for non-compliance with the provisions of the Keur of 5 December 1620 was that the contract was treated as null and void.¹⁰⁰ Van Bynkershoek mentioned, however, that a policy in terms of which the premium was not paid in cash upon the signing of the policy, was, at least in terms of a trade usage at Amsterdam, not treated as null and void.¹⁰¹ On 24 November 1639 the Court of Holland decided that an insurance contract, the premium of which was not paid upon the conclusion of the contract, would, notwithstanding the non-payment of the premium, be regarded as valid since it had to be deemed that the insurer had given credit to the insured.¹⁰² In this case the insurer was not allowed to set any (unpaid) premium off against any amount which may be due to the insured under the policy.

There are also other indications from the insurance practice of this time that the prohibition on the granting of credit for the premium was not honoured.¹⁰³

A Rotterdam Keur was promulgated on 12 March 1604. Section 7 of this Keur provided that all premiums had to be paid immediately. This section applied to all premiums, irrespective of their rates. The mode of payment of the premium (for example, cash) was not prescribed by section 7.¹⁰⁴ However, as mentioned, it was decided by the Court of Amsterdam on 5 December 1620, that all premiums, irrespective of the amount, had to be paid in cash concurrently with the signing of the policy.¹⁰⁵

In 1721 a new Rotterdam Keur was passed which consolidated and updated the earlier insurance Keur of 1604. In terms of section 55 of this new Keur, the insured was liable to pay the promised premium even where the insured goods or ship had arrived at the destination before the actual signing of the contract. Section 55 therefore pro-

97 See s 1 of the Amsterdam Keur of 1610; Van Niekerk *Sources* Appendix E(7) 143. See also Van Bynkershoek *Verhandelingen* 4 2 (777-778).

98 Both percentages included, see s 2 of the Amsterdam Keur of 26 January 1610.

99 Grotius *Inleidinge* 3 24 18; Anon *Aanhangzel* 36.

100 Van Bynkershoek *Verhandelingen* 4 2 (778) indicated that the penalty of voidness attached only if the insured had delayed payment. Insured often intentionally delayed payment of the premium in anticipation of news on the arrival or loss of the ship at the port of destination.

101 *Verhandelingen* 4 2 (779). See also Scheltinga *Dictata ad Gr* 3 24 18n110.

102 Van der Keessel *Praelectiones* 3 24 2 (1430-1431).

103 See the ransom policy accompanying the amendment of 26 January 1693 of the Amsterdam Keur of 1598; Van Niekerk *Sources* Appendix E(18) 157. This policy formula provided for an example of a policy which followed the prescription in terms of the 1693 amendment, see also the policy accompanying the Amsterdam Keur of 10 March 1744; Van Niekerk *Sources* Appendix F.

104 See Van Niekerk *Sources* Appendix H 213 et seq.

105 See Schorer *Aantekeningen* 629-630n36. See also Grotius *Inleidinge (Maasdorp)* 288n36.

vided for the situation where the parties concluded an insurance contract in respect of goods "lost or not lost", in terms of which the insurer undertook to cover a loss even if unbeknown to the parties the loss had already occurred.

Section 37 of the Amsterdam Keur of 1744 further strengthened the position of the insurer by providing that all premiums, irrespective of the rate of the premium, for outwardbound as well as homebound voyages, had to be paid in cash at the time of the signing of the policy. In the case of monthly insurance¹⁰⁶ the premium also had to be paid in advance and in cash for as many months as was stipulated in the policy. As regards the payment of premiums for any further months,¹⁰⁷ payment had to take place on the terms stipulated in the policy and at the latest by the end of the voyage or on arrival of the ship at the destination.¹⁰⁸

In the case of late payment of the premium by the insured, the insurer was entitled to charge the insured interest. If the insured had not paid the premium as stipulated in the policy within six months after the conclusion of the contract, the insurer was entitled to charge interest at a rate of twelve percent from the expiry of the six months until the actual payment of the premium.¹⁰⁹ Section 2 of the Amsterdam Keur of 26 January 1610 did not provide for interest on the late payment of premiums which were supposed to be paid upon the conclusion of the contract. In view of the legislative measures which prescribed immediate payment if the premium was below seven percent, one may assume that interest was in fact payable on those premiums which were late. Grotius stated as a general rule that if the insured failed to pay the premium on the date on which it was due (or if the insurer failed to pay after the division of the loss has been made), each was liable to the other for mora interest¹¹⁰ at the rate of twelve percent.¹¹¹

To conclude, it would appear that, in spite of numerous legislative attempts to curb the granting of credit for the payment of the premium, these legislative measures were not observed in practice. The fact that later legislation provided for interest to be charged on the late payment of premiums supports this conclusion.¹¹²

106 It would appear that the concept "monthly insurance" referred to the premium which was payable in terms of a time policy, eg, where a ship was insured for a period of time rather than for a particular voyage.

107 The reference to "further months" in s 37 presumably referred to a renewal (and extension) of the time policy by agreement between the parties.

108 See Van Niekerk *Sources* Appendix F 182. Section 37 did not specify which party was allowed to indicate the time of payment.

109 See s 2 of the amendment of 26 January 1610 of the Amsterdam Keur of 1598; Van Niekerk *Sources* Appendix E(7) 143; Wassenaer *Practyk* par 12 48-49 who also mentioned an interest rate of twelve percent; Van Zurk *Codex Batavus* par XXVI.

110 Ie, interest payable by a debtor on an amount in respect of which he is in default.

111 *Inleidinge* 3 24 19; see also Van der Keessel *Praelectiones* 3 24 19 (1479).

112 Scheltinga *Dictata ad Gr* 3 24 19.

3.3.3 The Mode of Payment

Roman-Dutch law did not provide for all the different methods of payment which are known to modern legal systems.¹¹³ Neither Roman-Dutch municipal legislation nor the Roman-Dutch writers prescribed or recommended any other method of payment of the premium in terms of an insurance contract than cash.¹¹⁴ The payment of the premium by the insured was therefore, as general rule, made in cash.

In practice, however, where a broker was involved in the conclusion of the contract, the payment of individual premiums to the insurer was often not made in cash, but was a matter of book entries. The insurer kept account of the commission owed by him to the broker and the broker in turn kept account of the premiums which he received on behalf of the insurer. The broker and the insurer settled accounts every three months. Both parties therefore had a "rekening-courant" relationship¹¹⁵ with the other party.¹¹⁶

3.3.4 The Place of Payment of the Premium

A contractual debt such as a premium had to be paid at the place mentioned in the contract.¹¹⁷ If no place was specified, payment had to be made where the contract was concluded. Some writers were of the opinion that the debtor (such as the insured in the present case) was not required to make payment at his creditor's (the insurer's) place of business, except where there was a trade usage to that effect.¹¹⁸ Other writers regarded the creditor's place of business as the place of payment. Others, again, considered whether or not the creditor and debtor had the same domicile. If they did have the same domicile, the creditor's domicile was the place of payment; if their domiciles differed, the debtor's domicile was regarded as the place of payment.¹¹⁹

3.3.5 By Whom the Premium Had to Be Paid

In terms of the general rules regarding the payment of debts, payment of the insurance premium had to be made by the debtor (insured) or someone on his behalf,

113 See, eg, ch 4 par 4.3.3; ch 5 par 5.3.3; ch 6 par 6.3.3; ch 7 par 7.3.3; ch 8 par 8.3.3 below.

114 Eg, s 1 of the amendment of 26 January 1610 of the Amsterdam Keur of 1598 which provided that "van nu voortaan alle Premien ... niet excederende seven ten hondert datelick *in contant gelt* betaelt sullen moeten werden" (my italics); Van Niekerk *Sources* Appendix E(7) 143.

115 Between the broker and the insurer there existed an arrangement that a settlement of accounts would take place every three months. Payment of the premium was, to a large extent, therefore a matter of book entries. This relationship between the broker and the insurer in terms of which the payment of the premium was a matter of book entries, was referred to as a "rekening-courant" relationship. See again par 3.3.2 above.

116 See Vergouwen 67, who mentions a "regulation" dated 22 February 1719 which prescribed settlement of accounts between the insurer and the broker every three months.

117 Grotius *Inleidinge* 3 39 9.

118 See Van Leeuwen *Censura forensis* 1 4 32 14.

119 See Grotius *Inleidinge* 3 39 9; Lee *Commentary* 347.

even if the debtor had no knowledge of the payment on his behalf.¹²⁰ But payment by a third party had to be made in the name of the debtor, otherwise it was not regarded as payment of the debtor's debt. The debtor was, however, not required to know that payment had been made by the third party if the third party had an interest in the payment of the debt, for instance, if the third party was the surety.¹²¹

Third parties who had an interest in or an obligation to pay the premium in the name of the insured included brokers,¹²² other intermediaries,¹²³ factors,¹²⁴ and partners.¹²⁵

3.3.6 To Whom the Premium Had to Be Paid

In terms of the general rules regarding the payment of debts, payment had to be made to the creditor (insurer) or to his general agent, or to his agent specially authorised for that particular business.¹²⁶ Payment to an agent had to be made before the authority was recalled, or at least before the party paying was aware that the authority had been recalled. In these circumstances payment to a third party was allowed even against the wishes of the creditor. Payment to someone other than the creditor was also allowed if the contract provided for such an arrangement.¹²⁷

But an important exception to the general rule was acknowledged. Payment to someone other than the creditor also amounted to discharge of the debt if the creditor afterwards ratified the payment, or if the payment eventually turned out to the advantage of the creditor.¹²⁸ Two principles were of importance in this respect. First, in Roman-Dutch law merchants often acted simultaneously as insurer and insured (and sometimes even as broker too).¹²⁹ The merchants were therefore simultaneously creditor and debtor in respect of different insurance contracts. Secondly, the payment of insurance premiums was to a large extent a matter of book entries.¹³⁰ Bearing these two principles in mind, consider the following example. Merchant A (the insured) insured his goods with merchants B, C and D (the insurers). C (the insured) insured his goods with merchants A, B and D (the insurers). B (the insured) insured his goods with merchants A, C and D (the insurers). In principle the debt owed by A to B would have been discharged if A paid C the amount which B owed to C.

120 Van der Linden *Koopmans handboek* 1 18 1 mentioned that payment by someone other than the debtor will also be valid, even if the payment was made without the authority or against the will of the debtor.

121 Grotius *Inleidinge* 3 39 10.

122 See Van der Keessel *Praelectiones* 3 24 6 (1446-1447).

123 Eg, commission agents: see Van der Keessel *Praelectiones* 3 24 18 (1477).

124 Ie, someone who transacts business for another; see Van der Keessel *Praelectiones* 3 24 3 (1433). As to the activities of factors in general, see Ketner 152-153.

125 See Van der Keessel *Praelectiones* 3 24 3 (1433).

126 See Van der Linden *Koopmans handboek* 1 18 1.

127 Grotius *Inleidinge* 3 39 13.

128 See Pothier *Obligations* 493; Van der Linden *Koopmans handboek* 1 18 1.

129 Dorhout Mees *Schadeverzekeringsrecht* 25-26; Van Niekerk *Sources* 21-24.

130 See further par 3.3.3 above.

The insured was allowed in terms of the law to pay the premium to the broker.¹³¹ For purposes of the receipt of the premium the broker was regarded as the agent of the insurer.¹³²

3.3.7 The Amount of the Premium

It was common practice to mention in the policy the rate of the premium, expressed as a percentage of the sum insured, as well as that portion of it which had to be paid in cash.¹³³ The rate of the premium was influenced by, inter alia, factors which had a bearing on the extent of the risk.¹³⁴ The rate of the premium was consequently determined on the basis of a number of factors, for example, the season of the year, the ability and experience of the captain of the ship, and the condition of the ship.¹³⁵

In the case where the insured concluded an insurance contract with various insurers but in respect of one insured object only, all the insurers were entitled to (a share of) the premium, except where the policy provided otherwise.¹³⁶ According to Grotius this principle entailed that a later underwriter had the same share in the profit and loss as an earlier one only if they took over the same risk.¹³⁷ Voet, however, cautioned that this text of Grotius should not be interpreted as purporting to give all of the co-insurers an equal share of the premium. Voet proceeded to give an example to illustrate that in the case of several co-insurers each insurer was permitted to levy his own rate of premium. According to Voet the individual rates of premium were influenced by, amongst other things, the time at which a particular insurer had accepted the risk. For example, one insurer might have been satisfied with a premium of eight or ten percent since there was no obvious risk involved at the time accepting of the risk. But a second and later insurer might have found it necessary to levy a premium of twenty percent because he was aware of the presence of a hostile fleet at the time of the acceptance of the risk.¹³⁸

131 See, eg, s 39 of the Amsterdam Keur of 10 March 1744.

132 As to the role of brokers in the receipt of premiums, see further par 3.5 below.

133 See Santerna 5 6; Wassenaer *Practyk* 46. Policy formulas usually provided blank spaces for the rate of the premium to be inserted: eg, "mits dat ons in gereede Gelde betaalt worde voor de prys van deeze verzeekering f ... ten hondert": see the policy formula prescribed by the Amsterdam Keur of 10 March 1744; Van Niekerk *Sources* 189. Lybrechts *Koopmans handboek* 183 referred to a case where the insurer undertook to insure the insured in return for "een zekere prys of premie" (my italics).

134 See Roccus *Aanmerkingen* no 156 where the method is set out by which the premium may be calculated for different types of insurance.

135 See Mesritz 6; Vergouwen 48.

136 Section 59 of the Rotterdam Keur of 28 January 1721 provided that "[a]lle de Asseuradeurs dezelve Police getekent hebbende de laatste zoo wel als de eerste het zelve regt tot de Praemie"; Van Niekerk *Sources* Appendix I 232. See also Van der Keessel *Praelectiones* 3 24 17 (1476) who suggested that although at first glance s 59 appeared to give all insurers in terms of a particular insurance contract the right to an equal share of the premium, each insurer was entitled only to his pro rata share of the premium as stipulated in the policy.

137 *Inleidinge* 3 24 17.

138 *Observationes ad Gr* 3 24n35. See Scheltinga *Dictata ad Gr* 3 24 17 for a similar caveat.

The various scenarios and their various consequences are perhaps best illustrated by the following examples. First, the case where several insurers each underwrote (different) portions of the risk at the same rate of premium. If, for example, the ship was worth 1 000 guilders and it was insured for its full value by three different insurers (A, B and C), all at a premium rate of ten percent, that is, a total premium of 100 guilders, A underwrote for a portion of 500 guilders (of the value of the ship), B underwrote for a portion of 300 guilders, and C underwrote for a portion of 200 guilders. This meant that A got 50 guilders, B got 30 guilders, and C got 20 guilders, by way of a premium. Secondly, the case where several insurers each underwrote (different) portions of the premium at different rates of premium. If, for example, the ship was worth 1 000 guilders and was insured for its full value by three different insurers (A, B and C), A underwrote a portion of 500 guilders (of the value of the ship) at a premium rate of five percent, B underwrote a portion of 250 guilders at a premium rate of six percent, and C underwrote a portion of 250 guilders at a premium rate of ten percent. This meant that A got 25 guilders, B got 15 guilders, and C got 25 guilders by way of a premium.

The Placcaat of 31 October 1563 mentioned a marine insurance premium at a rate of seven percent.¹³⁹ Van Bynkershoek correctly remarked that the rate of the insurance premium was in the final analysis a matter which laid within the discretion of the parties and which was influenced by a number of factors.¹⁴⁰

In terms of section 19 of the Rotterdam Keur of 1604 an insured who insured his goods with the knowledge of an already existing loss, was (to be) held liable for a penalty double the amount of the premium levelled in terms of the contract as well as certain administrative expenses incurred by the insurer, for example, the cost of obtaining proof of the insured's fraud. In addition the insurer was not to be held liable under the policy.¹⁴¹ It is important to note that the reference to a "double premium" ("dubbele praemie" or "noch eens gelyke praemie") does not refer to double insurance or an additional premium. A double premium was paid as a penalty and it is more correct to refer to it as a penalty which was double the amount of the premium.¹⁴²

139 See s 2; Van Niekerk *Sources* Appendix B 106. Premium rates varied considerably and were determined by a combination of factors: see again note 135 above. Research as to the rates of premiums payable during the sixteenth century on the insurance exchanges of Antwerp and Bruges, reveal premium rates ranging from as little as 2 percent (for a journey between Antwerp to London), to as much as 20 percent (for a journey between Seville (Spain) and the Netherlands): see De Groot 135-138. For examples of tables of insurance premiums which were levelled at the Amsterdam Bourse from January 1766 until March 1780, see Spooner 257-286.

140 *Verhandelingen* 4 2 (776).

141 Van Niekerk *Sources* Appendix H 214. See also s 39 of Rotterdam Keur of 1721; Van Niekerk *Sources* Appendix I 225 where a reprint of the Keur published in Rotterdam in 1748 is reproduced.

142 See s 3 of the Amsterdam Keur of 1744 and its amendment of 31 January 1775; Van Niekerk *Sources* Appendices F and G(3) 171 and 204-205 respectively.

Section 19 of the Amsterdam Keur of 1744 provided for the case of a chartered voyage¹⁴³ by a merchant (the insured) who had also concluded a bottomry contract¹⁴⁴ in respect of the chartered ship on the instruction of the ship's owner.¹⁴⁵ In terms of section 19, the insured was under an obligation to give notice to the insurer, should the insured have become aware of a deviation from the planned route of the voyage by the master of the ship.¹⁴⁶ The insured was furthermore under an obligation to negotiate an additional premium (in respect of the changed voyage) with the insurer. The insurer was not liable if the insured failed to give notice of a change in the voyage. Section 19 provided that the insured was able to claim damages from the master (presumably only in the case where the insurer was not held liable).

The Roman-Dutch writers were not agreed on the legal effect of a failure by the parties to fix the price (or rental) in the contract. The majority were of the opinion that an agreement to pay a reasonable price or rental was not sufficient to save a contract of sale or lease from being incomplete on an essential matter such as the amount of the price or rental. An agreement in terms of which the parties had agreed to sell or lease at a reasonable price or rental respectively was therefore void for vagueness.¹⁴⁷ Thus, by analogy, a failure by the parties to an insurance contract to fix the rate of the premium in the policy resulted in the contract being void for vagueness. But there is also authority to the contrary.¹⁴⁸ There was also a presumption in the interpretation of contracts that the parties intended their agreement to be valid and enforceable, rather than invalid or unenforceable.¹⁴⁹ Thus, it was possible to argue that in the case where the parties to an insurance contract failed to fix the rate of the premium in the policy, they agreed impliedly to insure at a reasonable premium.

143 A charterparty is a contract in terms of which a charterer hires from a shipowner the use of his vessel for a set period of time or for a particular voyage or voyages. A chartered voyage occurs where the vessel is hired for a particular voyage or voyages: see Dillon & Van Niekerk 35.

144 Bottomry was a contract whereby the owner of a ship borrowed money to enable the vessel to complete the voyage and pledged the ship (literally: the bottom or hull of the ship) as security for the loan. A bottomry bond was issued (as proof of the conclusion of the contract of bottomry) in terms of a contract of bottomry.

145 See Van Niekerk *Sources* Appendix F 175-176 for a reprint of this Keur as well as a list of other information which had to be mentioned by the insured in the policy, eg, the names of the money lenders in terms of the contract of bottomry, the name of the chartered ship, the name of the master of the ship etc. Failure to give this information resulted in the insurance contract being void. See also Van der Keessel *Praelectiones* 3 24 4 (1434-1437); *Theses selectae* th 717.

146 Ignorance by the insured of the changed voyage was apparently not an excuse for not giving notice to the insurer.

147 See Van Leeuwen *Censura forensis* 1 4 19 2; see also Erasmus, Van Warmelo & Zeffertt 271n9 and the authorities cited there.

148 Van Bynkershoek *Obs tum* 1558; Erasmus, Van Warmelo & Zeffertt 267-271. See also Roccus *Aanmerkingen* no 112-114 who, although not directly in point, referred (probably in the context of *laesio enormis*) to the concept of "een billyke en behooryke premie ...".

149 See Van der Linden *Koopmans handboek* 1 14 4n2.

3.4 NON-PAYMENT OF THE PREMIUM

3.4.1 Introduction

In Roman-Dutch law, marine insurance was the dominant form of insurance. Because of the nature of a marine insurance contract, which involved the insurance of goods to be carried by sea from one country to another, a single premium was usually payable which covered the entire voyage. From this it follows that Roman-Dutch legislation as well as the Roman-Dutch writers were concerned mainly with the payment of the first (and often the only) premium payable. The possibility of the non-payment of subsequent premiums was therefore not treated at all.¹⁵⁰

3.4.2 Non-Payment of the Premium in Terms of Indemnity Insurance Contracts

The actual payment of the (first) premium was not a requirement for the creation of the insurance contract.¹⁵¹ Likewise, the mere non-payment of the premium (be it the first or any subsequent premium¹⁵²) did not necessarily result in the lapse of the insurance contract.¹⁵³

In the case of non-payment of the premium, the commissioners of the Chamber of Insurance¹⁵⁴ were entitled, as well as qualified, to hear proceedings and to order the payment of premiums if the insured was in default with the payment of the premium.¹⁵⁵

150 This was the case notwithstanding the fact that time insurance policies, in terms of which (several) monthly premiums were payable, were also known.

151 See again par 3.2 above.

152 I.e., in the case of time policies.

153 See Lybreghts *Redenerend vertoog* vol 2 17 6.

154 The Chambers of Insurance ("Kamere van Assurantie") were special insurance courts in the Netherlands which functioned as a special tribunal to hear insurance disputes. These chambers were created by legislation during the latter part of the sixteenth century and the earlier part of the seventeenth century. As regards the creation, functions and procedure of the Chamber of Insurance for the city of Amsterdam, see ss 32-36 of the Amsterdam Keur of 1598; Van Niekerk *Sources* Appendix D(1) 126-127; as regards the creation, functions and procedures of a similar tribunal for the city of Middelburg, see ss 33-37 of the Middelburg Keur of 1600; Van Niekerk *Sources* 253-254; and as regards the creation, functions and procedures of a Chamber of Insurance for the city of Rotterdam, see ss 23-24 of the Rotterdam Keur of 1604; Van Niekerk *Sources* Appendix H 216. See also Van Zurck *Codex Batavus* par 12 29; Van der Keessel *Praelectiones* 3 24 21 (1482). See further Van Niekerk "Insurance Law" 319 for a discussion on the creation and role of the chambers of insurance in the Netherlands.

155 See s 4 of the Keur of 26 January 1693 which amended the Amsterdam Keur of 1598; Van Niekerk *Sources* Appendix E(18) 157. Section 4 provided that the commissioners were entitled "om op't verleende tweede default regt te doen". It is not quite clear what this entailed, but one suspects that the insurer was entitled to cancel the contract in the case of a second default by the insured, after he had been warned by the Court (on a previous occasion) to pay the premium. See also Van Zurck *Codex Batavus* par 12 29; Van Bynkershoek *Verhandelingen* 4 2 (778-779); Van der Keessel *Praelectiones* 3 24 2 (1431) and 3 24 21 (1482).

The insurer was able to enforce the payment of the premium by the insured with the *actio contraria*, which was a personal action.¹⁵⁶ The insured was able to enforce his claim for indemnity in terms of the insurance contract with the *actio directa*, which was also a personal action.¹⁵⁷ A personal action was the opposite of a real action.¹⁵⁸ Thus, if a shipowner insured his ship without paying the premium and then sold his ship before going insolvent, the insurer was neither able to claim the premium from the new owner of the ship nor did he have any claim to the ship. Because the *actio contraria* was a personal action, it could be enforced against the insured only and not against the new owner nor against the object which was insured. Likewise the new owner of the ship was unable to claim in terms of the insurance contract between the insurer and the original shipowner (insured).¹⁵⁹

3.4.3 Non-Payment of the Premium in Terms of Non-indemnity Insurance Contracts

Roman-Dutch law formally prohibited wagering on lives which took the form of insurance on lives, that is, wagers on lives which were disguised as insurance contracts were prohibited.¹⁶⁰ Initially Roman-Dutch law did not clearly distinguish between wagers on lives and insurances on lives. This was probably the reason why insurance on lives too was held in suspicion. Later the difference between wagers and insurance began to emerge more clearly, and in the final stages of Roman-Dutch law life insurance contracts were concluded in practice.¹⁶¹

However, the scant and cautious references in our common-law sources which do hint that in practice life insurance contracts were in fact concluded, do not provide any detail as to the specific legal principles, if any, applicable to the non-payment of premiums in terms of life insurance contracts. One has to assume therefore that the legal position regarding the non-payment of the premium in the case of non-indemnity insurance contracts was regulated by the same principles applicable to indemnity insurance contracts.

156 See Voet *Observationes ad Gr 3 24n42*; Van Bynkershoek *Verhandelingen 4 2* (776); Van der Keessel *Praelectiones 3 24 18* (1478). The *actio contraria* was the opposite of the *actio directa*. The *actio contraria* and the *actio directa* were the two actions available to the parties to a reciprocal contract. Eg, the *actio mandati directa* (the action of the mandator) versus the *actio mandati contrario* (the action of the mandatory): Van Zyl *Privaatreg 383n73*; Zimmermann *Obligations 413 et seq.*

157 Van der Keessel *Praelectiones 3 24 18* (1478).

158 In terms of a personal action (*actio in personam*) the plaintiff was not asserting a relationship between a person and a thing (which was the crucial point in a real action (*actio in rem*)), but rather a relationship between two persons. Based on this personal relationship the plaintiff set out to sue the particular defendant, because he, personally, was under a duty towards the plaintiff: Zimmermann *Obligations 6-7*.

159 Van Bynkershoek *Verhandelingen 4 2* (780-781). Voet *Observationes ad Gr 3 24n42* confirmed this principle by way of an example which illustrates that it also applied to merchandise.

160 See Havenga *Life Insurance 38*.

161 See Havenga *Life Insurance 31 et seq.*

3.5 THE ROLE OF BROKERS AND OTHER INTERMEDIARIES IN THE PAYMENT OF THE PREMIUM

3.5.1 Introduction

The practice of brokers concluding insurance contracts on behalf of the insured was well known and established in the Roman-Dutch insurance law. The duties of insurance brokers included not only the conclusion of insurance contracts on behalf of insured, but also matters such as the drawing up of policies and the receipt and payment of premiums on behalf of insurers and insured respectively. It was standard practice for brokers to be directly involved in the collection of premiums on behalf of insurers. Brokers were, however, also involved in (and sometimes liable to the insurer for) paying the premium to the insurer. In these circumstances it often happened that the premium was paid by the broker out of his own pocket on behalf of the insured. Legislation as well as the works of writers contain numerous references to the principles which governed the administration of premiums by brokers.¹⁶²

3.5.2 The Relationship Between the Insured and the Insurer

Brokers were often involved in the conclusion of the contract between the insured and the insurer. But in this paragraph the principles which applied to the case where no broker was involved are discussed. Those principles which regulated the relationships between the broker and the insured, and the broker and the insurer, are discussed in the following two paragraphs respectively.¹⁶³

If credit was given by the insurer to the broker, the insurer had no lien or right of pledge on the policy, or on the thing insured, or any other property of the insured.¹⁶⁴ Provided that the premium had not been paid by the insured to the broker, the insurer was apparently allowed to institute a personal action for the premium against the insured.¹⁶⁵ The insured could use the *actio contraria*, which was a personal action, to claim the premium from the insured.¹⁶⁶

The Commissioner of the Chamber of Insurance adjudicated the payment of premiums by the insured to the insurer in terms of section 55 of the Amsterdam Keur of 1744. An insured who was late with the payment of the premium was charged interest at a rate of eight percent (of the premium) in favour of the insurer. Interest was calcu-

¹⁶² Van der Keessel *Praelectiones* 3 24 3 6 18 (1432 1446 1477-1478); Vergouwen 46-49 63-67.

¹⁶³ See par 3.5.3 and 3.5.4.

¹⁶⁴ Van der Keessel *Theses selectae* th 766; Van der Keessel *Praelectiones* 3 24 18 (1477-1478). It would therefore appear that the policy became the property of the insured if credit was given for the payment of the premium and the policy was delivered to the insured.

¹⁶⁵ Van der Keessel *Theses selectae* th 766.

¹⁶⁶ See Voet *Observationes ad Gr* 3 24n42; Van Bynkershoek *Verhandelingen* 4 2 (776); Van der Keessel *Praelectiones* 3 24 18 (1478). As to the difference between the *actio contraria* and the *actio directa*, as well as the distinction between a personal action and a real action, see again par 3.4.2 above.

lated from the moment at which sentence was passed,¹⁶⁷ and had to be paid immediately. The judgment of the Chamber of Insurance also conferred the right of immediate execution in favour of the insurer upon the estate of the insured.

3.5.3 The Relationship Between the Broker and the Insured

In terms of an amendment and amplification in 1745 of the Amsterdam Keur of 1744, the broker had to sue the insured for the premium which was overdue within the week following the date on which the premium was due. These proceedings had to take place before the Chamber of Commerce.¹⁶⁸ The judgment by the Chamber conferred a right of execution in favour of the broker. This right entitled the broker to enforce the judgment of the Chamber against the estate of the insured.

The broker was furthermore under no obligation to deliver the policy to the insured if he had advanced the premium on behalf of the insured and the insured was late in the payment of the premium. In such a case the policy was subject to a right of retention by the broker.¹⁶⁹ It would appear that the policy was also subject to a right of retention by the broker in those cases where the premium was not advanced by the broker on behalf of the insured, as the broker was personally liable to the insurer for the collection of the premium.¹⁷⁰

If, however, the broker had not advanced the premium for the insured and the broker failed to sue the insured within the week following the date on which the premium was due, the broker not only forfeited one half of his commission to the insurer, but in addition he was also held liable to the latter for the premium.¹⁷¹ This was

167 le, a tempore sententiae. For an example which illustrates the practical application of this concept, see Van Bynkershoek *Obs tum* 2191.

168 See the amendment and amplification of 1745 of the Amsterdam Keur of 1744; Van Niekerk *Sources* Appendix G(1) 196.

169 Section 81 of the Rotterdam Keur of 28 January 1721; Van Niekerk *Sources* Appendix I 238-239; s 39 of the Amsterdam Keur of 10 March 1744; Van Niekerk *Sources* 182-183. See also Van der Keessel *Praelectiones* 3 24 6 (1446-1447); and Pauw *Obs tum nov* 148 where it was held by the Supreme Court ("Hooge Raad") on 28 December 1745 that a broker had a right of retention as regards the policy, in so far as he had incurred expenses ("zijn credit daarop had verstrekt") on the policy.

170 See the amendment and amplification of 1745 of the Amsterdam Keur of 1744 which provided that "ten dien respecte geweest hebben regt van parate executie ... ingevalle de Makelaar de Praemie mogte hebben voorschoten en daarenboven niet verplicht zyn de Police eerder te extradeeren"; Van Niekerk *Sources* Appendix G(1) 196. See also Van der Keessel *Praelectiones* 3 24 6 (1447) who argued that the broker enjoyed a right of retention in respect of the policy because he was personally liable towards the insurer for the collection of the premium from the insured. This clearly implied a personal liability (and consequently a right of retention) irrespective of whether the premium was advanced by the broker on behalf of the insured. According to Van der Keessel the personal liability of the broker for the collection of the premium was based on the fact that the broker received commission at one quarter of a percent from the insurer: *Praelectiones* 3 24 6 (1447).

171 See the amendment and amplification of 27 April 1745 of the Amsterdam Keur of 1744; Van Niekerk *Sources* Appendix G(1) 196-197.

the case because the broker was burdened with the duty to collect the premium. The broker, and not the insurer, had to collect the premium from the insured.¹⁷²

Roman-Dutch law provided for a mechanism in its civil procedure to ensure that premiums which had to be collected by the broker were speedily claimed by the broker from the insured. Commissioners of the Chamber of Insurance were empowered to give default judgment against the insured on the second default.¹⁷³ This was in contrast with earlier legislation which provided for default judgment on the third default only.¹⁷⁴

3.5.4 The Relationship Between the Broker and the Insurer

By way of introduction, something on the system of payment of premiums which was in force between a broker and an insurer in the Roman-Dutch law. Premiums were not paid over separately to the insurer by the broker as and when they were collected from the insured. An agreement existed between the broker and the insurer whereby a settlement of accounts would take place every three months. Payment of premiums was therefore, to a large extent, a matter of book entries.¹⁷⁵

Policy formulas which accompanied the Placcaat of 20 January 1571 provided for the acknowledgement by the insurer of premiums which were received by the broker and which were paid by the insured.¹⁷⁶

172 See Lybrechts *Koopmans handboek* par 81n1.

173 Section 55 of the Amsterdam Keur of 1744; Van Niekerk *Sources* Appendix F 185-186. The amendment and amplification of 1745 of the Amsterdam Keur of 1744, incorporated the provisions of s 55 of the Amsterdam Keur of 1744 by providing that "en zal voor Commissarissen daar op regt gedaan werden in conformité van het 55 ste Artikul van dese Ordonnantie"; Van Niekerk *Sources* Appendix G(1) 196. See also Lybrechts *Koopmans handboek* par 81n1.

174 See also the amendment to and amplification of 27 April 1745 of s 39 of the Amsterdam Keur of 1744; see also Van Niekerk *Sources* Appendix G(1) 196-197.

175 See Boel's commentary on Loenius *Decisien* 575 where the system of book entries which existed between a broker and an insurer was described as follows:

"Dog werd als nu, na wy geïnformeerd zyn, by de Assuradeurs, welken de Maakklaars met een voor hun Kassiers gebruyken, veel gepractiseerd, dat dese aan de Assuradeurs, in plaatse der geteekende Police, hun handschrift geeven; waar by sy aan hen bekennen soo veel schuldig te zyn, als de premie bedraagt; of ook anders maar enkel, sonder sodanig handschrift, by den Assuradeur op syn Boek den Maekklaar voor de Praemie werd gedebiteerd: En sulx den Assuradeur den Maekklaar, en die weder den Geassureerde sideerd en crediteerd."

See also Scholten 46-48; Vergouwen 55-56.

176 See s 2 of the Placcaat of 1563; Van Niekerk *Sources* Appendix B 105-106. See also s 35 of the Placcaat of 20 January 1571; Van Niekerk *Sources* Appendix C 116-117. But see the policy accompanying the Amsterdam Keur of 31 January 1598 - *GPB* vol I 846-859; Van Niekerk *Sources* Appendix D(1) 127, which did not acknowledge the receipt of a premium and which was tantamount to credit to the insured for the premium:

"Sijn mede te vreden, dat ... (gelyck hy [de geasseureerde] belooft mits desen) ons sal betalen den prijs deser Asseurantie over drie eerst-komende Maenden ..." (my insertion).

Ransom policies also acknowledged the receipt of premiums: See the policy formulas prescribed by the Amsterdam Keur of 1744 as well as the amendment to this Keur of 31 January 1775; Van Niekerk *Sources* Appendices F and G(3) 189 208.

The Amsterdam Keur of 1598 did not attempt to regulate the aspect of the payment of the premium to and its receipt by the broker.¹⁷⁷ But the amendment of 17 January 1613 of the Amsterdam Keur of 1598 provided that brokers were not allowed to delay the paying over of those premiums which had to be paid immediately in cash on the conclusion of the contract. It is not clear from the amendment whether this prohibition against a delay in the paying over of the premium also applied to premiums which had not yet been received by the broker.¹⁷⁸ A violation of this prohibition was punishable by a penalty of 25 guilders.¹⁷⁹

Section 37 of the Amsterdam Keur of 10 March 1744 provided that if the insurer had granted credit to the broker, and by implication to the insured for the payment of the premium, and the insured was at a later stage unable to pay the premium, the broker would be held personally liable for the premium. If the broker went insolvent after the insured had paid the premium to the broker, the insured was protected against a claim by the insurer for the premium.¹⁸⁰ Payment of the premium by the insured to the broker was therefore tantamount to payment to the insurer. It would appear that the insurer was entitled to claim the premium from the insured if the broker went insolvent and the insured had not yet paid the premium to the broker.¹⁸¹

But in terms of section 39 of the Amsterdam Keur of 10 March 1744, the broker was held liable to the insurer for the premium, simply because the broker received his commission from the insurer.¹⁸² According to this Keur it would appear that a broker could have been held liable to the insurer for the premium even where the premium had not yet been paid by the insured to the broker.¹⁸³ This fact caused some discontent among the brokers of the time¹⁸⁴ and led to an amendment in 1745 of the Amsterdam Keur of 1744.

In terms of this amendment, it was made clear that the insured could be liable to the insurer for the premium where the broker went insolvent and the insured had not yet paid the premium to the broker.¹⁸⁵ This amendment further provided that the insurer had to institute action for the premium against the broker before expiry of the second week following on the week in which the insurance contract was concluded. If the insurer failed to institute action against the broker within this period, the insurer lost

177 See Vergouwen 46.

178 However, one has to assume that if the broker had not yet received the premium, there could have been no duty of paying it over to the insurer.

179 See Van Niekerk *Sources* Appendix E(9) 145 where the amendment is reproduced.

180 Section 37 of the Amsterdam Keur of 10 March 1744; Van Niekerk *Sources* Appendix F 182. See also Van der Keessel *Praelectiones* 3 24 18 (1477); Havenga "Regsverhouding" 103-104.

181 See again par 3.5.2 above.

182 Van Niekerk *Sources* Appendix F 183.

183 See also Van der Keessel *Praelectiones* 3 24 18 (1477).

184 "[N]a veel occasie van billijke klagten heeft gegewen aan de Makelaars en andere doende in Assurantie": see Van Niekerk *Sources* Appendix G(1) 196.

185 Vergouwen 64 summarises the effect of the amendment of 27 April 1745 as follows: "Ofschoon zoowel makelaar als verzekerde aansprakelijk waren voor de premie had de assuradeur slechts een vordering op den een en bij insolventie van dezen op den ander".

his right against the broker, and also forfeited a quarter of the stipulated premium to the poor if he received the premium (at a later stage) from the insured. If the broker paid the premium to the insurer, the broker had to sue the insured for the outstanding premium within the week following the date on which the premium was due. If the broker failed to institute action against the insured for the outstanding premium, the broker forfeited one half of his commission¹⁸⁶ to the insurer.¹⁸⁷ These proceedings had to take place before the Chamber of Insurance.¹⁸⁸

Loenius referred to the practice in terms of which brokers acknowledged the payment of the premium in a separate document, although the premium was in actual fact not yet paid by the insured to the broker. The reason for this practice was to evade legislation¹⁸⁹ which required the payment of the premium by the insured to the insurer, immediately upon conclusion of the contract. In such circumstances the insurer was entitled, apparently in terms of a trade usage, to debit the account of the broker¹⁹⁰ with the amount of the premium.¹⁹¹

Van der Keessel also referred to the trade usage which existed amongst merchants of Amsterdam that the premium was seldom if ever paid by the insured to the broker upon the conclusion of the contract. But in the policy the insurer acknowledged that the premium has been paid by the insured. In a separate document the broker declared to the insurer that the premium was still unpaid by the insured. According to the evidence of the brokers, they were not personally liable on the grounds of their admittance in this separate document, which contradicted the policy on the aspect of the payment of the premium by the insured. The brokers argued that in any event they still owed the premium in the books of the insurer. Van der Keessel was of the opinion that this trade usage regarding the protection of the broker against claims from the insurer in terms of the broker's declaration in a separate document, had been abolished by legislation.¹⁹²

186 The commission payable to a broker was determined by agreement between the insurer and the broker as well as any prevailing trade usages in a particular city or region. In Amsterdam, for example, brokers were entitled to commission of one quarter percent of the insured amount: s 39 of the Amsterdam Keur of 10 March 1744. See also Van Zurck *Codex Batavus* par XXIV; Van der Keessel *Praelectiones* 3 24 6 (1477). Brokers also had the right to sue the insurer for the commission payable in terms of the agreement between the broker and the insurer: s 39 of the Amsterdam Keur of 10 March 1744; Van Niekerk *Sources* Appendix F 183.

187 See also Vergouwen 65.

188 See the amendment and amplification of 1745 of the Amsterdam Keur of 1744; Van Niekerk *Sources* Appendix G(1) 196.

189 See, eg, s 37 of the Amsterdam Keur of 10 March 1744; Van Niekerk *Sources* Appendix F 182.

190 As to the system of book entries which prevailed between an insurer and the broker regarding the receipt and payment of premiums, see again par 3.3.2 note 90 and 3.5.3 above.

191 Loenius *Decisien* 575.

192 *Praelectiones* 3 24 18 (1478).

The rate of interest payable to the insurer by the broker on unpaid premiums, was the ordinary interest rate.¹⁹³

In conclusion it is important to note that the insurer was in principle prohibited from giving credit to the insured for the payment of the premium. This prohibition was, however, evaded by the insurer by giving the broker credit for the payment of the premium.

3.6 RETURN OF THE PREMIUM

3.6.1 Introduction

In certain circumstances the insured was entitled to a return of the premium which he had paid. The Roman-Dutch sources did not distinguish between the insured's right in this regard where he paid the premium to the broker or directly to the insurer. It would appear, therefore, that the insured had the same right to a return of the premium irrespective of whether the premium was paid to the insurer or to the broker who received it on behalf of the insurer.¹⁹⁴

In principle the insured claimed the return of the premium by means of the *condictio indebiti*, which was an enrichment action. The *condictio indebiti* served to claim a return of an undue payment (premium) which was paid by the debtor (insured) to the creditor (insurer).¹⁹⁵ The insured occasionally used the *actio directa* to claim a return of the premium.¹⁹⁶ The *condictio indebiti* was, as mentioned, an enrichment action and the *actio directa* was a contractual action. Although both enrichment and contract were sources of obligations, they were nevertheless two distinct branches of the law of obligations. One logical consequence which followed from this distinction was that the party who wished to claim a return of his payment by means of the *actio directa* had to prove the existence of a valid contract. A claim for a return of money based on the *condictio indebiti* was not dependent on the existence of a (valid) contract.¹⁹⁷

193 Grotius *Inleidinge* 3 24 19 was of the opinion that an interest rate of twelve percent was payable by the broker on any outstanding premiums by virtue of the provisions of the Amsterdam Keur of 1610. During the time of Van der Keessel the ordinary interest rate was apparently eight percent: Van der Keessel *Theses selectae* th 767. See again par 3.5.2 above.

194 See again par 3.5.4 above as to the relationship between the broker and the insurer.

195 As to the general scope and applicability of the *condictio indebiti*, see Zimmermann *Obligations* 834 848-851.

196 See Van der Keessel *Praelectiones* 3 24 18 (1478) who did not expand on the circumstances in which the insured used the *actio directa* instead of the *condictio indebiti*.

197 Eg. A sold his horse to B. Some weeks later, he duly delivered the horse to B. When A sued B for the purchase price, the contract of sale turned out to be invalid. It was clear that A was entitled to recover the horse from B. However, A's claim could neither have been based on delict (B, by accepting the horse did not act unlawfully), nor on contract (A, by making delivery of the horse, intended to discharge his own contractual obligation, and did not intend to create a contractual obligation on the part of B). A required therefore a special remedy to claim from B the performance which was never owed to him and he therefore had no right to keep. This remedy was the *condictio indebiti*: see Zimmermann *Obligations* 834.

The circumstances in which the insured was entitled to a return of the premium will now be considered.

3.6.2 In the Case Where the Insurance Contract Did Not Come into Operation

The principles discussed in this paragraph are not restricted to cases where the insurance contract did not come into operation at all. They include those situations where, although the contract was valid, the possibility of the risk, as contemplated by the parties at the conclusion of the contract, did not commence.

If the insurer had not been at risk at all, for example, where the merchant had planned a voyage for which insurance was taken out but the voyage was never undertaken, the insured was entitled to a return of the premium. Both Santerna and Roccus mentioned that if the premium was unpaid in these circumstances, the insurer would not have been able to claim the premium from the insured since the insurance contract was a conditional contract.¹⁹⁸ As far as the obligation of the insured to pay the premium was concerned, the insurance contract was subject to a resolutive condition; the insured was not entitled to keep the premium if the risk commenced. Likewise the insurer was entitled to keep (or claim) the premium only if the risk commenced.¹⁹⁹ From this construction by Santerna and Roccus it followed that a defence by the insured against a claim by the insurer for the payment of the premium was simultaneously the basis for a claim by the insured to recover a premium which was already paid to the insurer.²⁰⁰ The non-commencement of the risk did not affect the validity of the contract but only the enforceability of the performances of the parties in terms of the contract. In order to qualify for a return of the premium, the insured had to notify the insurer of the abandonment of the voyage within four months after the conclusion of the contract.²⁰¹ The insurer was allowed, in such a case, to deduct from the premium received one half percent by way of administrative costs.

If the insured was aware²⁰² at the time of the conclusion of the insurance contract that the ship had already reached its destination, he had to pay the insurer an

198 Roccus *Aanmerkingen* no 33 described the conditionality of the insurance contract as follows: "[O]mdat een Contract van assurantie is conditioneel. Want zoo een contract of Police werd gemeenlyk opgesteld in dezer voegen, wanneer het op deze reys mogt komen te gebeuren dat uwe zaaken of goederen quamen te vergaan, zoo beloof ik de waarde van dien te zullen betalen, mits gy my daar voor geeft agt Ducaten van ieder honderd, wanneer die goederen niet zyn vertrokken voor't aangaan van 't Contract, dierhalven ook niet gezegd kan werden eenig gevaar geloopt te zyn." The insurance contract was therefore concluded on the condition that the insurer would bear the risk.

199 Santerna 5 10; Roccus *Aanmerkingen* no 32-34.

200 Santerna 5 10.

201 Section 16 of the Placcaat of 31 October 1563; Van Niekerk *Sources* Appendix B 107-108. See also s 11 of the Statuten, Ordonnantien, Reglementen, en Costumen van Rechte van Frieslandt Book 1 Title XXVIII Insurance (1716), which provides for a similar right of the insured; s 56 of the Rotterdam Keur of 1721.

202 According to Van der Keessel *Theses selectae* th 724 the concept of "knowledge of the insured" entailed not only positive knowledge but also probable knowledge.

amount double that of the premium as a penalty for his fraud.²⁰³ This situation patently corresponded with the case where the insured was aware at the time of the conclusion of the contract that the ship was already lost. The public prosecutor could prosecute the insured in these circumstances for fraud.²⁰⁴

If the insurer was aware, at the time of the conclusion of the insurance contract, that the ship had already reached its destination (in other words, the insurer was aware that the risk which he undertook to bear in terms of the contract had already passed), the insured was also entitled to a return of the premium.²⁰⁵

Where the insured had insured goods which had not been sent to him or where fewer goods had been shipped than declared at the conclusion of the contract, the insured was entitled to a return of the full or a pro rata portion of the premium, depending on whether no goods or only a portion of the goods had been shipped. In this case the insurer was also entitled to retain a half percent of the premium for his administrative costs.²⁰⁶ Voet supported the right of the insured to a return of the premium in these circumstances, provided that the merchant (insured) was ignorant either of the name of the ship or of whether the goods had in fact been loaded. It would appear that Voet was of the opinion that where the insured was not ignorant of these facts and nevertheless concluded the insurance contract, he would have forfeited the premium in full.²⁰⁷ Decker reiterated that if there was fraud on the part of the insured, he was bound to pay the premium. It would appear that if there was fraud on the part of the insured, he

203 Section 39 of the Rotterdam Keur of 1721; Van Niekerk *Sources* Appendix I 225; Van der Keessel *Praelectiones* 3 24 5 (1444).

204 Section 40 of the Rotterdam Keur of 1721; Van Niekerk *Sources* Appendix I 225; Van der Keessel *Praelectiones* 3 24 5 (1444).

205 Roccus *Aanmerkingen* no 315-316 mentioned that if the abandonment of the voyage was not the fault of the insured, it appeared to be just for the premium to be returned. He did not expand on the consequences if the abandonment of the voyage was the fault of the insured, but it would have been fair if the insured was not allowed to claim a return of the premium in these circumstances. Van der Keessel's *Praelectiones* 3 24 1 (1429) argument for the return of the premium in these circumstances was based on the nature of the insurance contract, namely an aleatory contract which was subject to an uncertain event, so that in the case where there had been no uncertain event, the insurer was not entitled to the premium.

206 Section 22 of the Amsterdam Keur of 1598; Van Niekerk *Sources* Appendix D(1) 125. Similar provisions were to be found in s 24 of the Middelburg Keur of 30 September of 1600; Van Niekerk *Sources* Appendix J 254; s 18 of the Rotterdam Keur of 1604; Van Niekerk *Sources* Appendix H 215; s 56 of the Rotterdam Keur of 1721 which provided for the exemption (for an administrative fee of one half percent) of the payment of the premium which was still due under the policy. This provision illustrated the principle that a defence by the insured against a claim by the insurer for the payment of the premium, was simultaneously a basis for a claim by the insured to recover a premium which was already paid to the insurer; Van Niekerk *Sources* Appendix I 231. Section 23 of the Amsterdam Keur of 1744 provided for similar circumstances in which the premium had to be returned but added that the premium had to be returned to the insured if goods which were of lesser value than those that he had insured, were sent to him; Van Niekerk *Sources* Appendix F 177. This principle was confirmed by Grotius *Inleidinge* 3 24 16; Van Leeuwen *RHR* 72; Van der Keessel *Praelectiones* 3 24 16 (1473); Van der Keessel *Theses selectae* th 761. See also Van Bynkershoek *Observatum* 1357; Pauw *Observatum nov* 149.

207 Voet *Observationes ad Gr* 3 24n33 34: "[E]t tamen tunc curet sibi assecurationem fieri, tunc enim perdit totum praemium assecurationis."

was still bound to pay the premium even if the risk did not commence.²⁰⁸ If there was no fraud on the part of the insured, he was allowed to claim the return of the premium or had the right to withhold payment of the premium.²⁰⁹ The aim of section 40 of the Rotterdam Keur of 1721 and section 39 of the Amsterdam Keur of 1744 was to curb the many irregularities and incidents of fraud which were prevalent in the sphere of insurance in the Roman-Dutch law.²¹⁰

An important exception to the rule that the insured was entitled to a return of the premium if the goods had not been shipped, was contained in section 7 of the Rotterdam Keur of 12 March 1604. Generally the name of the ship which was to carry the insured goods had to be mentioned in the policy. If the merchant (insured) was ignorant as to the name of the ship, he had to mention this fact at the conclusion of the contract. The name of the ship then had to be mentioned in an annexure to the policy, or the insured had to supply the insurer with a receipt indicating that the goods had been loaded on a ship. In such a case the premium had to be paid in cash. In these circumstances the insured was not entitled to a return of the premium even if he was able to prove at a later stage that the goods were not shipped to him.²¹¹ Section 56 of the Rotterdam Keur of 1721 provided for a similar exception.²¹² This exception was also applicable at Dordrecht.²¹³ The reason for this exception appears to be another attempt by the legislature to curb the possibility of fraud on the part of insured.

Section 57 of the Rotterdam Keur of 1721 provided that in the case where the name of the ship or the master had not been expressed in the policy, the full premium had to be paid and was not returnable except if the contract allowed for the return of the premium. In the absence of an express term as to the return of the premium, premiums already paid were thus forfeited by the insured.²¹⁴

Section 23 of the Amsterdam Keur of 1744 provided that if the insured goods had already been loaded from the quay or bank onto barques, boats or lighters to be taken to the ship on which they were to be transported, and the goods were then returned to the quay or bank, the insured was similarly entitled to a return of the premium. But in these circumstances the insurer was entitled to keep one percent of the premium.²¹⁵ It would therefore appear that section 23 provided for an exception to

208 See Decker *Aantekeningen* 72 note c.

209 Decker *Aantekeningen* 72-73 note c, relying on Straccha gloss 6n9.

210 See Van Niekerk *Sources* 27-29. See again notes 203 and 204 above.

211 Section 7 of the Rotterdam Keur of 12 March 1604; Van Niekerk *Sources* Appendix H 214; s 56 of the Rotterdam Keur of 1721; Van Niekerk Appendix I 231; Van der Keessel *Theses selectae* th 762. Scheltinga *Dictata ad Gr* 3 24 16n97 referred in this context to s 8 of the Amsterdam Keur of 1598, but s 8 provided only for a postponement in the voyage and not for the return of the premium.

212 Van Niekerk Appendix I 231.

213 Van der Keessel *Theses selectae* Th 762.

214 See Van Niekerk *Sources* Appendix I 231-232.

215 Van Niekerk *Sources* Appendix F 177-178. See also Van der Keessel *Praelectiones* 3 24 16 (1473) who mentioned that the insurer was allowed to keep one percent of the premium since the risk had partially commenced: "[N]unc assecuratori deberi 100am praemii, quia scilicet iam aliquod periculum esse coepit assecuratoris."

the general principle that the premium was not returnable once the risk had commenced. The reason for this exception appeared to be the fact that although the risk had commenced, it was not the full risk as contemplated by the parties in the contract, but only an insignificant risk.²¹⁶ The return of the premium was also allowed in the case of insurance on the hull of a ship where the voyage had been terminated.²¹⁷ The underwriter was allowed to retain one percent of the premium.²¹⁸ The fact that the underwriter was allowed to retain one percent of the premium, in contrast with, for example, the half percent of the premium which he was allowed to keep in the case where the insured had insured goods which had not been sent to him,²¹⁹ is indicative that a partial risk had commenced in terms of the situation contemplated by section 23 of the Amsterdam Keur of 1744.

Section 24 of the Amsterdam Keur of 1744 provided for a return of the premium by several insurers who had signed the same policy in circumstances similar to those mentioned in section 23 of that Keur.²²⁰ In terms of section 24, each insurer was liable only to return the premium in proportion to the sum for which he had engaged himself. From this it followed that several insurers were not joint debtors. One consequence which flowed from this principle was that, on the insolvency of one of the insurers, his liability did not fall upon the other insurers.²²¹ This entailed that if one of the insurers went insolvent, the other insurers were not liable to contribute to his share of the premium which had to be returned.

3.6.3 In the Case Where the Contract Was Void

Section 2 of the Amsterdam Keur of 1744 provided that in the case where the name of the captain of the ship was not mentioned in the policy, the contract was to be regarded as null and void. In such an instance the insured was not entitled to claim the return of the premium where he would otherwise have been entitled to such a return. This section was an exception to the general rule that the premium was in principle to be returned to the insured if the contract was null and void. This constituted another legislative attempt to take measure against the many instances of fraud which were common in Roman-Dutch insurance law.²²² Section 2 did, however, also provide for an

216 See again Van der Keessel *Praelectiones* 3 24 16 (1473) who mentioned that "nunc assecuratori deberi 100am praemii, quia scilicet iam aliquod periculum esse coepit assecuratoris" (my italics).

217 Section 23 of the Amsterdam Keur of 1744; Van Niekerk *Sources* Appendix F 178.

218 Section 23 of the Amsterdam Keur of 1744; Van Niekerk *Sources* Appendix F 177-178; Van der Keessel *Theses selectae* th 761. Section 23 did not specify if the premium was to be returned if the voyage had commenced. From the general style of s 23, as well as the fact that it referred specifically to insurance on the hull of the ship, it appeared that the insured was not entitled to a return of the premium if the full risk had commenced. The relevant part of s 23 provided that "dogt indien de verseekerde reise magt werden gestaakt sal aan den Assuradeur voor de restorno en geloopene risiko werden betaalt een ten hondert".

219 See again s 56 of the Rotterdam Keur of 1721; Van Niekerk *Sources* Appendix I 231. See also note 206 above.

220 See Van Niekerk *Sources* Appendix F 178.

221 Van der Keessel *Praelectiones* 3 24 14 (1472); Van der Keessel *Theses selectae* th 764.

222 See again par 3.6.2 above.

exception. If the consignor's name (instead of the name of the captain of the ship) was mentioned in the policy and if the policy provided that the premium had to be returned if the consignor's name was stated in the policy, the insured was in principle entitled to a return of the premium.²²³

As regards a bottomry contract, the Amsterdam Keur of 1744 contained an exception to the rule that the insured was in principle entitled to a return of the premium if the insurance contract was null and void.²²⁴ Van Leewen described a contract of bottomry as the lending of money on the keel or bottom of the ship, in terms of which the borrower of the money undertook to return the same amount with a certain rate of interest, if the ship arrived safely at her destination.²²⁵ Section 21 of the Amsterdam Keur of 1744 declared insurance on goods subject to a bottomry bond to be null and void in principle, and the insured was generally not entitled to a return of the premium.²²⁶ The reason for this prohibition against insurance on goods subject to a bottomry bond was to prevent the bottomry debtor (the borrower) from making a profit on the realisation of the risk. If the ship on which the bottomry bond was passed, perished, the bottomry debtor was released from his debt towards the money lender. If the bottomry debtor had been allowed to claim in terms of the insurance contract as well, he would have made a profit, which was contrary to the nature of the insurance contract.²²⁷ However, where the order to insure the goods had been given by the owner or consignor of the goods before the bottomry had been passed, the insurance lapsed in so far as it related to the sum of money of the bottomry bond. In this instance the premium had to be returned but the insurer was allowed to retain one half percent of the premium by way of administrative expenses.²²⁸

The amendment of 30 January 1756 of the Amsterdam Keur of 1744 provided that in certain exceptional circumstances, insurance on goods subject to a bottomry bond was permissible if they had been insured under the general term of "merchandise", provided that the insured specifically had to declare the existence of the bottomry bond in the contract. If someone had shipped goods to an outward destination and expected return cargo from the outward port, but was uncertain as to the exact nature and extent of his interest in the cargo,²²⁹ he was allowed to insure his interest not only under the general term of "merchandise", but also with specific reference to his bottomry interest.²³⁰ But in these circumstances the insured was not entitled to a return of the premium unless he had declared under oath that he had no direct or indirect

223 See Van Niekerk *Sources* Appendix F 170-171; Van der Keessel *Praelectiones* 3 24 6 (1450).

224 Section 21 of the Amsterdam Keur of 1744; Van Niekerk *Sources* Appendix F 176-177.

225 Van Leewen *RHR* 4 9 1.

226 See Van Niekerk *Sources* Appendix F 176-177.

227 Van der Keessel *Praelectiones* 3 24 4 (1435).

228 See the amendment of 30 January 1756 of the Amsterdam Keur of 1744; Van Niekerk *Sources* Appendix G(2) 198-199.

229 The relevant part of s 21 of the amendment of 30 January 1756 of the Amsterdam Keur of 1744 provided that "of waar in het interest bestaan zal mogen ... ten opzichte van het Bodemarye-Interest".

230 See Van der Keessel *Theses selectae* th 717 720.

interest in the bottomry on the ship which was burdened with the bottomry bond.²³¹ This amendment of the Amsterdam Keur of 1744 was a further attempt by the legislature to curb the possibility of fraud on the part of the insured.

It is obvious that in the case where the insurance contract was void, the insured's right to a return of the premium was negated if there was fraud on his part.

3.6.4 In the Case Where the Contract Was Voidable for Misrepresentation

In terms of Roman-Dutch law a contract was voidable when the one party had been induced to enter into the contract by the fraud of the other party.²³² The contract was voidable at the option of the party who had been misled.

If the misrepresentation was committed intentionally (that is, fraudulently), the insurer was entitled to rescind the contract and the insured was not entitled to a return of the premium. This is in accordance with the principle that the Roman-Dutch insurance law fulfilled also a punitive function in the case of fraudulent conduct by one of the parties.²³³

In the case of an innocent or a negligent misrepresentation, the contract was also voidable, and the insured was apparently entitled to a return of the premium. The innocent party was furthermore allowed to claim damages if he had suffered any damage.²³⁴

3.6.5 In the Case Where Breach of Contract Had Occurred

In Roman-Dutch law the legal consequences in the case where breach of contract had occurred, were determined by asking whether the debtor had complied with his contractual obligations and, if not, whether his failure to perform or to perform properly was attributable to his fault. The debtor was not liable when his failure to perform or to do so properly was due to force majeure or chance.²³⁵

The innocent party had different remedies at his disposal in the case of breach of contract by the other party. Save for the instance where the failure to perform (properly) was due to force majeure or chance, the guilty party was in principle liable to the innocent party for damages and interest.²³⁶ In the context of the insurance con-

231 See the amendment of 30 January 1756 of s 21 of the Amsterdam Keur of 1744; see also Van Niekerk *Sources* Appendix G(2) 198-199.

232 Grotius *Inleidinge* 3 17 3; Scheltinga *Dictata ad Gr* 3 17 3n4; Van der Linden *Koopmans handboek* 1 14 2c. See also Zimmermann *Obligations* 673n166 where a fraudulent misrepresentation is described as "an intentional misstatement of an existing, material fact which was intended to induce, and did in fact induce, the innocent party to enter into the contract".

233 Grotius *Inleidinge* 3 24 20; Van der Keessel *Praelectiones* 3 24 20 (1481 1482).

234 See also Joubert *Contract* 90-92; Zimmermann *Obligations* 329-330.

235 Van der Linden *Koopmans handboek* 1 14 7; Zimmermann *Obligations* 807-809.

236 Van der Linden *Koopmans handboek* 1 14 7.

tract, breach of contract (especially as regards the delivery of a specific performance) seldom caused any problems because both the undertaking by the insurer to indemnify the insured should the risk materialise which he had undertaken to bear, as well as the premium which was payable by the insured, usually consisted of the payment of a sum of money.

The Roman-Dutch writers did not discuss the legal ramifications flowing from a breach of the insurance contract by one of the parties, nor did they realise the possibility of complete or partial cancellation of the contract. One has therefore to deduce the principles which applied to insurance contracts from the general principles which were referred to in the preceding paragraphs. Breach of contract by the insured would have entitled the insurer to claim damages and interest from the insured, provided the insurer could prove that he suffered damage. If the insured had already paid the premium to the insurer, the amount of the premium was taken into consideration in establishing the damages payable by the insured. Since the insurer would almost inevitably have been able to prove damage in the form of lost profits and administrative costs, it was highly unlikely that the premium was ever returned to the insured in the case of a breach of contract by him. Breach of contract by the insurer, on the contrary, would usually have entitled the insured to claim the return of the premium if he could prove, for example, that he had had to conclude a second insurance contract with another insurer, and consequently had had to pay a second premium.

Van Bynkershoek referred to a decision of the Court of Amsterdam of 30 January 1626 in terms of which the insured was not allowed to claim a return of the premium where the insurer went insolvent but was allowed to cancel and resile from the contract, probably on the ground of the insurer's breach of his undertaking to indemnify the insured (in the future).²³⁷

3.6.6 In the Case Where No Insurable Interest Existed

The insurance of expected profit²³⁸ was prohibited during the early days of Roman-Dutch law.²³⁹ This was an attempt to enforce the principle of indemnity.²⁴⁰ In terms of the principle of indemnity the insured was only entitled to be indemnified for (actual) damage suffered by him.²⁴¹ Further reasons for this prohibition included the view that insurance of expected profit was in the nature of wagering insurance as well as the difficulty of determining the indemnity in such cases.²⁴² Despite the prohibition,

²³⁷ *Verhandelingen* 4 2 (775).

²³⁸ I.e., the possibility of monetary gain to the merchant (insured) derived from future commercial activities.

²³⁹ Section 22 of the Placcaat of 1550; Van Niekerk *Sources* Appendix A 101. Prohibitions against the insurance of prospective profits were also contained in s 11 of title VII of the Placcaat of 1563, s 3 of the Placcaat of 1571, and s 2 of the Amsterdam Keur of 1598, albeit by implication: see Van Niekerk *Sources* 78. This prohibition was reiterated in s 2 of the Rotterdam Keur of 1604; Van Niekerk *Sources* Appendix F 170-171.

²⁴⁰ Van Niekerk *Sources* 78.

²⁴¹ See Dorhout Mees *Schadeverzekeringsrecht* 22.

²⁴² Van Niekerk *Sources* 78-79.

however, the practice of insuring expected profit was widespread and recognised by the courts.²⁴³ Although the prohibition was retained in the Rotterdam Keur of 1721,²⁴⁴ the Amsterdam legislature decided in section 17 of the Keur of 1744 to acknowledge and regulate the practice of insuring prospective profit.

Section 17 of the Amsterdam Keur of 1744 provided that if the insured wished to insure prospective profits based on an assumed interest,²⁴⁵ such interest had to be valued²⁴⁶ in the policy with a reference to the goods on which such profits were expected. No return of the premium on this assumed interest was allowed.²⁴⁷ The prohibition on the return of the premium in these circumstances was obvious, especially in the light of the high incidence of fraud and other irregularities in the Roman-Dutch insurance law, and the general prohibition on wagering. This prohibition was in accordance with the general Roman-Dutch approach that the premium was forfeited in the event of fraud on the part of the insured. Although the mere non-realisation of expected profits did not in itself constitute fraud, the Amsterdam legislature probably did not wish to encourage fraudulent conduct²⁴⁸ by the insured.²⁴⁹

The amendment, by the Keur of 31 January 1775, to section 18 of the Amsterdam Keur of 1744 described the different objects which were insurable in terms of fire insurance as well as general insurance. The second part of the amendment contained general provisions as well as the requirement that the interest of the insured had to be valued in the policy. It was important for the insured to have a real interest ("een reël interest") in the object. This interest, as well as the risk against which the insurance contract provided cover, were to be mentioned in the policy. In the event of the realisation of the risk the insured was expected to prove his interest in the object. Failure to prove such interest resulted in the dismissal of the claim. The insured was furthermore not entitled to a return of the premium in these circumstances.²⁵⁰

It is obvious that the Roman-Dutch legislature placed an important premium on the existence of an interest by the insured in the object of the risk. In the absence of proof of such an interest, the premium was not returnable to the insured. This require-

243 See Van Niekerk *Sources* 79 and the decision of the Dutch Supreme Court which illustrated the incidence of this practice, referred to there.

244 See s 28 of the Rotterdam Keur of 1721; Van Niekerk *Sources* Appendix I 222.

245 See Van der Keessel *Praelectiones* 3 24 4 (1438) who described the insurance of prospective profits based on an assumed interest as "geimagineerde winst, die men zig op het ondernomen belang zoude kunnen verbeelden".

246 See Van Niekerk *Sources* 80n207.

247 See s 17 of the Amsterdam Keur of 1744; Van Niekerk *Sources* Appendix F 175. See also Van der Keessel *Praelectiones* 3 24 4 (1438); Van der Keessel *Theses selectae* th 717; Van der Linden *Koopmans handboek* 4 6 2.

248 Eg, in certain circumstances the insured would perhaps preferred that the goods were lost and to claim the insurance money, instead of trying to sell the goods in poor trade conditions.

249 See also the view expressed by Van Niekerk *Sources* 80n207 who is of the opinion that there would seem to be no reason why the return of the premium in the case of the insurance of prospective profits should not be allowed in appropriate circumstances, in modern law.

250 See Van Niekerk *Sources* Appendix G(3) 205. See also Van der Keessel *Praelectiones* 3 24 4.

ment aimed to discourage the insured from insuring an interest, the existence of which was uncertain, for example, a future interest. The legislature simultaneously discouraged fraudsters from speculating or wagering on the possibility of a future interest in terms of an insurance contract.

3.6.7 In the Case Where There Had Been Over-Insurance

In terms of section 14 of the Placcaat of 31 October 1563 the insured was not allowed to claim any return of the premium in the case of fraudulent over-insurance. In such a case the premium was forfeited to the government. If the insurer was ignorant²⁵¹ of the over-insurance, he was allowed to keep one half percent of the premium (presumably one half percent of the excess premium).²⁵²

In terms of section 15 of the Placcaat of 31 October 1563 and section 32 of the Middelburg Keur of 30 September 1600, if the insured had innocently over-insured²⁵³ his interest in the object of the risk, the insurance in excess of his interest was regarded as null and void. This would be the case where, for example, the insured innocently placed an excessive value on the insured goods. The insurer was allowed, in terms of a trade usage, to retain one half percent of the excess premium.²⁵⁴ The balance of the excess premium²⁵⁵ was (assumably) returned to the insured.²⁵⁶ If the over-insurance was coupled with double insurance,²⁵⁷ the insurer (or insurers) who had signed the earlier policy, remained liable for the whole amount of their insurance. But the other insurer(s) was (were) discharged from making good the loss to the extent of the excess, and was (were) bound to return the premium.²⁵⁸

251 le, without any fraudulent intentions.

252 Van Niekerk *Sources* Appendix B 107. A similar provision is to be found in s 31 of the Middelburg Keur of 30 September of 1600; Van Niekerk *Sources* Appendix J 255. See also Van der Keessel *Praelectiones* 3 24 4 (1437); Van der Keessel *Theses selectae* th 717.

253 Eg, where the insured concluded more than one insurance contract as regards the same object of risk and the total amount of cover in the two or more insurance contracts, exceeded the insured's interest in the object of the risk.

254 The excess premium was that portion of the premium which represented the excess value which was placed on the insured goods.

255 le, that portion of the excess premium which remained after the deduction of one half percent for administrative costs.

256 Van Niekerk *Sources* Appendix B 107. A similar provision was to be found in s 32 of the Middelburg Keur of 30 September of 1600; Van Niekerk *Sources* Appendix J 255.

257 le, over-insuring the same risk-object with two or more insurers.

258 Van der Keessel *Theses selectae* th 763. Van der Keessel did not discuss the question whether the premiums which were returned were subject to a deduction of one half percent but one has to assume, in view of the numerous other legislative provisions which provided for a deduction, that it was also the case in the present circumstances. But see Roccus *Aanmerkingen* tit 6 s 2 who mentioned that in the case of over-insurance where more than one insurer were involved, each insurer was liable to make a pro rata return of the premium: "De Ristorno moet altijd over alle Assuradeurs, op de Police staande, verdeelt, en pro rata van een ygelijks getekende somma werden gereguleert ...". However, in tit 6 s 3, Roccus mentioned that s"[w]anneer iemand op eenderley goed, op twee of meer plaatsen tessen, of tot egale of diferente premien, versekeren laat, zoo zal het niet in der geassureerden feuse of magt staan, welke van deze Affurantie hy wil laten ristornen ... maar de oudste Police of Assurantie, welke volgens den datum door de Assuradeurs het eerste is getekent geworden ... zal in zyn volle kragt blyven, waar tegens de jongste of laaste gedane Assurantie volgens den datum door zodanige ristorno zal werden ingetrokken ... [m]aar in zo verre op een en de zelve Police en op eene plaats de ondertekening

Section 19 of the Rotterdam Keur of 1604 provided that the promised premium had to be paid in full, even in the case of over-insurance. At first blush section 19 appears to be in conflict with the provisions contained in section 18 of the same Keur. Section 18 provided that if the insured had insured goods which had not been sent to him, or where fewer goods had been shipped than declared at the conclusion of the contract, the insured was entitled to a return of that portion of the premium which represented the excess insurance.²⁵⁹ However, section 18 was apparently concerned with the situation where there was innocent over-insurance. Section 19, on the contrary, apparently governed the situation where the over-insurance was caused by fraudulent double insurance or multiple insurance.²⁶⁰

It is obvious that the Roman-Dutch legislature wished to penalise fraudulent over-insurance, in which case the premium was forfeited by the insured to the insurer.

3.6.8 In the Case Where the Policy Expressly Provided for the Return of the Premium

Section 57 of the Rotterdam Keur of 1721 provided that in the case where the name of the ship (which carried the insured goods) or her master²⁶¹ had not been expressed in the policy, and if the contract did not provide for the return of the premium, the full premium had to be paid by the insured and was not returnable. In the absence of an express term as to the return of the premium, premiums already paid were therefore forfeited by the insured.²⁶² It is therefore clear that parties were allowed to provide expressly for the return of the premium in certain circumstances.

Section 58 of the Rotterdam Keur of 1721 in fact stated the principle that effect had to be given to the express terms of the contract in preference to the provisions of the Keur regarding premiums.²⁶³

op verscheyden tyden van de Assuradeurs gedaan is, zoo moet de *ristorno* gemaakt werden over hun allen in 't gemeen, zonder onderscheyd, na proportie van een yders getekende Somma ..." (my italics). It would therefore appear that Roccus drew a distinction between, on the one hand, insurance concluded at more than one place, and, on the other hand, insurance concluded at one place only. See also s 59 of the Rotterdam Keur of 1721; Van Niekerk *Sources* Appendix I 232.

259 See again par 3.6.2 above.

260 Van Niekerk *Sources* Appendix H 215.

261 Van der Keessel *Praelectiones* 3 24 6 (1450) referred to the statement by Grotius that it was sufficient for the contract to be valid if either the name of the ship or the name of her master was mentioned in the contract. But Van der Keessel rejected this statement by Grotius because all the legislation required both to be mentioned in the policy.

262 See ss 56-57 of the Rotterdam Keur of 1721; Van Niekerk *Sources* Appendix I 231-232.

263 There is no clear indication from s 58 whether this provision dealt with the return of the premiums only or whether it dealt with premiums in general. It is submitted that since s 58 is the last section in the Keur under the heading "Van het betalen der Praemien", as well as the fact that s 58 is couched in rather general terms, it must be construed as referring to premiums in general. See also Van der Keessel *Praelectiones* 3 24 16 (1473); Van der Keessel *Theses selectae* th 762.

3.7 FORFEITURE OF THE PREMIUM

In some instances the policy expressly provided for the forfeiture of the premium.²⁶⁴

Legislation further provided for certain instances where the premium was not returnable. Section 57 of the Rotterdam Keur of 1721 provided that if the name of the ship or the name of the captain of the ship was not mentioned in the policy, and the policy did not provide for the return of the premium, the insured was not allowed to claim a return of the premium.²⁶⁵

If the insurer went insolvent the insured was entitled to cancel the contract, but he was not entitled in such a case to claim a return of the premiums already paid. Those premiums had to be appropriated to the advantage of the estate and all the creditors of the insurer.²⁶⁶

3.8 FUNCTION AND INSURANCE OF THE PREMIUM

3.8.1 Function of the Premium

The function of the premium in the Roman-Dutch law was to serve as counter-performance by the insured in return for the insurer's undertaking to bear the risk of the realisation of the uncertain event.²⁶⁷

3.8.2 Insurance of the Premium

It appears that the insurance of the premium could occur in one of two ways. The premium could either be insured by the inclusion of the amount of the premium in the value of the goods or ship which were insured,²⁶⁸ or the amount of the premium could be insured as such.²⁶⁹ It would appear that both forms of insurance of the premium were encountered in the Roman-Dutch law.

264 See the fire policy accompanying the amendment of 31 January 1775 of the Amsterdam Keur of 1744 which provided that "zullen in deeze Verzekeringen geen restorno ... plaats hebben"; Van Niekerk *Sources* Appendix G(3) 209.

265 See Van Niekerk *Sources* Appendix I 231-232. See again par 3.6.8 above as to the provisions of ss 56-57 of the Rotterdam Keur of 1721. For further examples in terms of which legislation provided for the forfeiture of the premium, see par 3.6.2, 3.6.3, 3.6.6, and 3.6.7 above.

266 See the amendment of 30 January 1629 of the Amsterdam Keur of 1598; Van Niekerk *Sources* Appendix E(14) 151. See also Voet *Observationes ad Gr* 3 24n42.

267 Van der Linden *Koopmans handboek* 4 6 1.

268 Van Veen *Premie* 16 et seq.

269 See, eg, s 25 of the Rotterdam Keur of 1721 which provided that "[m]en zal mogen ... laten assureren de Schepen ... allerhande Goederen Waren ende koopmanschappen bederfelyke ende onbederfelyke ... en *daar benevens* de onkosten tot de Ladinge ... de praemien gegeven of beloofft" (my italics); Van Niekerk *Sources* Appendix I 221-222.

Grotius also acknowledged the possibility of insuring the premium, albeit only for nine-tenths of the amount of it. One tenth of the premium had to remain uninsured at the risk of the owner of the goods.²⁷⁰ In Rotterdam merchants and freighters were apparently allowed to insure the full premium.²⁷¹ Van den Berg also acknowledged the practice of insuring the premium.²⁷²

Originally, the insured was not allowed to insure for the full value of the object of the risk and was expected to act as his own insurer for a certain portion of the value. The reason for such compulsory under-insurance was to eliminate the perceived adverse influence which full-value insurance had on the measure of care exercised by merchants and shipowners in protecting their insured property.²⁷³ However, in terms of section 2 of the amended Middelburg Keur dated 4 February 1719 it was provided that

"de Geassureerdens hun ten vollen sullen moogen laten versekeren tot de praemie van Assurantie incluys".²⁷⁴

This relaxation of the previous prohibition against full-value insurance was also repeated in section 25 of the Rotterdam Keur of 28 January 1721 where the possibility of insuring the premium as such²⁷⁵ was also acknowledged.²⁷⁶

Insurance of the premium during the Roman-Dutch period was most often encountered in the case of property insurance, but was also prevalent in the spheres of freight insurance, reinsurance, fire insurance and life insurance.²⁷⁷ Van Veen refers to the development of the concept of insurance and shows that originally the insurance of the "premium", that is, the repayment of the loan in terms of the maritime loan and the "price" in terms of the simulated contract of sale²⁷⁸ was not necessary since the "premium" was paid only after it had been ascertained that the uncertain event had not

270 Grotius *Inleidinge* 3 24 4. But Scheltinga *Dictata ad Gr* 3 24 4 did not mention any restriction on the insurance of the premium. See also Wassenaer *Practyk* 44.

271 See Grotius *Inleidinge (Maasdorp)* 3 24 4n8; Schorer *Aantekeningen* 3 24 4n8; Van der Keessel *Theses selectae* th 716. Roccus *Aanmerkingen* tit 3 s 3 also referred to the practice of insuring the full premium, as well as insuring the full premium in terms of a bottomry contract: tit 9 s 1.

272 Van den Berg 557-558.

273 As to the prohibition in the Roman-Dutch law on full-value insurance, see Van Niekerk *Sources* 80 et seq.

274 See Van Niekerk *Sources* Appendix K 261 where the amendment is reproduced. The Ordinance of Barcelona of 1458 contained an even earlier acknowledgement of the possibility to insure the premium. However, the 1435 Ordinance of Barcelona did not refer to this possibility: see Van Veen *Premie* 29. Van Veen at 29 also refers to a similar practice in force in France as early as 1329 and which was known as "primes des primes".

275 "Men zal mogen ... laten assureeren ... de praemien gegeven of beloofd."

276 Van Niekerk *Sources* Appendix I 221-222. The practice of insuring the premium was repeated in s 7 and 22 of the Amsterdam Keur of 1744; Van Niekerk *Sources* Appendix F 172-173 and 177. See also Anon *Aanhangsel* 38 where it is reiterated that anything (save for human lives, wagers and wages of seamen) can be insured, and therefore, by implication, also the premium; Van der Keessel *Praelectiones* 3 24 4 (1435).

277 Van Veen *Premie* 36 63 77 95 97.

278 See again ch 2 par 2.2.3.1.3 and 2.2.3.1.6 above.

materialised.²⁷⁹ He correctly criticises the practice of insuring the premium as being in conflict with the principle of indemnity, a cornerstone of the concept of insurance.²⁸⁰ The need to insure the premium became relevant only after legislation had been passed which required the payment of the premium in advance.²⁸¹ The obligation which rested upon the insured to pay the premium also ensured a measure of care exercised by the insured in protecting the insured property. If the insured was allowed to recoup the premium from the insurer, or any other insurer for that matter, it would have affected his attitude towards protecting the insured property.²⁸² The measure of care exercised by a particular insured in protecting the insured property had a direct influence on the rate of the premium levelled by the insurer.

3.9 CONCLUSION

The legal aspects of the insurance premium were the subject of a thorough treatment by the Roman-Dutch legislature as well as a penetrating analysis by the common-law writers.

A number of aspects, however, received a concentrated measure of attention by the legislators as well as the writers. It is the exposition of these aspects in particular which may provide clear-cut answers to issues still causing modern-day insurance legislatures and lawyers headaches. A random selection of these aspects, in no particular order, include the following:

In Roman-Dutch law the premium was regarded as the "price" of insurance and the correlation between the "price" in terms of a contract of sale and the "premium" in terms of an insurance contract continued to be recognised.²⁸³ This opened the door for the application of principles of other types of contract, where applicable, to the contract of insurance.²⁸⁴

It was also acknowledged that the premium could consist of something other than money. This aspect is of importance to certain mutual insurance schemes as well as indigenous mutual-aid societies.²⁸⁵ The "premium" in certain mutual insurance contracts may take the form of something other than money. The question as to whether the "premium" in terms of a mutual insurance contract is a premium for the purpose of defining an insurance contract will determine, amongst other things, whether the principles of an insurance contract will apply to the particular mutual insurance contract.

The premium was, in principle, payable only after the period of insurance. This indicates that in spite of legislation requiring the immediate payment of the premium,

279 *Van Veen Premie* 100.

280 *Van Veen Premie* 12-13.

281 *Van Veen Premie* 19-28.

282 *Van Veen Premie* 46.

283 See again ch 2 par 2.3.2 above.

284 See again par 3.2 above.

285 See again par 3.2 above. See ch 9 par 9.2 below.

credit was nevertheless given. This aspect is important in cases where the risk materialised after the conclusion of the contract but before the actual payment of the premium.²⁸⁶

The broker was regarded as the agent of the insurer for the purpose of receiving the premium. This principle provided an important measure of protection for the insured if the broker went insolvent after the premium had been paid by the insured to the broker.²⁸⁷

Finally, Roman-Dutch law provided for numerous circumstances in which the insured was entitled to a return of the premium.²⁸⁸ More important, however, are those circumstances laid down in Roman-Dutch law in which the insured was not entitled to a return of the premium. Owing to the peculiar nature of the insurance contract and the many malpractices which had arisen in the insurance business,²⁸⁹ Roman-Dutch insurance law penalised fraud severely. Any fraud on the part of the insured resulted in forfeiture of the premium. This was partly so because the insured was, especially during the early part of Roman-Dutch law, in a stronger bargaining position than the insurer. The scope for the perpetration of fraud by the insured was limitless. Over-insurance, over-valuation, insurance on ships and goods in which the insured had no financial concern, and insurance which was taken out only after news had been received or a strong suspicion had arisen of loss or damage were the order of the day.²⁹⁰ Legislative intervention followed and as a penalty for his fraud, or to discourage him from committing fraud, the insured forfeited his premium in the following instances:

- First, where he was aware at the time of the conclusion of the insurance contract that the ship had already reached its destination.²⁹¹
- Secondly, where certain important information, for example, the name of the captain of the ship, was omitted from the contract.²⁹²
- Thirdly, if the insured committed an intentional misrepresentation.²⁹³
- Fourthly, if he insured expected profits.²⁹⁴
- Fifthly, in the case of fraudulent over-insurance.²⁹⁵

286 See par 3.3.1 and 3.3.3 above.

287 See par 3.5.2 and 3.5.4 above.

288 See par 3.6 above.

289 See Van Niekerk *Sources* 21 et seq.

290 See Van Niekerk *Sources* 28 for these and other examples of insurance fraud.

291 See again par 3.6.2 above.

292 See again par 3.6.3 above.

293 See again par 3.6.4 above.

294 See again par 3.6.6 above.

295 See again par 3.6.7 above.

4.1 INTRODUCTION

The insurance contract law of the Netherlands is in a process of transition. It is currently regulated by several codes. These codes are the *Nieuw Burgerlijk Wetboek*,² the *Wetboek van Koophandel*,³ and the *Burgerlijk Wetboek*.⁴ The provisions of the different codes are constantly being considered and interpreted by the Dutch courts. The decisions of the Dutch Supreme Court are therefore a further important source of law. The Dutch legal system is a codified one and there are consequently no subsidiary common-law rules.⁵

In Dutch law the insurance contract is but another type of contract and as a result all the general principles of the law of contract are, in so far as they are not incompatible with the principles of insurance law, applicable to the insurance contract.⁶ It is therefore necessary to consider also the general principles of the law of contract as embodied in the *NBW*. In this chapter a distinction will be made between the *NBW*, that is, those titles which are in force, and the draft *NBW*, that is, those titles not yet in force.⁷

The arrangement of the provisions regarding the insurance contract in Dutch law is somewhat unsystematic. The different provisions are contained in several codes. In

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- 1 In writing this chapter, the following general works on Dutch insurance law were consulted: Van Barneveld 407-426; Dorhout Mees *Handelsrecht* III 143-145; Wery 52-53; Scheltema & Mijnsen 270-276; Clausing 3 ed 91-103.
- 2 In English, the "New Civil Code" of 1986 (hereafter the *NBW*).
- 3 In English, the "Code of Commerce" of 1838 (hereafter the *WvK*).
- 4 In English, the "Civil Code" of 1838 (hereafter the *BW*). All the codes are divided into books which again are divided into titles, (sometimes) into sections and finally into articles. In the *WvK* and the *BW* the articles of the different books are numbered consecutively and for the purpose of reference citation of the specific articles alone will suffice, eg, article 281 of the *WvK*. However, in the *NBW* the articles of the different books are not numbered consecutively and a full citation is required. For example, a reference to article 6.1.6.41 of the *NBW* is a reference to book 6, title 1, section 6, article 41. But sometimes titles are not divided into sections and a "full citation" will then not include a number of a section.
- 5 For a concise summary of the history and sources of Dutch insurance law, see Wansink "Netherlands" 199-202. See also Havenga *Life Insurance* 215 et seq.
- 6 Wery 5-6; Wansink "Netherlands" 200.
- 7 Most but not all the titles of the *NBW* have come into operation. At present Book 1 (law of persons and family law), Book 2 (legal persons), Book 3 (patrimonial law), Book 5 (property and real rights), Book 6 (general part of the law of obligations) and certain titles of Book 7 (special contracts, ie, sale and exchange, mandate, deposit and suretyship) have come into operation. Book 4 (law of succession) and certain titles of Book 7 (special contracts, eg, contract of settlement, bills of exchange and cheques, publishing contract and aleatory contracts including insurance) will come into operation only at a later date. The draft *NBW* is contained in Meijers *Teks* vol 4.

the first place books 3 and 6 of the *NBW* contain general provisions which apply to all contracts, including insurance contracts.⁸

Secondly, the *WvK* too contains provisions which deal specifically with insurance contracts. Articles 246 to 284 of the *WvK* contain general provisions applicable to all insurance contracts⁹ and also specific provisions for fire insurance,¹⁰ crop insurance,¹¹ life insurance,¹² marine insurance,¹³ and transport insurance.¹⁴ The general provisions regarding insurance apply to the specific insurance contracts only to the extent to which they are not in conflict with the nature of a specific contract.¹⁵

Thirdly, the *BW* provides that an insurance contract is an aleatory contract.¹⁶ This means that the provisions contained in title 16 of the *BW*, which deals with aleatory contracts, apply with equal force to insurance contracts.

Finally, the draft *NBW* also provides for aleatory contracts¹⁷ and for insurance.¹⁸ Title 7.17 of the draft *NBW*, which will provide for insurance, is divided into three sections.¹⁹ Section 1 contains some general provisions, section 2 provides for indemnity insurance and section 3 provides for non-indemnity insurance. The provisions contained in the *WvK* which deal with the insurance law will be replaced by the provisions contained in title 7.17 of the draft *NBW* once the latter has come into operation.²⁰

In this chapter the law which applies to insurance premiums in terms of the *WvK*, *BW* and the *NBW* will first be discussed. Where appropriate, the law which will apply to insurance premiums once the provisions of the draft *NBW* that deal with insurance premiums have come into operation, will also be briefly referred to.

4.2 THE PREMIUM AS AN ESSENTIAL FEATURE OF THE CONTRACT OF INSURANCE

The *WvK* defines insurance as follows:

8 The *NBW* differs from the *BW* and also from, eg, the German, Italian and Greek Codes in that it devotes a separate book (Book 6) to the general part of the law of obligations. Contracts governed by special provisions are dealt with in a different book. The same system is to be found in the Swiss and Egyptian Codes and in the new French Code: see Ministry of Justice 68.

9 See art 248 of the *WvK*.

10 Articles 287-298 of the *WvK*.

11 Articles 299-301 of the *WvK*.

12 Articles 302-308 of the *WvK*.

13 Articles 592-685 of the *WvK*.

14 Articles 686-695 of the *WvK*.

15 Dorhout Mees *Handelsrecht III* 107.

16 Article 1811 of the *BW*.

17 See art 7.16.1 et seq of the draft *NBW*. See also Nuytinck et al 4-5 for an exposition of the different types of aleatory contract and the different legal consequences which attach to them.

18 See art 7.17.1.1 et seq of the draft *NBW*.

19 See art 7.17.1.1 et seq of the draft *NBW*.

20 Wansink "Netherlands" 200.

"Assurantie of verzekering is eene overeenkomst, bij welke de verzekeraar zich aan den verzekerde, tegen genot eener premie, verbindt om denzelven schadeloos te stellen wegens een verlies, schade, of gemis van verwacht voordeel, welke dezelve door een onzeker voorval zoude kunnen lijden."²¹

The draft *NBW* defines insurance as follows:

"Verzekering is de overeenkomst waarbij de verzekeraar zich tegen het genot van premie jegens zijn wederpartij, de verzekeringsnemer, tot het doen van een of meer uitkeringen verbindt, waarbij hetzij deze verbintenis hetzij de premiebetaling dan wel beide afhankelijk zijn van een bij het sluiten van de overeenkomst voor partijen onzeker voorval."²²

This definition applies in principle to insurance for profit as well as mutual insurance.²³

The insurance contract is described in Dutch insurance-law textbooks as a reciprocal agreement²⁴ between two parties in terms of which the one party (the insurer), in return for the payment of a premium, undertakes to indemnify the other party (the insured) on the occurrence of an uncertain event which causes loss to the insured.²⁵

The premium is one of the essentials of the contract of insurance.²⁶ The essentials of a(n) (insurance) contract are those characteristics of a particular type of con-

²¹ Article 246 of the *WvK*.

²² Article 7.17.1.1 of the draft *NBW*. Generally a contract is described as "a multilateral juridical act whereby one or more parties assume an obligation towards one or more other parties": see art 1349 of the *BW*; art 6.5.1.213 of the *NBW*. As in other Continental codes, the *NBW* defines contracts in terms of promises rather than bargains. Two basic principles underpin the concept "contract" in the *NBW*. In terms of the first principle it is acknowledged that parties give their consent freely to a legal obligation. The second principle has a basic objective of protecting interests arising from a reasonable reliance by one party on the conduct of another party: see Whincup 1208.

²³ See Meijers *Toelichting* 1159; Van Stolk 4.

²⁴ See Van Barneveld 415. Nuytinck et al at 4n8 indicate that the fact that the insurance contract is a reciprocal agreement, means that title 6.5 of the *NBW*, which provides for conditional obligations, applies also to insurance contracts.

²⁵ See Molengraaff "Overeenkomst" 446; Scheltema & Mijnsen 270; Veldkamp 10; Wery 7; Clausen 3 ed 12. But see the criticism levelled by Molengraaff "Overeenkomst" at 399-400 against defining the contract in terms of the intention of the parties. He suggests that the real criteria to distinguish between the insurance contract and other types of contract, eg, the wager, should be sought in judicial concepts and not economic concepts such as profit and loss. He finally suggests at 466-469 that the aspect of indemnity is the basis for the distinction between an insurance contract and a wager. But it would appear that the criteria suggested by Molengraaff are not water-tight, as indemnity is also an economic concept.

²⁶ Article 246 of the *WvK*. See also Fonkert at 11-12 who supports the view of Scheltema & Mijnsen (at 270) that a contract in terms of which no premium is payable, cannot be classified as an insurance contract. Dorhout Mees, in contrast, suggests that the premium is not an essential of the contract of insurance. For a more detailed discussion as to the validity of an insurance contract in terms of which no premium is payable, see par 4.2 below. See also Mesritz 8 who argues that the premium is not an essential, but a natural of the contract of insurance.

tract which distinguish it from other types of contract. The undertaking to pay a premium (or price) as such does not necessarily distinguish the insurance contract from other types of contract. But it is the undertaking to pay the premium in conjunction with the other essentials of the insurance contract which distinguishes it from other types of contract.²⁷

Dutch law does not provide for a statutory definition of the concept of "premium". Van Barneveld defines it as

"een prestatie van de verzekerde, welke volgens 246K. de verzekeraar geniet in ruil voor de verbintenis tot schadeloosstelling, die hij jegens de verzekerde op zich neemt".²⁸

Although it need not necessarily, the premium usually consists of money.²⁹ Veldkamp defines the concept of "insurance" as

"een organisatie ... waarbinnen men door een premiebetaling, *van welke aard*³⁰ en onder welke naam dan ook, gevrijwaard kan worden tegen de eventuele schade".³¹

The *WvK* acknowledges mutual insurance as a valid form of insurance.³² It has been suggested that the description of the concept of "premium" should be extended to include the undertaking of a performance other than money.³³ Such an expanded version of the definition of the premium would provide for most types of insurance contract, including mutual insurance contracts.

The premium is regarded as the counter-performance or the price³⁴ undertaken by the insured in return for the undertaking by the insurer to bear the risk. The undertaking to bear the risk includes the undertaking to indemnify the insured in the event of the materialisation of the uncertain event. The performance of the insurer is

27 See Molengraaff "Overeenkomst" 30, on the analogy of his example of the contract of sale.

28 Van Barneveld 408.

29 Van Stolk 68.

30 My italics.

31 Veldkamp 10.

32 Article 286 of the *WvK*. See also Van Stolk 5; Van Barneveld 96 et seq.

33 Van Stolk at 4-5 suggests that the relevant part of the definition of insurance in art 246 of the *WvK* should read: "[T]egen ontvangst van eene premie ... *of andere voorwaarden*" (the italics being his).

34 For an acknowledgement of the association between the premium in terms of the insurance contract, and the price in terms of a contract of sale, see Molengraaff "Overeenkomst" 431. See also Rang 60 who states that "[i]n de verzekeringswereld beschouwt men de verzekering namelijk als een koopwaar, waarvan de prijs gelijk is aan de premie". For a critique of the construction in terms of which the contract of sale is equated with the contract of insurance, see Mesritz 9. He is of the opinion that in terms of art 246 of the *WvK*, the actual payment of the premium is a condition for the contract of insurance to take effect. He concludes at 10-11 that the effect of his construction is that the contract of insurance cannot be regarded as a reciprocal contract, and consequently, that it can not be compared with the contracts of sale and lease. Finally, in the case of a life insurance contract which is paid up fully, reference is sometimes made to the premium as the purchase price: see Van der Burg 59.

therefore described as a conditional performance.³⁵ This construction of the function of the premium correctly explains the reason why the premium is, as a matter of general principle, not recoverable by the insured in the event of the non-materialisation of the risk.³⁶ The insurer's counter-performance therefore consists in bearing the risk that the uncertain event which is insured against, may materialise.³⁷ The obligation of the insurer to indemnify the insured upon the materialisation of the uncertain event is a consequence of its undertaking to bear the risk.³⁸ The insurer's counter-performance in return for the insured's undertaking to pay the premium does not consist of the actual indemnification by the insurer.³⁹ The nature of the insurer's performance usually has a bearing on the question whether it is a continuous performance which, in turn, may influence the divisibility of the performance.⁴⁰

Although the actual indemnification by the insurer is conditional (namely, on condition that the risk as described in the contract has materialised and that the insured has fulfilled all other requirements to be indemnified in terms of the contract) the insured undertakes to pay the premium in anticipation of this conditional indemnity.⁴¹ By concluding the insurance contract the insured commits himself unconditionally to pay the premium.⁴² The insurer, in turn, undertakes to bear the risk. Although the undertaking to indemnify is given conditionally, the undertaking given by the insurer to bear the risk is given unconditionally.⁴³ This satisfies the requirement of reciprocity.⁴⁴ The *NBW* provides that in the case of a reciprocal agreement,⁴⁵ the parties are allowed

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- 35 See Dorhout Mees 108. But in the case of life insurance the undertaking by the insurer to pay a fixed sum of money is usually given unconditionally. The only uncertainty involved is the time of payment: see Dorhout Mees 108-109.
- 36 See Van der Feltz 7. See also Dorhout Mees *Handelsrecht III* 143-144 and 216-217. See further par 4.6 below as to the effect of this construction on the return of the premium.
- 37 Molengraaff "Overeenkomst" 25-29 34.
- 38 See Dorhout Mees *Handelsrecht III* 143-144.
- 39 See Molengraaff "Overeenkomst" 428-429.
- 40 The divisibility of the parties' performance affects a number of contractual aspects, including the right of the insured to claim a return of the premium. But as the return of the premium is regulated by the *WvK*, the Dutch writers are not concerned with the effect which the nature of the insurer's performance may have on the return of the premium. See further par 4.6 below.
- 41 Bom's statement at 2 that the insurer has the chance of winning the premium ("heeft de kans de premie te winnen") is therefore incorrect.
- 42 The importance of the uncertain event in defining the obligations of the parties in terms of the insurance contract is clear from the definition of insurance provided for in art 7.17.1.1 of the draft *NBW*. The relevant part of the definition provides that "waarbij hetzij deze verbintenis [van de verzekeraar] hetzij de premiebetaling dan wel beide afhankelijk zijn van een ... onzeker voorval" (my insertion). It is submitted that this part of the definition embodies the fundamental idea that the existence of a risk and its transfer from the insured to the insurer, constitutes the basis of every contract of insurance. Fortuitousness, in the sense of uncertainty, forms part of the concept of risk. Although the premium is usually promised and paid unconditionally, the absence of a risk would mean that the insured may be entitled to a return of the premium. In this sense of the word the premium is indeed promised and paid "afhankelijk van een onzeker voorval".
- 43 See Van Feltz 7; Van Barneveld 408.
- 44 Dorhout Mees *Handelsrecht III* 108. Theoretically there should always be a causal link between the premium and the indemnification, between the risk and the indemnification, and between the risk and the premium: Veldkamp 11.
- 45 Article 6.5.5.261 of the *NBW*. See also art 1349 of the *BW*.

to rely on the exception of the unfulfilled contract⁴⁶ if the other party fails to perform, or fails to perform as stipulated.⁴⁷

The actual payment of the premium is not a requirement for the contract to take effect or, provided that credit for the premium has been granted to him, for the insured to enforce his claim.⁴⁸ According to Dorhout Mees the granting of credit is unknown in the Dutch insurance industry.⁴⁹ But the insured must tender to pay the premium⁵⁰ if he wishes to enforce a claim in terms of the contract after the due date of the premium, or if no credit was granted.⁵¹ If the premium is not yet due at the time when the insured institutes his claim for an indemnity, it is, of course, not necessary to tender the premium.

Although the actual payment of the premium is not required for the insurance contract to take effect,⁵² the parties must reach agreement on the fact that a premium will be paid. In the absence of an undertaking by the insured that a premium will be paid, no insurance contract will come into effect.⁵³

In principle, no formalities are required in Dutch law for a valid insurance contract to take effect.⁵⁴ It takes effect when the parties have reached consensus on all the essentials of the insurance contract.⁵⁵

46 *ie, the exceptio non adimpleti contractus.*

47 Article 6.5.5.262 of the *NBW*.

48 During the Roman-Dutch period, pre-payment, *ie*, payment at the beginning of the period of insurance, of the premium was a requirement for the attachment as well as the enforcement of the contract: see Dorhout Mees *Schadeverzekeringsrecht* 193. See again ch 3 par 3.3.2 above.

49 Dorhout Mees *Schadeverzekeringsrecht* 193.

50 See also the decision in "Rechtbank Rotterdam", 15 May 1934, *NJ* 1935 17.

51 Article 7.17.1.3 of the draft *NBW* provides that with the commencing of each new period of insurance, there does not rest a duty on the insured to pay the premium and thereby renewing the insurance. See also Meijers *Toelichting* 1168.

52 See also the decision in "Rechtbank Rotterdam", 15 May 1934, *NJ* 1935 17.

53 Molengraaff "Overeenkomst" 31; Van Barneveld 413-414. Article 254 of the *WvK* provides that if an insurance contract does not contain an indemnity clause, it will be void. But the *WvK* does not provide an indication as to the status of an insurance contract in terms of which the parties failed to agree on the premium.

54 Although art 7.17.1.8 of the draft *NBW* requires that the contract must be in writing to be enforceable against the insurer, this does not entail that writing is necessary for the contract to take effect. If seen against the large amounts involved in many insurance contracts, writing is required to protect the insurer against fraud or misunderstanding: Meijers *Toelichting* 1165; Nuytinck et al 6. Article 255 of the *WvK* also requires that the agreement between the parties must be reduced to writing. But art 255 does not entail that writing is a formal requirement for the coming into being of the contract. Article 257 of the *WvK* provides that the contract takes effect as soon as the parties have reached agreement on the essential terms of the contract, even before the contract has been signed. Article 258 of the *WvK* contains a provision similar to art 7.17.1.8 of the draft *NBW*.

55 See art 1356 of the *BW*; art 3.2.33 and 3.2.37(1) of the *NBW*; art 257 of the *WvK*. See also Dorhout Mees *Handelsrecht III* 107; Van Veen *Levensverzekering* 5n12; Nuytinck et al 5.

In practice the terms of the agreement are invariably embodied in an insurance policy.⁵⁶ The policy is the document in which the agreement or contract between the parties is embodied. The policy and by implication, therefore, the contract of insurance must stipulate the premium.⁵⁷ It is uncertain whether, in order to comply with the requirement imposed by legislation, it is sufficient for the parties to reach agreement that a premium will be paid, or whether the parties must reach agreement on the amount of the premium as well.⁵⁸ It is submitted that it is not necessary for the parties to reach agreement on the actual amount of the premium. This argument is given further impetus if seen against the fact that it is the mere undertaking by the insured to pay the premium which constitutes an essential of the insurance contract, in contrast to the actual payment of it.⁵⁹ This requirement is also provided for in the case of life⁶⁰ and marine insurance policies.⁶¹

An agreement to insure which does not contain an undertaking to pay a premium is in essence a conditional contract of donation.⁶² However, the pragmatists argue that in spite of these theoretical principles, one does encounter examples of "free" insurance. The "free" accident insurance offered when one buys a newspaper, or a railway or air ticket, and the "free property insurance" when one buys a new fountain pen or top hat, are some of the examples listed as "free" insurance. But it is correctly pointed out that these are not valid examples of "free" insurance, as the premium is already included in the purchase price of the item or ticket.⁶³ These examples therefore qualify as insurance contracts.

Reference is also made to "premiumless"⁶⁴ life insurance. This, according to some writers, occurs where the insured decides to exercise his right in terms of a life insurance contract and ceases payment of any further premiums. The contract often provides that the insured is in certain circumstances entitled to cease payment of further premiums even where the contract has not lapsed. The insurance contract is kept in force by reducing the capital sum which is set aside for eventual payment on the death of the life insured. A certain portion of this fund is then utilised as a premium.⁶⁵ It is, however, obvious that this example also does not qualify as true "free" insurance.

56 Article 257 of the *WvK* requires the insurer to sign the policy and to deliver it to the insured within a specified time after the contract has come into being. See also art 259 and 681-1 of the *WvK* and art 7.17.1.8 of the draft *NBW*: see Nuytinck et al 5-6.

57 See art 256-1(7) of the *WvK*.

58 See art 256-1(7) of the *WvK*, which provides that "[a]lle polissen ... moeten uitdrukken ... [d]e premie van verzekering".

59 See again note 27 above.

60 Article 304(6) of the *WvK*; art 7.17.3.12(1) of the draft *NBW*. Life insurance policies are provided for in art 7.17.3.9-24 of the draft *NBW*.

61 See art 681-1(1) of the *WvK*, which provides that "[d]e makelaars in zee-assurantiën zijn verplicht: Aan den verzekeraar ... uit te reiken eene onderteekende nota, houdende vermelding van ... de premie".

62 See Mesritz 7-8 and the authorities cited there. See also Van Barneveld 414; Van der Burg 59.

63 See Dorhout Mees *Schadeverzekeringsrecht* 191-192; Van der Burg 59n2; Van Barneveld 414.

64 In Dutch, "premie vrij".

65 See Stigter/Ploeg 48 56; Nuytinck et al 145-146.

The premiums are "paid" by transferring the corresponding amount from the accumulated fund to the premium account. In reality there is, therefore, no actual payment of the premium to the insurer, but merely a re-allocation of funds already received by the insurer.

A further example sometimes held to be "free" insurance is social insurance.⁶⁶ The reasoning here appears to lie in the fact that the premium is not paid by the insured but by the government. But it is obvious that the mere fact that the premium is paid by a third party does not mean that no premium is paid.⁶⁷ A further reason advanced to bolster the argument that social insurance is an example of "free" insurance, is the fact that the insured is indemnified irrespective of whether or not the premium has been paid. Although it is true that the actual payment of the premium is not a requirement for indemnification in at least some types of social insurance, this does not detract from the fact that the obligation to pay the premium still exists.⁶⁸

Dorhout Mees is of the opinion that the statutory fire insurance on behalf of the mortgagee qualifies as an example of "free" insurance.⁶⁹ In terms of this type of insurance the insurer is obliged to indemnify the mortgagee who has suffered damage owing to the destruction of the property by fire. The mortgagee enjoys indemnification despite the fact that he has neither concluded the contract of insurance, nor paid the premium. Dorhout Mees continues by saying that this type of agreement does not constitute a stipulation in favour of a third party, as the mortgagee is entitled to indemnification even if the original contract of insurance is void, or if the fire was started by the insured as mortgagor. He concludes that this type of "insurance contract" also does not qualify as a contract of donation, because there is no intention to donate on the part of the insurer.⁷⁰ However, these arguments by Dorhout Mees do not detract from the fact that the mortgagor *undertook to pay a premium* in terms of the insurance contract.

If there are no claims by the members of a mutual society during a particular year, there will, strictly speaking, be no premium payable by the members. But the mutual society, that is, the insurer, often reinsures the risk with a reinsurance company. The premium paid in terms of the reinsurance contract is usually recouped from the members of the mutual society. It is, therefore, most unlikely that in the case of mutual insurance a situation will arise where no premium is payable.⁷¹ It is important to reiterate that it is *not the actual payment* of a premium (or the absence of it) which is an essential of the contract of insurance. The *undertaking* by one party to pay a premium

66 In Dutch, "sociale verzekering". See, eg, Veldkamp 11.

67 See, in general, Rang 62-63.

68 See Rang 63. In terms of s 31 of the "Algemene Ouderdomswet" 1957 the poor are exempted from paying premiums in terms of social insurance. However, these "unpaid" premiums are recouped from the state: see Rang 106-109.

69 Dorhout Mees *Schadeverzekeringsrecht* 191-192.

70 See Dorhout Mees *Schadeverzekeringsrecht* 191-192. But see Fonkert 12 who argues that this is an example of a contract of donation.

71 Völlmar 358.

is required as an essential of an insurance contract. Whether or not the premium is eventually paid will not influence the nature of the contract, but merely its enforceability.

In passing, a few remarks on the possibility of drawing a distinction between premium insurance and mutual insurance.⁷² As a point of departure it is important to note that it is misleading to distinguish between mutual insurance and premium insurance by referring to the aspect of the premium. Both "premium insurance" and mutual insurance comprise an undertaking by the insured to pay a premium. Premium insurance should rather be referred to as insurance for profit.⁷³ Insurance for profit can in some respects be regarded as different from mutual insurance.⁷⁴ First, in the case of mutual insurance the final premium⁷⁵ is calculated only after the period of insurance has expired.⁷⁶ In the case of insurance for profit the premium is calculated and (usually) paid upon conclusion of the contract. But the premium is sometimes paid only after the period of insurance has come to an end.

Secondly, a distinction between these two types of insurance is also drawn on the basis of the difference in fixing the (final) amount of the premium. The premium in terms of mutual insurance is usually not fixed upon the conclusion of the contract. The premium in terms of an insurance for profit contract is, in contrast, usually fixed upon the conclusion of the contract. But if the parties to an insurance for profit contract agree to insure at a premium to be arranged, this distinction between mutual insurance and insurance for profit falls away.⁷⁷

Thirdly, in the case of mutual insurance, the object is (usually) not to make a profit but merely to arrange for the spreading of the risk between the different members

72 As to the relative advantages of mutual insurance if compared with premium insurance or rather, insurance for profit, see Van Stolk 8-10; Bom 6. As to the disadvantage of mutual insurance as regards the initial uncertainty of the amount of the premium, see Bom 8. As insured who participate in a mutual insurance scheme are liable to contribute to the losses suffered by co-insured during the course of a particular period of insurance, the final amount of the premium is not fixed before that period has come to an end. The final amount of the premium is therefore uncertain until the period of insurance has come to an end: see Bom 5-6.

73 le, insurance contracts which are concluded with the object to generate a profit for the account of the insurer.

74 This does not, however, detract from the fact that the mutual insurance contract is in essence an insurance contract: see Hage 163; Bom 1-4. As to the legal principles imposed by the *WvK* on mutual insurance companies, see Bom 15 et seq.

75 In Dutch, "omslag".

76 Roeleveld 20 describes the function of the premium in terms of a mutual insurance contract as follows: "[V]erplicht die rechtsverhouding het fonds, als verzekeraar niet *tegen genot van een premie* het lid als verzekerde schadeloos te stellen, maar tegenover de verplichting tot schadeloosstelling van het fonds stelt zij de verpligting van het lid om zijn juist aandeel in het totaal der uit te keren schadevergoedingen en kosten bij wijze van omslag te betalen; dat dit niet anders wordt doordat van "premie" sprake is, aangezien met dat woord niet bedoeld wordt op een premie, als waarvan in een verzekeringsovereenkomst sprake is, maar van de voorlopige omslag, die het karakter heeft van vooruitbetaling op de definitieve omslag."

77 See Van Barneveld 97-98. If seen against this fact, it is clear that the reference to insurance for profit as "fixed-premium insurance" (in Dutch, "verzekering op vaste premie") to distinguish between mutual insurance and insurance for profit does not take the matter any further.

of the mutual society.⁷⁸ A member of a mutual society is simultaneously insurer and insured.⁷⁹ In the case of premium insurance, the insurer administers the spreading of the risk among a community of equally endangered insured with the aim of making a profit. The motive of profit is usually absent in the case of mutual insurance. The distinction should therefore rather be drawn between mutual insurance on the one hand, and insurance *for profit* on the other hand, than between insurance for profit and mutual insurance respectively.⁸⁰ But Van Barneveld argues that the *possibility* of profit is not unique to insurance for profit. According to him, mutual insurance contracts do sometimes show a profit. These profits are then transferred to the reserve fund or paid to the members. However, this argument loses sight of the fact that the mutual insurer does not levy a premium *with the intention* of making a profit. The fact that the "profit" is returned to the insured serves as proof that the premium was not initially levied to make a profit. It must be conceded that the *motive* of the insurer at the conclusion of the contract (that is, whether it secretly intends to make a profit) is not relevant in the classification of the contract. It is true that the *intention* of the parties as expressed in the terms of the contract is conclusive. However, in the case of a mutual insurance contract the parties at least tacitly agree that the insurer will not make a profit. If a mutual insurance contract shows a "profit" at the end of a particular period of insurance, it must be regarded as accidental and not intentional. Such "profit" can in any event not be regarded as a "profit" in the usual sense of the word as it is usually returned to the insured in some form or the other. The absence of any intentional profit-taking is therefore the distinctive feature of mutual insurance. It stands to reason that an insured, as a member and simultaneously as insured and insurer in terms of a mutual insurance contract, cannot make a "profit" from his own premium.

It would appear, then, that although it is possible in most cases to distinguish between mutual insurance and insurance for profit on the ground of either the time of fixing of the premium, or the presence or absence of a profit, these two criteria do not always constitute watertight tests. But it can be argued convincingly that *an intention to make a profit* (as embodied in an express or tacit term of the contract) is, as a matter of general principle, absent in the case of mutual insurance.

78 Roeleveld 32n2 explains the calculation of the premium in terms of a mutual insurance contract as follows: "Bij vaste premien moet de verzekeraar een winstoogmerk hebben, hetgeen bij onderlinge waarborgmaatschappijen ontbreekt. Bij deze instellingen is de premie als voorschot te beschouwen, waardoor de maatschappij haar verplichtingen kan nakomen. Te veel betaalde premie zal daarom teruggegeven, te weinig betaalde nagevorderd worden." See also Wery 12.

79 See Mesritz 3; Hage 163.

80 An insurer for profit is also referred to as a speculative insurer. Because the premium in the case of insurance for profit is usually based on a pre-calculated actuarial basis, the premium is speculative but fixed. It is speculative in the sense that the insurer speculates on the possibility and circumference of the risk: Hage 166-167; Dorhout Mees *Schadeverzekeringsrecht* 191; Dorhout Mees *Handelsrecht III* 144. See also par 4.3.7 below.

4.3 THE PAYMENT OF THE PREMIUM

4.3.1 Introduction

The insured is usually under no obligation (to continue) to pay the premium in the case of non-indemnity insurance contracts, for example, life insurance. Even in the case of those indemnity insurance contracts where the insured undertook to pay (subsequent) premiums, the insurer does not usually enforce its right to claim the premium.⁸¹ The reason for this is twofold. First, the pre-payment of the premium is usually a requirement for the insurer's liability. If the premium is unpaid, the insurer is usually not liable to indemnify the insured. Secondly, the amount of the premium is usually very small.⁸² The insured therefore has, by implication, the option to renew (and to enforce)⁸³ the contract by paying the premium. It is, of course, possible to insert a term in the contract that the insured will not be allowed to resign from the contract by refusing to pay the premium.⁸⁴

4.3.2 The Time of Payment of the Premium

In terms of the general rules regarding the time of payment of the debt, the premium is, in the absence of a contradicting term in the contract, payable upon the conclusion of the contract.⁸⁵ Where a time for performance has been set, it is presumed only to prevent the obligation from being claimed earlier.⁸⁶ Payment of a debt before it is due will not be regarded as an undue payment.⁸⁷ A debtor is not allowed to invoke a stipulation of time if he has been declared bankrupt,⁸⁸ or if he fails to provide the security promised by him,⁸⁹ or if through a cause attributable to him, the existing security for the claim has been diminished.⁹⁰

In the case of insurance for profit,⁹¹ the premium is, as general rule, payable in advance.⁹² In the case of certain types of insurance, for example, transport insurance,

81 Clausing 3 *ed* 91.

82 Scheltema & Mijnsen 271.

83 But the insured does not have a right to renew an indemnity contract by paying the premium, if the insurer is not interested in renewing it.

84 Clausing 3 *ed* 91.

85 Article 6.1.6.38 of the *NBW*. The phrase "terstond worden nagekomen en kan terstond nakoming worden gevorderd" must not be interpreted literally. It entails payment within a reasonable time, without unnecessary delay: see Nieuwenhuis, Stolker & Valk 451; Hartkamp 193.

86 See Ministry of Justice 146.

87 Article 6.1.6.39(2) of the *NBW*. See also art 1306 of the *BW*.

88 See Hartkamp 200-201.

89 See Hartkamp 201. This provision is rather controversial because the *BW* provides no solution to the problems contemplated by the *NBW*. Eg, the *BW* does not give an indication whether the claim should become due because the security provided (or promised) for it, has by chance become insufficient: see Ministry of Justice 147.

90 Article 6.1.6.40(a)-(c) of the *NBW*. See also art 1307 of the *BW*. See Hartkamp 201.

91 See again par 4.2 above as to the distinction between mutual insurance and insurance for profit.

92 See Wery 52; Clausing 3 *ed* 91. This represents a deviation from the position under Roman-Dutch law where the premium was, as a matter of general principle, payable in arrears: see again ch 3 par 3.3.2 above.

a non-recurrent premium is payable. In the case of most types of long-term insurance, such as property insurance and liability insurance, premiums are payable at the beginning of each new period of insurance.⁹³

Pre-payment of the premium is of particular importance in the case of life insurance.⁹⁴ Insurance contracts in general, and life insurance contracts in particular, usually provide that payment of the first premium is a condition for the contract to take effect.⁹⁵ The cover in terms of the insurance contract will be suspended or terminated, depending on the agreement between the parties, only if the insurer has sent a letter of demand to the insured. The insurer must give the insured at least 30 days' notice to pay the premium after the insured has fallen into default. This period of 30 days is calculated from the date of default or the date on which the letter of demand is served on the insured, whichever is the latest.⁹⁶ This statutory protection of the insured does not apply if the insured has informed the insurer (before the due date) that he will not be able to pay the premium.⁹⁷ The insurer is not allowed to stipulate that it will not be liable in terms of the contract should the risk materialise while the premium is unpaid but before the insured is in default.⁹⁸

The activities of the Board of Supervision⁹⁹ have an important influence on the Dutch insurance industry.¹⁰⁰ In terms of a decision of the Board, the payment of a premium which is late due to the insured's negligence does not automatically cause the lapse of the cover in terms of the contract. The Board decided in one case that the enforcement of a cancellation clause on the grounds of a late payment of the premium due to the insured's negligence, would have been detrimental to the reputation of the insurance industry. The Board concluded that even in the case of intentional non-payment of the premium, the insured should have been made aware of the adverse

93 Dorhout Mees *Handelsrecht III* 144.

94 Article 7.17.3.12(1) of the draft *NBW* provides that the risk in terms of a life insurance contract will not take effect before the payment of the first premium.

95 Meijers *Toelichting* 1196. Scheltema & Mijnsen 271 are of the opinion that a condition which requires the payment of the first premium for the contract to take effect, is regulated by the provisions of art 6.5.5.262 of the *NBW*. Thus, art 6.5.5.262 is a codification of the maxim *exceptio non adimpleti contractus*, ie, the exception on the ground that the plaintiff, too, is in default and therefore cannot demand performance. It provides that "[k]omt een der partijen haar verbintenis niet na, dan is de wederpartij bevoegd de nakoming van haar daartegenover staande verplichtingen op te schorten. In geval van gedeeltelijke of niet behoorlijke nakoming is opschorting slechts toegelaten, voor zover de tekortkoming haar rechtvaardigt".

96 Article 7.17.1.10(1) of the draft *NBW*. See also Nuytinck et al 20.

97 See art 6.1.9.83 of the *NBW*; Nuytinck et al 20.

98 Article 7.17.1.10(2) of the draft *NBW*. The insurer is, however, entitled to stipulate that the risk will attach only at the payment of the first premium: Meijers *Toelichting* 1167.

99 In Dutch, "Raad van Toezicht".

100 The decisions of the Board of Supervision are not binding authority and should be distinguished from the decisions of the courts, which are binding authority. The principal objective of the Board of Supervision is the protection of the integrity of the insurance industry. This does not mean that the courts do not take note of the decisions of the Board of Supervision. In general these decisions have strong persuasive value: see Wansink "NBW" 105. As regards the self-regulation and the disciplinary powers of the Board, see De Raad van Toezicht 27-33.

effect of such conduct, before the insurer would be allowed to rely on a cancellation clause.¹⁰¹

It has been decided by the courts that the principle of good faith may militate against an insurer which wishes to rely on a clause which suspends the cover in terms of the contract.¹⁰² In one case the premium in terms of the insurance contract was unpaid on the date stipulated for payment (25 February), and the risk materialised forty or so days later (9/10 April). The Court decided that the insured would be allowed to pay the premium and to enforce his claim in terms of the contract. This decision was reached despite the fact that the contract stipulated that the cover in terms of the contract would be cancelled at the expiration of 30 days after the due date.¹⁰³

Insurance contracts often provide for days of grace.¹⁰⁴ The insured is provided with the opportunity to rectify his delay by payment of the premium within, say, 14 or 30 days after the original due date. If the insured pays the premium within the days of grace, the cover in terms of the contract will revive from the date of payment, and not with retroactive effect. If the insured fails to pay the premium within the days of grace, the cover in terms of the contract will lapse with effect from the original date on which the premium was due.¹⁰⁵

Finally, the time of the payment of the premium is also important in establishing whether the insurance contract consists of a single contract or whether it consists of several insurance contracts. For example, if only one (annual) premium is payable during a particular year, the insurance contract will be deemed to be indivisible. If the same (annual) premium is payable in twelve equal instalments, the insurance contract nevertheless remains one single contract. This construction has a bearing on the duty to disclose which rests on the insured, as well as the possibility of a return of the premium.¹⁰⁶ If the premium is paid in twelve monthly premiums or instalments, the duty to disclose arises afresh on payment of each instalment since the contract is renewed on payment and acceptance of each premium. If one premium only is payable (even if it is paid in instalments), the duty to disclose arises once only.¹⁰⁷ Whether the contract is a single contract with a premium payable in twelve instalments, or whether it is divisible into several contracts, is a matter of construction of the policy. The question of whether

101 Clausing 3 *ed* 91-92.

102 See Clausing 3 *ed* 91-93 and the authorities cited there.

103 See the decision of the "Hof's Gravenhage", 18 October 1985, 1986 S & S 131. But the correctness of this decision will have to be reconsidered once the provisions of the draft *NBW* come into operation. Article 7.17.1.10(1) of the draft *NBW* provides that the insurer must give the insured 30 days to rectify the delay in the payment of the premium. If the insured fails to pay the premium in the 30 days following the delay, he will be in default: see Meijers *Toelichting* 1167.

104 The concept of "days of grace" (in Dutch, "terms de gr ce") is not unique to the insurance contract. A similar concept is also germane to insolvency procedures as well as contracts in general, where a moratorium is placed on the payment of debts: see Hartkamp 200.

105 Clausing 3 *ed* 91.

106 See Van der Burg 60. As to the influence on the frequency of the payment of the premium on its return, see par 4.6.1 below.

107 See Van der Burg 60.

the contract is a single contract or several contracts also has a bearing on the maximum amount of liability in terms of the insurance contract,¹⁰⁸ as well as on the question as to whether or not the premium or a portion of it must be returned.¹⁰⁹

4.3.3 The Mode of Payment

In terms of the general principles regarding the payment of debts in money, the debt (premium) must be paid in current money.¹¹⁰ But the parties are free to arrange for payment by another method should the terms of their contract, legislation, commercial usage or the principles of reasonableness and fairness provide or dictate such other method.¹¹¹ The debtor (insured) is entitled to pay the creditor (insurer) by way of an electronic transfer of funds, except if the creditor (insurer) forbids this type of payment.¹¹² Payment by way of the electronic transfer of funds is deemed to be made at the moment at which the creditor's (insurer's) account is credited.¹¹³

The *NBW* allows the debtor (insured) to pay the debt (premium) in a currency other than the Dutch currency should the place of payment indicated by the contract or the *NBW* not be in the Netherlands.¹¹⁴ The *NBW* also regulates the payment of interest on money debts.¹¹⁵

If the insurer as creditor accepts delivery of a cheque, postal order, transfer order or another document tendered to it as payment of the debt (premium), it is presumed to be taken subject to the document being honoured.¹¹⁶ The insurer as creditor is entitled to suspend its own performance until it is satisfied that the document of payment has been honoured.¹¹⁷

108 The insurance contract may provide that the insurer's liability is restricted to a certain amount in terms of any single insurance contract.

109 If a single or annual premium is payable the premium is not returnable once the risk has commenced: see Van der Burg 60. See also par 4.6 below.

110 Article 6.1.11.112 of the *NBW*. Current money entails coins and notes accepted by the State: Nieuwenhuis, Stolker & Valk 537-538.

111 Nieuwenhuis, Stolker & Valk 538.

112 Article 6.1.11.114(1) of the *NBW*. Such a prohibition by the creditor may not militate against the principles of reasonableness and fairness: Nieuwenhuis, Stolker & Valk 539. See also art 1426a of the *BW*.

113 Article 6.1.11.114(2) of the *NBW*.

114 Article 6.1.11.121 of the *NBW*. See also art 6.1.11.122-126 of the *NBW* for further provisions which apply to the payment of money debts in foreign currencies. As to the establishment of common risk premium tariffs in Europe in general, see Fitzsimmons 69-75. Article 6.1.11.113 of the *NBW* provides for an interesting rule where payment is made in the Dutch currency. In terms of this article, any debt in money must be rounded to the nearest figure divisible by five. The reason for this rule is that the smallest denomination in Dutch currency is a five cents coin. Eg, an amount of f14,99 must be rounded to f15,00 but an amount of f14,97 will be rounded to f14,95. See also art 1426(a) of the *BW*.

115 Articles 6.1.11.119-120 of the *NBW*. These articles should be read in conjunction with the provisions for the specific types of contract: see Nieuwenhuis, Stolker & Valk 544-546. See also art 1286-1287 of the *BW*.

116 See Hartkamp 188-189.

117 Articles 6.1.6.46(1)-(2) of the *NBW*.

In terms of the general rule regarding payment, any costs involved in a particular method of payment, as well as the cost of issuing a receipt, are borne by the person who makes the payment (the insured).¹¹⁸ The creditor (insurer) must issue a receipt for each payment which he receives, except where the contract or a trade usage or equity indicates otherwise. The debtor (insured) is entitled to suspend the payment if the creditor (insurer) wrongly refuses to issue a receipt.¹¹⁹ If the debtor (insured) must render performances of the same kind at two or more successive points in time, any two successive receipts create the presumption that all previous payments have also been made.¹²⁰ This is an irrebuttable presumption.¹²¹

If the insurer undertakes to request payment of the premium by way of the electronic transfer of funds,¹²² it is not allowed to rely on late payment of the premium to avoid the contract where it has not requested such premium from the insured or his bank by way of the premium request slip.¹²³ The insurer's ignorance of the correct address of the insured may result in a delay in the request and payment of the premium. If the broker has failed to inform the insurer of a change in the address of the insured, the late payment in terms of an electronic transfer of funds will be a ground for the insurer to deny liability in terms of the contract.¹²⁴

4.3.4 The Place of Payment of the Premium

The general principle provides that if no place has been determined in the contract for delivery of the debtor's (insured's) performance, performance must take place at the place where the debtor (insured) exercises his profession or business, or in the absence of such a place, at the place where he is domiciled.¹²⁵ This rule applies to performances other than the payment of money and will be relevant, for example, in the case of a mutual insurance contract, in which case the premium consists of something other than money.¹²⁶ Debts (premiums) which comprise the payment of money must be paid at the domicile of the creditor (insurer)¹²⁷ except where legislation, usage or

118 Article 6.1.6.47 of the *NBW*. This article applies also if payment was made by a third party on behalf of the debtor: Ministry of Justice 154; Nieuwenhuis, Stolker & Valk: 456; Hartkamp 210. See also art 1431 of the *BW*.

119 Article 6.1.6.48(1) of the *NBW*. See also Hartkamp 211.

120 Article 6.1.6.50(1) of the *NBW*. See also art 1430 of the *BW*. See Hartkamp 212-213. This rule is derived from Roman-Dutch law: see Ministry of Justice 284 and the reference to Voet *Commentarius ad pandectas* 46 3 14.

121 See Ministry of Justice 157.

122 Eg, by way of a debit order. In Dutch, "acceptgirokaart".

123 See Clausing 3 *ed* 94-95 and the authorities cited there.

124 Clausing 2 *ed* 68.

125 Article 6.1.6.41 of the *NBW*. See also art 1429 of the *BW*. See Hartkamp 204-207.

126 See again par 4.2 above as to the nature of the premium.

127 Article 6.1.11.116(1) of the *NBW*. Article 6.1.11.116(1) should be read with art 6.1.6.41 of the *NBW*. Articles 6.1.11.111-126 of the *NBW* deal with the payment of money debts and should be read with art 6.1.6.27-51 of the *NBW*, which deal with the payment of debts in general. See also art 1429-2 of the *BW*: Hartkamp 205. This rule is based on a rule expounded by Pothier: see Ministry of Justice 148-149.

the contract indicates the contrary.¹²⁸ The creditor (insurer) is allowed to indicate a place of payment other than his domicile upon the conclusion of the contract.¹²⁹

A debt which has arisen from the profession or business of the creditor must be paid at the place of business of the creditor.¹³⁰ Thus, except if the policy indicates the contrary, the payment of the premium must take place at the domicile of the insurer.¹³¹ If the contract is concluded through the intervention of a broker,¹³² the premium is payable neither at the domicile of the creditor (insurer), nor at the domicile of the debtor (insured). The broker is invoiced for the premium by the insurer and he bears the responsibility for paying the premium to the insurer.¹³³ Payment of the premium where a broker is involved is therefore largely a matter of book entries.¹³⁴

4.3.5 By Whom the Premium Is to Be Paid

In terms of the general principle the debtor (insured) will be released if payment to the creditor (insurer) has been made by a third party and accepted as payment by the creditor (insurer). It is not necessary for the third party to have an interest in the payment of the debt (premium).¹³⁵ Payment by a third party will not release the debtor (insured) if the contract forbids performance by a third party.¹³⁶ The creditor (insurer) is entitled to reject payment by a third party, even in the absence of a term in the contract which forbids such payment.¹³⁷ Article 6.1.6.34 of the *NBW* provides that a debtor (insured) who has paid a person who was not entitled to receive payment, can, in certain circumstances, invoke his release against the person to whom the payment should have been made. In order to be released the debtor (insured) has to prove that he had reasonable grounds to believe that the recipient of the payment (premium) was entitled to the performance as creditor, or that the payment was to be made to him for another reason. Where payment of the debt by a third party fulfills, as regards such third party, the requirement of article 6.1.6.34 of the *NBW*,¹³⁸ the third party can claim the releasing effect of the payment in his favour.¹³⁹

128 Article 6.1.11.115 of the *NBW*. See also art 1429-1 of the *BW*.

129 Article 6.1.11.116(2) of the *NBW*.

130 Article 6.1.11.118 of the *NBW*. See also art 14 of the *BW*.

131 In Dutch, "een brengschuld". If the payment is to take place at the domicile of the debtor, it is known in Dutch as "een haalschuld". See also Molengraaff *Leidraad* 671; Fonkert 116; Van Barneveld 414.

132 As to the role of brokers and other insurance intermediaries in the conclusion of the insurance contract and the payment of the premium, see par 4.5 below.

133 Van Barneveld 414-415.

134 See further par 4.5.4 below.

135 See Hartkamp 166 who gives the examples of a wealthy uncle who pays a debt on behalf of his nephew, or a friend of the debtor who pays the debt while the debtor is on holiday.

136 Article 6.1.6.30(1) of the *NBW*. See also art 1418 and 1419 of the *BW*; Van der Burg 60n3; Hartkamp 168; Nuytinck et al 24n75.

137 Article 6.1.6.30(2) of the *NBW*.

138 Namely that the third party had reasonable grounds to believe that the recipient of the payment (premium) was entitled to the performance as creditor, or that payment was to be made to him for another reason.

139 Articles 6.1.6.35(1) and 6.1.6.35(2) of the *NBW*. In the case of a payment in terms of art 6.1.6.34 and 6.1.6.35, the person who is entitled to payment, will have recourse against a person who has received payment without having a right to it: art 6.1.6.36 of the *NBW*.

The debtor (insured) is entitled to suspend payment of the debt if he has reasonable doubts as to whom the payment must be made.¹⁴⁰ There is no indication in the *NBW* as to any formal steps¹⁴¹ which a debtor (insured) must take in exercising his right to suspend payment. It is, however, required that the debtor should exercise this right in good faith.¹⁴²

The *NBW* provides that where the individual owners of flats in a complex or block of flats take out compulsory fire or explosion insurance, they are represented by the manager of the complex or block who bears the responsibility to pay the premium and claim the indemnity from the insurer.¹⁴³

The insured is, as a matter of general principle, responsible for the payment of the premium.¹⁴⁴ But it is not essential that the premium be paid by the insured.¹⁴⁵ The premium can be paid on behalf of the insured by an individual, for example, the employer of the insured,¹⁴⁶ or the pledgee of a non-indemnity policy,¹⁴⁷ or by an authority, for example, the government.¹⁴⁸

Article 263 of the *WvK* provides that in the case of the transfer of ownership of the insured object in terms of the insurance contract, the cover provided by the insurance contract is similarly transferred (by operation of law) to the new owner.¹⁴⁹ Thus, if the insurable interest in the particular risk object passes under singular title¹⁵⁰

140 Article 6.1.6.37 of the *NBW*.

141 Eg, sending a notice to the would-be creditor of his decision to suspend payment.

142 See Nieuwenhuis, Stolker & Valk 450-451.

143 Article 5.9.3.136 of the *NBW*. However, the manager acts as agent of the individual owners and this is consequently not a true example of a third party who pays the premium from his own pocket: Nieuwenhuis, Stolker & Valk 407-408.

144 Article 7.17.1.1(1) of the draft *NBW*; Nuytinck et al 20. See also Hartkamp 166.

145 See Van der Burg 60n3; Veldkamp 8-9; Nuytinck et al 21.

146 Eg, in the case of social insurance where both the employer and the employee contribute to the premium. If the employee's remuneration consists of something other than money, the employer bears the responsibility to pay the full premium: De Guasco, Van der Meer & Huij 68-69.

147 Article 7.17.3.15(1) of the draft *NBW* provides that the insurer in terms of a non-indemnity policy must give written notice of the non-payment of the premium to the pledgee. As the pledgee has an interest in keeping up the policy, this will enable the pledgee to encourage the pledgor to pay the premium or to pay the premium himself: see Nuytinck et al 155.

148 See Rang 61. For a discussion of the question whether a third party who has paid the premium in terms of a life policy on another person's life, is allowed to deduct the amount of the premium from his taxable income, see Geenen 7-8; Nanninga 209-210. In terms of Dutch revenue law, the third party is not allowed to deduct the premium from his taxable income since he is not the debtor in terms of the insurance contract. But if the third party has committed himself towards the insurer to pay the premium, he will be a debtor in terms of the insurance policy: see Geenen 7.

149 See the decision in "Hooge Raad", 13 February 1930, *NJ* 1930 415 which confirmed this principle. But see the note (by EM Meijers) on this decision in which the question was raised as to the right of the new owner to reject the insurance contract and to conclude an insurance contract with another insurer. According to this note, art 281 of the *WvK* will apply to this situation and the new owner will be entitled in principle to cancel the insurance contract and to conclude a new contract. This view is shared by Burgers 53.

150 In Dutch, "onder bijzondere titel". Singular title is the opposite of universal title.

to the new owner and he takes over the insurance contract from the previous owner, the new owner becomes responsible for the payment of the premium.¹⁵¹

If the insurance contract was concluded on behalf of a third party, it needs to be established whether the contract was concluded in favour of a third party or whether it was concluded by a mandatary on behalf of his mandator. In the case of a stipulation in favour of a third party, the actual party to the insurance contract will still be liable for the payment of the premium. In the case of a contract of mandate, the mandator will be liable to pay the premium.¹⁵²

4.3.6 To Whom the Premium Is to Be Paid

In terms of the general principles of the law of contract, payment should be made to the creditor (insurer) or his representative.¹⁵³ In terms of these general principles payment by the debtor (insured) to an incapable¹⁵⁴ creditor (insurer) will release the debtor (insured) if the creditor (insurer) has benefited from the payment, or if the payment has reached the incapable creditor's legal representative.¹⁵⁵ Although this provision would at first appear to be of little relevance to insurance contracts (where the insurer is usually a juristic person and its capability to receive the premium is never an issue) it may nevertheless apply to certain insurance contracts.¹⁵⁶

Payment to someone other than the creditor will also release the debtor if the creditor ratifies the payment.¹⁵⁷ If the debtor pays someone who is not entitled to receive payment, the debtor can invoke his release by payment against the creditor, provided that he is able to prove that the payment was made in good faith and that he had reasonable grounds to believe that the recipient of the payment was entitled to receive payment as creditor.¹⁵⁸ A third party who has received payment to which he was not entitled, is regarded as the debtor of the person who has made the payment.¹⁵⁹ The return of the premium by the third party in such circumstances is due with immediate effect.

151 Article 7.17.2.6(1) of the draft *NBW*. Article 7.17.2.6(2) of the draft *NBW* provides some protection to the insurer in that it is allowed to deduct any unpaid premium from the amount of indemnification claimed in terms of the contract: Meijers *Toelichting* 1174. See also Dorhout Mees *Handelsrecht III* 235.

152 Scheltema & Mijnsen 272.

153 See Hartkamp 169-170.

154 I.e., a minor or a person under curatorship.

155 Article 6.1.6.31 of the *NBW*. See also art 1423 of the *BW*; Hartkamp 176-177.

156 See Van Barneveld 80 et seq for examples of different types of insurer which include, in certain circumstances, individuals.

157 Article 6.1.6.32 of the *NBW*. See also art 1421 of the *BW*; Hartkamp 176.

158 Article 6.1.6.34 of the *NBW*. For the payment to release the debtor in terms of this article, it is not sufficient for the debtor merely to prove that he was under the impression that the third party was the lawful representative of the creditor: Nieuwenhuis, Stolker & Valk 449. See also art 1422 of the *BW*; Hartkamp 177. This article justifies an extensive, rather than a narrow interpretation: Ministry of Justice 281.

159 Article 6.4.2.205 of the *NBW*. See also art 1398 of the *BW*.

4.3.7 The Amount of the Premium

The premium represents the possibility of risk and is usually expressed as a percentage of the insured sum.¹⁶⁰ The amount of the premium must be certain or ascertainable.¹⁶¹ The amount of the premium may not be left to the sole discretion of the insurer or of the insured.¹⁶²

The amount of the premium is usually stipulated in the contract. The premium in terms of an insurance for profit contract¹⁶³ is determined on actuarial grounds,¹⁶⁴ and is usually a fixed percentage of the insured sum.¹⁶⁵ The insurer in terms of an insurance for profit contract therefore levies an estimated but fixed premium, and is therefore also referred to as a speculative insurer. As the amount of the premium in terms of an insurance contract for profit is fixed upon the conclusion of the contract, any surplus or deficit in the books of the insurer at the end of a particular period of insurance is for its account. For example, if the total premium income of the insurer falls short of making good the total amount of claims for a particular year, the insurer is not allowed to request its insured to contribute to the shortfall. The insurer has to supplement the shortfall from its own reserves.¹⁶⁶ But if the total premium income exceeds the amount paid out in claims during that year, the insurer keeps the surplus, as its profit.

The amount of the premium¹⁶⁷ in terms of mutual insurance is directly linked to the trading results of the mutual society. The premium is usually not fixed upon conclusion of the contract but only after the period of insurance has lapsed.¹⁶⁸ Often a preliminary premium is levied at the beginning of a mutual society's financial year, and a final premium at the end of the financial year when it is possible to establish the trading results of that particular year.¹⁶⁹ A final premium is usually payable only if the preliminary premium is insufficient to cover the total amount of claims during the particular year. In the case of mutual insurance the society, that is, the insurer, is usually not supposed to show either a surplus or a loss resulting from the contributions made by the members.¹⁷⁰ The fact that a final premium is levied, ensures that there is neither a shortfall nor an incidental surplus.¹⁷¹

The amount of the premium is determined with regard to the following considerations: First, the amount required by the insurer to indemnify the insured upon the

160 Dorhout Mees *Handelsrecht III* 144.

161 Molengraaff "Overeenkomst" 446.

162 Hage 171.

163 See again par 4.2 above for the distinction between insurance for profit and mutual insurance.

164 Scheltema & Mijnsen 270.

165 See Dorhout Mees *Schadeverzekeringsrecht* 192; Dorhout Mees *Handelsrecht III* 144.

166 See Van Barneveld 113 et seq.

167 In Dutch, "omslag".

168 Dorhout Mees *Handelsrecht III* 144.

169 Dorhout Mees *Handelsrecht III* 113.

170 Hage 166-167.

171 See again par 4.2 above as to the other distinctions between insurance for profit and mutual insurance.

materialisation of the risk. Secondly, the administrative costs involved in issuing and maintaining the policy.¹⁷² Thirdly, the commission of the insurance intermediary. Fourthly, the profit of the insurer for bearing the risk.¹⁷³ In the case of life insurance it is in principle possible to determine the premium on a scientific basis.¹⁷⁴ But in the case of non-indemnity insurance the calculation of premiums is to a large extent based on a calculated prediction and a measure of speculation.¹⁷⁵ The amount of the premium in terms of indemnity insurance policies tends to fluctuate more from one year to another than in the case of non-indemnity insurance.¹⁷⁶

The time of payment of the premium may also co-determine the amount of the premium. Insurers often give discount on the premium if the insured is prepared to pay the premium in terms of a long-term insurance contract in advance.¹⁷⁷

In a Supreme Court decision it was held that if the insurer unilaterally increases the annual premium during the duration of the contract, the insured is in principle entitled to cancel the contract. The premium for the portion of the time when the insurer was at risk, is not returnable to the insured. But the insured is entitled to claim a pro rata return of the premium which was paid in advance.¹⁷⁸ This decision supports the general principle that the amount of the premium is subject to agreement between the parties. If the contract provides for a fixed or determinable increase in the premium during the duration of the contract, the insurer is entitled to enforce this stipulation.¹⁷⁹

In principle the insurer is not allowed to increase the premium in terms of an insurance contract during a particular period of insurance. However, the insurer is allowed to adjust the premium at the beginning of a new period of insurance if it becomes aware of circumstances which will increase the possibility of the realisation of

172 Eg, the costs involved in printing and delivery of the policy, and the costs involved in sending the insured reminders to pay outstanding premiums.

173 Van Barneveld 408.

174 See Stigter/Ploeg 3-59 for an overview of the actuarial principles underlying life insurance.

175 Mesritz 4-6; Van Barneveld 410. It has also been said that "[k]ostprijsbepaling [van de schadeverzekering] is dan niet mogelijk. Staat de dekking wel vast dan is het slechts op grond van ruim cijfermateriaal uit het verleden (goede statistieken) en betrouwbare prognose voor de toekomst mogelijk om tot schatting van de schadelast te komen ... tot de totale kostprijs": Claes 1008-5. The type of insurance will also play a role in the calculation and amount of the premium. For a discussion of the different considerations to be taken into account when assessing the rate of the premium in the case of travel insurance, see Den Ouden Huijge, Phillips & Renckens 29; for a discussion on the permissibility of differentiation in premiums in terms of life insurance, see Catz 68 et seq.

176 The reason for this phenomenon is obvious. Changing social and economic factors like the crime rate, natural disasters and the inflation rate tend to have a much greater influence on indemnity insurance than on non-indemnity insurance: Van Leeuwen *Verzekeringsbedrijf* 9-10.

177 Westermann 83.

178 "Hoge Raad", 3 November 1989, *NJ* 1990 no 78 at 336-337.

179 Van Nieveldt 47.

the risk.¹⁸⁰ The insurer is allowed to make a general adjustment to the premium of all the policies of a particular kind. Should the insurer decide on a general increase in the premiums in terms of a particular type of policy, all the insured must be informed accordingly.¹⁸¹

The amount of the premium must be in relation to the risk born by the insurer. If the amount of the premium is too high in relation to the risk, the market will (indirectly) ensure a correction in that the particular insurer will lose its clients to other insurers.¹⁸² Molengraaff refers to Santerna, who suggested that if the amount of the premium is out of all proportion to the risk born by the insurer, the contract is not one of insurance but a wager.¹⁸³ But Molengraaff indicates that this statement by Santerna must be seen against the fact that he was a canonist and that his writings were probably influenced by the papal prohibition against usury.¹⁸⁴ This approach of Santerna seems to describe the ideal economic situation, rather than reality. The practice of insurance shows that in some types of insurance the premium appears to be unrealistically low, while in other types of insurance the premium is disproportionately high when compared with the risk born by the insurer.¹⁸⁵ Van Nievelde appears to grasp the crux of the matter by stating that although the amount of the premium is supposed to bear a resemblance to the extent of the risk, the parties are nevertheless in principle free to agree on any amount.¹⁸⁶

It would appear that it is not necessary for the (exact) amount of the premium to be stipulated in the policy. But the fact that the insured undertook to pay a premium must be reflected in the policy.¹⁸⁷ In practice the parties often prefer not to mention the amount of the premium in the policy. For example, a seller who is, in terms of a contract of sale, under an obligation to insure the object of the risk, may prefer that the buyer is ignorant as to the amount of the premium. Van Barneveld hints that the insurer may

180 Article 7.17.2.11(1) of the draft *NBW*. But this article does not apply to insurance contracts in respect of human lives, livestock, and transport: art 7.17.2.11(2) of the draft *NBW*. The reason for these three exceptions to the general rule is the fact that the possibility of an *increase* in the particular risk which underlie each of them, goes to the root of the nature of these types of insurance: Meijers *Toelichting* 1176.

181 Clausen 3 ed 97.

182 Van Barneveld 408-409.

183 Molengraaff "Overeenkomst" 429.

184 Molengraaff "Overeenkomst" 430-431.

185 See Rang who states (at 60) that "[d]e concurrentie [de verzekerings wedijver] heeft veroorzaakt, dat [de premie] in bepaalde gevallen tot een onverantwoord niveau is gedaald. Een voorbeeld daarvan is de wettelijke aansprakelijkheidsverzekering voor bromfietzers: de premie is zo laag, dat nauwelijks de administratiekosten zijn gedekt. Het gebeurt echter ook, dat de premietarieven, door gebrek aan concurrentie, niet worden aangepast, zodat de premie onbehoorlijk hoog is in verhouding tot het risico. Dit bespeuren wij bijvoorbeeld bij de levensverzekering" (my insertions).

186 Van Nievelde 43.

187 Article 256-1(7) of the *WvK* requires that the "premie van verzekering" must be mentioned in the policy. See also Van Barneveld 413 who states that "[w]el bepaalt sub 7 van artikel 256K., dat in de polis "de premie van verzekering" moet worden vermeld, maar daar dit artikel slechts aanvullend recht behelst, volgt hier een dergelijke plicht niet uit. Niet in te zien valt, waarom de premie in de polis zou moeten worden genoemd."

prefer to include the amount of the premium in the purchase price, and that he may therefore be reluctant to give a "break-down" of the purchase price to the buyer. The economic reasoning behind such an attitude speaks for itself.¹⁸⁸ The seller and the insurer may then agree to insure the object "according to the contract" or "at a premium as arranged".¹⁸⁹

Similarly, the parties may prefer not to mention the amount of the premium in the policy if they have not yet reached consensus on the exact amount of the premium. It would be sufficient if the parties laid down an express or implied method or guideline by way of which the premium could be determined. If the amount of the premium is not mentioned in the policy, it must therefore be taken that the parties intended that a reasonable premium would be payable. The concept of "a reasonable premium" comprises the current premium being levelled for the particular type of risk by the insurance exchange.¹⁹⁰ If it is not possible to determine the amount of the premium or if no intention by the parties to insure at a reasonable premium can be deduced, the contract will be void for vagueness.¹⁹¹

Article 7.1.1.4 of the *NBW* provides that if a contract of sale is concluded without a price having been determined, the buyer must pay a reasonable price. A number of factors may determine what a reasonable price is. The price a seller would usually have contracted for at the time of the conclusion of the contract, is the price which is considered reasonable. The question as to whether or not the thing in question is a luxury article or not, is a further factor which may be taken into account in this regard. A reasonable price can also be determined by taking into account the going price.¹⁹² It is obvious that Dutch law acknowledges the principle of a reasonable price and that a contract, the price of which has not been agreed upon on the conclusion of the contract, will not be invalid purely for that reason. It may be argued, by way of analogy, that the Dutch law will acknowledge the concept of a "reasonable premium", if and when the courts are asked to decide the question.¹⁹³

The parties may also decide to appoint a third party in the policy to fix the premium.¹⁹⁴ If the third party fails to fix the premium, the contract will be void for vague-

188 See Van Barneveld 413.

189 See Van Barneveld 413.

190 See Molengraaff *Leidraad* 671.

191 See Van Barneveld 413-414.

192 The "going price" is the price which is paid on the open market for a particular object or service. See Meijers *Toelichting* 840n8 who is of the opinion that the criterium of "the going price" provides only a solution where the seller is a merchant, because art 7.1.1.4 of the *NBW* provides for the relationship between merchants. See also Nieuwenhuis, Stolker & Valk 739.

193 In the decision in the "Hof Arnhem", 14 July 1927, *NJ* 1928 1699 the premium was not fixed at the conclusion of the contract, but it was agreed that the premium would be the average premium for the particular type of risk. See again par 4.1 above as to the applicability of the general principles of the law of contract to the insurance contract.

194 Molengraaff *Leidraad* 671 gives the following example of such a clause: "Voor zoverre er risico's valideren op dit contract, waarvan de premie of conditie niet hieronder bepaald zijn, zullen deze bij onderlinge schikking of des noods door arbiters geregeld worden".

ness.¹⁹⁵ An expert may also be appointed to fix the increase in the premium if the policy provides for such an increase but the method of determining the exact amount of the increase was not stipulated in the policy.¹⁹⁶

In the case of certain types of social insurance the premium is to be fixed by a statutory body or the Minister concerned with social security.¹⁹⁷

In Dutch law the question as to whether a particular court has jurisdiction to decide a case depends on the amount involved in the dispute. For purposes of establishing the jurisdiction of a court, the separate instalments of an annual premium are regarded as a single amount, and the aggregate of the separate premiums is of no relevance.¹⁹⁸

4.4 NON-PAYMENT OF THE PREMIUM

4.4.1 Introduction

Every creditor to a reciprocal contract is in principle entitled to cancel the contract if the debtor is partially or fully in default.¹⁹⁹ A debtor will be in default if the creditor has sent him a letter of demand and the debtor has failed to perform within the (reasonable) period stipulated for performance in the letter of demand.²⁰⁰

The non-payment of the premium in terms of a liability insurance policy in the event of the insolvency of the insured, will not have the effect of terminating the insurance contract. But the insurer will be entitled to deduct the amount of the premium which is in arrears from the amount of indemnity owed to the insured in terms of the policy.²⁰¹

195 See also art 1501 of the *BW* which provides that "[i]ndien die derde de [prijs] niet wil of niet kan doen, heeft er geen koop plaats" (my insertion).

196 See art 661 of the *WvK* which provides that "[i]ndien verhooging van premie, voor het geval van opkomenden oorlog of andere te ontstane gebeurtenissen, bedongen is, wordt dezelve, voor zoo verre de hoegrootheid der verhooging niet bij de polis is uitgedrukt, des noods door den regter, na verhoor van deskundigen geregeld, met inachtneming van het gevaar, de omstandigheden en de bij de polis gemaakte bedingen". See also Molengraaff *Leidraad* 671.

197 See De Guasco, Van der Meer & Huij 201; Leede 40.

198 Dorhout Mees *Schadeverzekeringsrecht* 192.

199 Article 6.5.5.265 of the *NBW*; art 1302 of the *BW*. See also Dorhout Mees *Handelsrecht III* 109.

200 Article 6.1.9.81-82 of the *NBW*. See also art 1274 of the *BW*. For an example of where the insurance contract provided for the immediate termination of the contract if the premium was still unpaid eight days after the due date, see the decision in "Rechtbank Utrecht", 1 November 1922, *NJ* 1923, 982.

201 Article 3.10.3.287 of the *NBW*. It is suggested that the insurer enjoys a unjustifiable advantage to the other creditors in terms of article 3.10.3.287 of the *NBW*: Wansink "NBW" at 86-87.

The policy usually provides for a period of grace.²⁰² A term which provides for a period of grace allows an insured who has failed to pay the premium on the due date stipulated in the contract respite to pay the premium within a fixed period of time (usually fourteen days) after the original due date. During the period of grace the insured does not enjoy any cover in terms of the insurance contract but payment of the premium within the period of grace will prevent the lapse of the contract.²⁰³ The cover in terms of the contract is therefore suspended pending the payment of the premium during the period of grace. By paying the premium during the period of grace the insured is allowed to prevent the lapse of the policy.

The contract usually stipulates the consequences of non-payment of the premium, for example, that the payment of the premium by the insured will be a condition for the enforcement of the claim.²⁰⁴ A term which provides thus has been ruled not to be contrary to the principles of public order, reasonableness and equity.²⁰⁵ But the insurer is, in the absence of a resolutive condition, not allowed to regard the contract as automatically cancelled in the event of the default of the insured.²⁰⁶ The insurer must notify the insured in writing of its intention to cancel the contract.²⁰⁷

Article 7.17.1.10 of the draft *NBW* provides that the non-payment of a second or later premium will not result in the suspension or termination of the insurance cover or the insurance contract, unless the insurer has sent the insured a letter of demand. The letter of demand must give the insured the opportunity to pay the outstanding premium within a period of 30 days following the original due date, or the date on which the letter of demand was received, whichever is the latest.²⁰⁸

Generally, the insurer is entitled to claim damages from the insured for the non-payment of the premium if it is able to prove that it has suffered damage.²⁰⁹

202 As to the difference between a suspensive condition for payment of the debt ("terms de droit"), and a period of grace clause ("terms de grâce"), see Hartkamp 200. In terms of a suspensive condition the creditor is not allowed to claim performance until the date set for performance. In terms of a period of grace clause, in contrast, the performance is already due, but the creditor prefers to give the debtor some extra time to pay the debt. Although the practical consequences of both legal phenomena appear to be similar, there are important dissimilarities. In terms of an insurance contract the insured enjoys cover notwithstanding the fact that the payment of the premium is suspended. However, during the period of grace the insured usually does not enjoy cover.

203 Dorhout Mees *Handelsrecht III* 144.

204 Van der Burg 61.

205 See Dorhout Mees *Schadeverzekeringsrecht* 194. But also see par 4.3.3 above.

206 Dorhout Mees *Schadeverzekeringsrecht* 195.

207 See art 1302 of the *BW*; art 6.5.5.267 of the *NBW*.

208 See Nuytinck et al 19-20. Likewise, in the case where a non-indemnity insurance policy is given in pledge, the insurer must give written notice to the pledgee of the non-payment of the premium: see art 7.17.3.15(1) of the draft *NBW*. This will enable the pledgee to encourage the pledgor to pay the premium, or to pay the premium himself: see Nuytinck et al 155.

209 Articles 6.1.10.95-100 of the *NBW*; Nuytinck et al 23.

4.4.2 Non-Payment of the Premium in Terms of Indemnity Insurance Contracts

In most instances the contract stipulates the consequences of non-payment of the premium. For example, the payment of the first premium is usually a suspensive condition for the cover in terms of the contract to take effect. As regards the payment of subsequent premiums the contract usually allows for a period of grace. In the case of non-payment of the premium, the contract usually provides that the insured will not be able to claim an indemnity should the risk materialise.²¹⁰ If the contract contains a cancellation clause, the insurer will be entitled to cancel the contract because of the non-payment of the premium. It has been held that an insurer which cancelled the contract only four years after the non-payment of the premium occurred, acted in bad faith.²¹¹

If the policy does not provide for the consequences resulting from non-payment of the premium, the position is uncertain. In the case of indemnity insurance the insurance contract is renewed at the end of each period of insurance.²¹² Non-payment of the premium in terms of an indemnity insurance contract will not automatically cause the insurance contract to lapse. In the absence of a cancellation clause, some writers are of the opinion that the insurer is nevertheless entitled to cancel the contract.²¹³ But others do not share this view and are of the opinion that the cancellation of the contract would have undesirable results.²¹⁴ They suggest that cancellation (in the absence of a cancellation clause) can be effected only through a letter of demand or an order of court.²¹⁵

If the insured has committed an intentional misrepresentation or breach of contract, the insurer will nonetheless not be entitled to claim the premium for the new period of insurance.²¹⁶ The reason for this rule must be seen in the light of the fact that the renewal of the insurance contract is a matter of consensus between the parties. The insured therefore has the freedom of choice to renew the contract or to refrain from doing so.

Article 7.17.1.10 of the draft *NBW* provides protection to the insured where he has neglected to pay the second or later premium under an insurance contract. It provides that such non-payment will not result in the suspension or termination of the insurance cover or the insurance contract, unless the insurer has sent the insured a letter of demand. It further provides that the letter of demand must give the insured the

210 See Van Barneveld 418-419. For an example of a case where the policy provided for the termination of the cover in terms of the contract 30 days after the due date for the premium lapsed, see the decision in "Rechtbank Amsterdam", 23 January 1985, 1985 S & S 366 at 367.

211 See the decision in "Rechtbank 's-Gravenhage", 9 January 1923, *NJ* 1924 49.

212 See Dorhout Mees *Handelsrecht III* 146; Clausing 3 ed 95-96.

213 See Westermann 84 who relies on the provisions imposed by art 1301 of the *BW*. See also art 6.1.5.22 of the *NBW*. But this article does not support Westermann's notion, as it deals with a resolutive condition, which is in essence a cancellation clause.

214 See in this regard Fonkert 123; Den Ouden Huijge, Phillips & Renckens 104.

215 Van Barneveld 418.

216 See Dorhout Mees *Handelsrecht III* 146; Clausing 3 ed 95.

opportunity to pay the outstanding premium within a period of 30 days following the original due date, or the date on which the letter of demand was received, whichever is the latest.²¹⁷

4.4.3 Non-Payment of the Premium in Terms of Non-Indemnity Insurance Contracts

Non-indemnity insurance policies²¹⁸ often provide for different results in the event of non-payment of the premium. The contract does not usually create an obligation to pay the premium, but the actual payment of the premium is often made a condition for continued cover in terms of the contract. The insured is therefore, as a matter of general principle, entitled to suspend payment of the premium in terms of the contract.²¹⁹

Non-indemnity insurance contracts usually contain a period of grace during which the insured is allowed to pay the premium, notwithstanding the fact that he has failed to pay the premium on the date set for payment in the contract. Payment of the premium during the period of grace will ensure that the insured enjoys continued cover in terms of the contract.²²⁰

If the premium in terms of a life insurance contract is still unpaid 30 days after the due date, the insurer may regard the contract as having lapsed.²²¹ But if the policy contains an element of saving, as non-indemnity policies often do, the insured is allowed to suspend payment of the premiums and to surrender the policy, provided that sufficient funds have been accumulated at the time of surrender.²²² Some writers suggest that a life policy may (validly) provide that the insured is not entitled to surrender it.²²³

Non-indemnity insurance contracts often provide for an option whereby the insured is able to suspend the further payment of premiums in terms of a policy which has already been in force for a number of years, without the policy lapsing.²²⁴ The

217 See again par 4.4.1 note 206 above.

218 Eg, life insurance policies.

219 See Fonkert 353; Stigter/Ploeg 45; Van Veen *Levensverzekering* 16.

220 Dorhout Mees *Handelsrecht III* 220.

221 Article 7.17.3.12(2) of the draft *NBW*. Meijers *Toelichting* 1196. See again par 4.3.2 above.

222 Article 7.17.3.15 of the draft *NBW*. See also Van Veen *Levensverzekering* 16. Article 7.17.3.15 of the draft *NBW* provides for the termination of the payment of premiums, while art 7.17.3.13 of the draft *NBW* provides for the surrender of the policy: see Meijers *Toelichting* 1197.

223 See Stigter/Ploeg 47-48. This statement is probably incorrect. Article 7.17.3.13(1) of the draft *NBW* provides that the insurer is under an obligation to adhere to the insured's request to surrender the policy or to convert the policy to a "premiumless" policy, should the policy dispose of a surrender value: Meijers *Toelichting* 1196. As to the concept of "premiumless insurance", see again par 4.2 above.

224 In Dutch, "premiëvrije verzekering". See art 7.17.3.13 of the draft *NBW*: Meijers *Toelichting* 1196-1197. Such a policy is also often referred to in insurance parlance as a matured policy. On the possibility (or rather, the correctness) of the use of the concept of "premiumless" or "free" insurance, see in general par 4.2 above.

policy is kept in force by paying the premium from money accumulated in the reserve fund.²²⁵

If a non-indemnity policy does not contain an option to keep the policy in force by utilising the funds accumulated in the reserve fund, the non-payment of the premium will eventually result in the lapse of the policy. The insured will receive the surrender value of the policy (if there is any).²²⁶ If the policy has not yet accumulated a positive value, the insured will lose the premiums already paid in the case of the non-payment of further premiums.²²⁷

4.5 THE ROLE OF BROKERS AND OTHER INTERMEDIARIES IN THE PAYMENT OF THE PREMIUM

4.5.1 Introduction

Insurance contracts are usually concluded through the intervention of an insurance intermediary. Dutch law draws a distinction between two types of insurance intermediary.²²⁸

First, there is the insurance agent²²⁹ who is often no more than a commercial agent.²³⁰ However, the insurance agent occasionally acts independently from the insurer, and the circumstances of each case will determine whether or not the insurer can be held liable for the conduct of the agent. Generally, an insurance agent is an independent intermediary rather than a commercial agent. It is also possible for the agent to act as mandatary of the insurer in respect of the receipt of the premium.²³¹

²²⁵ See Van Barneveld 417; Stigter/Ploeg 48-49; Van Veen *Levensverzekering* 17 50. See also art 7.17.3.15(2) of the draft *NBW*.

²²⁶ See Van Barneveld 417; Van Veen *Levensverzekering* 16-17.

²²⁷ Stigter/Ploeg 46.

²²⁸ See Dorhout Mees *Handelsrecht I* 14-36 for the general principles regarding agency.

²²⁹ In Dutch, "verzekeringsagenten". Van Barneveld at 158-160 draws a further distinction between agents and empowered agents. An "agent" is often no more than a commercial agent while an "empowered agent" in terms of the "Wet Assurantiebemiddelingsbedrijf" 1991 is an insurance agent who acts on behalf of the insurer. According to Van Barneveld at 158-163 there is a difference between a broker ("makelaar") and an insurance intermediary ("assurantiebezorger") on the one hand, and an agent ("agent") on the other hand. The difference is that in principle the "makelaar" and "assurantiebezorger" act independent from the insured and the insurer, while the "agent" usually stands in some sort of a relationship to the insurer. He also refers at 158 to the fact that the concept "agent" is a contradiction in terms because "agent" means spontaneous agency (*negotiorum gestio*) and the "agent" in terms of an insurance contract is usually not an unauthorized agent (*negotiorum gestor*). Be that as it may, he concludes that the concept of "agent" is to such an extent part and parcel of Dutch insurance parlance that it should be tolerated.

²³⁰ In Dutch, "handelsagenten". See also art 75 of the *WvK* which regulates the relationship between the commercial agent and his principal.

²³¹ Section 14 of the "Wet Assurantiebemiddelingsbedrijf" provides that the insurance intermediary is in principle entitled to collect the premium on behalf of the insurer ("... verzorgt de tussenpersoon voor de verzekeraar het incasso der premies"). See also Dorhout Mees *Handelsrecht III* 115.

Secondly, there is the insurance broker²³² who is generally deemed to be the mandatary of the insured, and is suppose to obtain cover for the insured on the most favourable terms. But brokers also often act as the mandatary of one or more (usually foreign) insurance companies.²³³ It is important to note that article 62 of the *WvK* defines the broker as an independent intermediary.²³⁴

The provisions imposed by articles 681 to 685 of the *WvK* apply to brokers only, and not to other types of insurance intermediary.²³⁵

Generally the "Wet Assurantiebemiddelingsbedrijf" 1991²³⁶ provides for the position of the insurance intermediary.²³⁷ This Act does not apply to insurance agents who are employed by an insurer at a fixed salary.²³⁸

All insurance intermediaries are in principle entitled to remuneration for their intercession. Three different types of remuneration are prevalent. First, the conclusion commission,²³⁹ which is the commission for concluding the insurance contract. Secondly, the continuation commission,²⁴⁰ which is the commission for collecting subsequent premiums. Thirdly, the "courtage",²⁴¹ which is the remuneration for acting as a conduit between the insurer and the insured in the payment of the indemnification. The conclusion commission and the continuation commission are payable by the insurer and the "courtage" is payable by the insured.²⁴²

For purposes of this paragraph the concept of "broker" will be used to connote all types of insurance intermediary.

4.5.2 The Relationship Between the Insured and the Insurer

Since the contract of insurance is usually concluded through the intervention of an intermediary on behalf of the insurer, the insured and the insurer often do not know each other.²⁴³

232 In Dutch, "makelaars". At the insurance exchange in Amsterdam, brokers are also referred to as "assurantiebesorgers": see Dorhout Mees *Handelsrecht III* 115. See also art 62-70 of the *WvK* which regulate the legal position of the broker.

233 Dorhout Mees *Handelsrecht III* 115.

234 "Makelaar is hij ... [wat] zijn bedrijf maakt van het verlenen van bemiddeling bij het totstandbrengen en het sluiten van overeenkomsten in opdracht en op naam van personen tot wie hij *niet in een vaste betrekking staat*" (my insertion and italics): see art 62 of the *WvK*.

235 Mesritz 76-78.

236 This Act came into effect on 1 April 1991 and is the successor of the "Wet op Assurantiebemiddeling".

237 See Van Barneveld 160.

238 Dorhout Mees *Handelsrecht I* 36.

239 In Dutch, "afsluitprovisie".

240 In Dutch, "continuatieprovisie".

241 "Courtage" is a derivation from the French word "courtier", which means "agent" or "broker".

242 See Van Barneveld 163 et seq; Dorhout Mees *Handelsrecht III* 115.

243 See, in general, Van Huizen "Herwaardering" 463 who describes this reality as follows: "In de meeste gevallen is de [verzekeraar] niet in de positie de betrouwbaarheid en met name de kredietwaardigheid van de derde te beoordelen. Hij zal hiervoor moeten afgaan op het oordeel van zijn tussenpersoon" (my insertion).

Payment of the premium in the ordinary course of business is effected through the broker who collects and receives the premium on behalf of the insurer.²⁴⁴ If the parties agree that the broker will be liable to the insurer for the payment of the premium, payment of it by the insured to the broker will be tantamount to payment to the insurer.²⁴⁵

If the risk materialises while the premium is unpaid due to the fault of the (insolvent) broker, the insurer will not be liable.²⁴⁶ But if the broker goes insolvent and the premium has not yet been paid by the insured to the broker, the insurer is entitled to claim the premium directly from the insured.²⁴⁷ The *WvK* does not elaborate on the reasons why the insured becomes personally liable for the payment of the premium to the insurer.²⁴⁸ But it has been speculated that the insolvency of the broker has the effect of terminating the contract of mandate which exists between the insured and the broker.²⁴⁹ The insured therefore becomes personally liable to the insurer for the premium upon the insolvency of his (the insured's) mandatary (the broker).²⁵⁰ The insurer and the insured may include a term in their contract which provides that the insured will not be personally liable to the insurer, in other words, that the insurer will bear the risk of insolvency of the broker.²⁵¹ It would appear that the insurer would not be able to claim the premium from the insured if credit for the payment of the premium was given by the insurer to the broker, and the broker is not insolvent.²⁵²

4.5.3 The Relationship Between the Broker and the Insured

The broker is regarded as the mandatary of the insured.²⁵³ The first obligation of the broker in terms of marine insurance is to draft the policy.²⁵⁴ The policy must reflect, amongst other things, an undertaking by the insured to pay a premium.²⁵⁵ The policy often contains a clause which provides that the insurer will debit the broker's account in

244 See art 682-1 of the *WvK*. See also s 14 of the "Wet Assurantiebemiddelingsbedrijf" which provides that "... verzorgt de tussenpersoon voor de verzekeraar het incasso der premies".

245 See art 7.17.1.11(a) of the draft *NBW*; Nuytinck et al 23. Article 7.17.1.11(a) of the draft *NBW* is also applicable to insurance intermediaries other than brokers: Meijers *Toelichting* 1167-1168. See also par 4.5.3 below.

246 See the decision in "Rechtbank Amsterdam", 23 January 1985, 1985 S & S 366 at 368.

247 See Scholten 58-60; Van Nieveldt 44. See also Van Huizen "Herwaardering" at 467 who argues that notwithstanding the liability of the broker to pay the premium, the insured remains the principal debtor as regards the payment of the premium to the insurer.

248 Articles 629-630 of the *WvK*.

249 Scholten 60.

250 See also the (now) repealed art 607 of the *WvK* which provided that "[w]anneer de makelaar faillieert zonder de premie van den verzekerde te hebben ontvangen, is, *niettegenstaande* de bepaling van [artikel 606], de verzekeraar, met uitsluiting van anderen, gerechtigd dezelve van den verzekerde te ontvangen". See also Scholten 60.

251 Scholten 62.

252 See also Mesritz 70-71.

253 Van Huizen "Herwaardering" 464.

254 Article 681-1(2) of the *WvK*.

255 Article 681-1(1) of the *WvK*. See also Scholten 25 et seq. See again par 4.2 above.

its books with the amount of the premium, and that the insured will be credited with the amount. The effect of this clause is to burden the broker with the collection of the premium.²⁵⁶ The mere fact that the insurer debits the broker's account with the amount of the premium does not constitute payment of the premium by the insured to the insurer.²⁵⁷ Payment of the premium by the insured to the broker will be tantamount to payment to the insurer.²⁵⁸

The broker in terms of non-marine insurance is, as a matter of general principle, not personally liable to the insurer for the premium.²⁵⁹ But the effect of a trade usage in force at the insurance exchange is that if the insurer gives credit for the payment of the premium (to the broker), the broker will be personally liable for the payment of the premium.²⁶⁰ This trade usage is a heritage from Roman-Dutch law²⁶¹ in terms of which the broker, and not the insured, was regarded as the debtor for the payment of the premium to the insurer.²⁶²

The broker in terms of marine insurance is personally liable for any unpaid premiums if no credit was given by the insurer to the insured.²⁶³ Article 682 of the *WvK* implies that a marine insurance contract takes effect even if the premium is unpaid.²⁶⁴ The municipal legislation in Roman-Dutch law required the payment of the premium in advance. But the requirement of a payment in advance in Roman-Dutch law was not adhered to in practice. Article 682 of the *WvK* is therefore a codification of a trade usage from the Roman-Dutch period.²⁶⁵

256 See the decision in "Rechtbank Amsterdam", 11 March 1981, *NJ* 1981 no 490 at 1633 where the relevant clause provided that "[v]oor welke premie wij (een tussenpersoon) in rekening-courant belasten en verzekerde hierbij kwiteren". In the case of mutual insurance the broker is apparently not implicitly entitled or burdened to collect the premium: see the decision in "Kantong Rotterdam", 1 May 1951, *NJ* 1953 no 15 at 32.

257 See the decision in "Hof Amsterdam", 30 June 1948, *NJ* 1949 no 197.

258 Article 7.17.1.11(a) of the draft *NBW*. See also art 682 and 684 of the *WvK*. It is important to note that art 7.17.1.11(a) of the draft *NBW* is also applicable to insurance intermediaries other than brokers: Meijers *Toelichting* 1167-1168. Articles 682 and 684 of the *WvK*, in contrast, apply only to brokers. This rule is derived from Roman-Dutch law: see again ch 3 par 3.5.3 above.

259 See art 1843 of the *BW*; Van Huizen "Herwaardering" 464.

260 Van Huizen "Herwaardering" 463.

261 Roman-Dutch law was, of course, mainly concerned with marine insurance: see again ch 3 par 3.1 above.

262 This trade usage has its origin in the method of payment which prevailed in Roman-Dutch law (and which still prevails today). Payment of the premium between the insurer and the broker was, and is, to a large extent a matter of book entries (in Dutch, "rekening-courant verhouding"): see Van Huizen "Herwaardering" 464. See again ch 3 par 3.5.4 above.

263 Article 682 of the *WvK*. See also Scholten 33. Van Huizen "Herwaardering" 464 compares the position of the broker in terms of a marine insurance contract with that of a surety, but with the difference that art 1869-2 of the *BW* provides that the broker has no right of excussion against the debtor (insured). Van Huizen at 465 concludes that the insured nevertheless remains the principal debtor.

264 This is also in accordance with the general principle contained in art 257-1 of the *WvK* which provides that "de overeenkomst van verzekering bestaat, zoodra dezelve is gesloten; de wederzijdsche rechten en verplichtingen van den verzekeraar en van den verzekerde nemen van dat oogenblik hunnen aanvang, zelfs vóór dat de polis is onderteekend". See also Scholten 33-34.

265 See again ch 3 par 3.5.3 above.

If the broker has advanced the premium to the insured, the broker has a right of retention on the policy.²⁶⁶ This right of retention is in accordance with the general principle applicable to contracts of mandate. In terms of this principle, the mandatary is entitled to recoup any expenses incurred by him in the course of the mandate from the mandator.²⁶⁷

If the broker has advanced the premium to the insured, the broker will enjoy a right of preference on the proceeds²⁶⁸ of the policy for the amount of the premium advanced, in the event of the insolvency of the insured.²⁶⁹ This rule is derived from Roman-Dutch law.²⁷⁰ Likewise, this right of preference applies if the premium was advanced by the broker and the policy delivered to the insured.²⁷¹ If the broker is burdened with the collection of the premium, he has the right to claim the premium from the insured in his own name.²⁷²

4.5.4 The Relationship Between the Broker and the Insurer

Unless the insurer and the broker have agreed otherwise, the broker is responsible for the collection of the premium. In this respect the broker is regarded as the mandatary of the insurer.²⁷³ In order to establish whether the premium has been paid timeously, the time of payment to the broker is taken as the time at which payment was effected.²⁷⁴

The broker is in principle entitled to collect the premium²⁷⁵ and the insurer may not without good reason deprive the broker of this opportunity to retain contact with his

²⁶⁶ Article 684-1 of the *WvK*; art 7.17.1.11(b) of the draft *NBW*. See also Mesritz 73; Scholten 73. A distinction should be drawn between, on the one hand, the situation where the broker advances the premium on behalf of the insured and, on the other hand, the situation where the broker pays the (first) premium or any part thereof, without recouping it from the insured at a later stage, to entice the insured to conclude the insurance contract. The latter situation is prohibited by s 16(1) of the "Wet Assurantiebedrijfsbedrijf" which provides that "[h]et is verboden ter zake van een verzekering direct of indirect provisie ... of enig ander op geld waardeerbaar voordeel toe te kennen ... of te beloven aan anderen dan de tussenpersoon tot wiens portefeuille de verzekering behoort". For an example of the application of s 16(1) of the "Wet op Assurantiebedrijfsbedrijf", which was the predecessor of s 16(1) of the "Wet Assurantiebedrijfsbedrijf", see the decision in "Hoge Raad", 5 March 1968, *NJ* no 234.

²⁶⁷ See art 7.7.404 of the *NBW*; art 1849 of the *BW*. See also Van Huizen "Herwaardering" 466.

²⁶⁸ Eg, the amount payable in terms of a life insurance policy or the amount of the indemnity in terms of an indemnity policy. Although the realisation of the proceeds of a policy does not always coincide with the insolvency of the insured, it sometimes does.

²⁶⁹ Article 685 of the *WvK*. See the decision in "Rechtbank Amsterdam", 26 April 1972, *NJ* 1973 no 98 at 270 where it was decided that this right of the broker enjoys preference to any competing claim of a cessionary of the policy. See also Völlmar 358.

²⁷⁰ See again ch 3 par 3.5.3 above.

²⁷¹ Article 685 of the *WvK*. See also Mesritz 74-75.

²⁷² See the decision in "Hoge Raad", 19 October 1979, *NJ* 1980 no 299.

²⁷³ See Van Huizen "Faillissement" 290.

²⁷⁴ See Clausing 3 ed 93.

²⁷⁵ See Van Huizen "Herwaardering" 465 who is of the opinion that the broker has a right as well as a duty to collect the premium.

(the broker's) clients.²⁷⁶ Section 14 of the "Wet Assurantiebemiddelingbedrijf" provides that the insurer is entitled to discharge the broker from his duty to collect the premium if the broker neglects to collect the premium, or if the broker neglects to pay the collected premium over to the insurer, or if the broker is guilty of conduct which indicates that he might not comply with his responsibilities as regards the collection of the premium.²⁷⁷

The position of the broker in terms of a marine insurance contract is governed by the rules contained in articles 681 to 685 of the *WvK*. The marine insurance broker is personally liable for any unpaid premiums if no credit was given by the insurer.²⁷⁸ If credit for the payment of the premium was given by the insurer to the insured, the broker will not be personally liable for the payment of the premium.²⁷⁹ But in most instances credit is given by the insurer to the broker, who then becomes liable to the insurer for the payment of the premium.²⁸⁰ The effect of this is that the broker becomes the debtor for the payment of the premium, and that the insured is no longer liable to pay the premium to the insurer.²⁸¹ From this it follows that if the insurer has given credit for the payment of the premium to the broker, it will not be able to rely on the provisions of article 682 of the *WvK* to claim the premium from the insured.²⁸² The insurer has a preferential claim against the estate of an insolvent broker for any premiums due, in respect of premiums received by the broker in the month preceding the broker's insolvency.²⁸³ This preferential claim applies only if the intermediary is a broker; it does not apply in the case of an insurance agent.²⁸⁴

276 See the decisions in "Hoge Raad", 15 November 1968, *NJ* 1969 no 25 at 93; "Hoge Raad", 19 October 1979, *NJ* 1980 no 299. In the case of mutual insurance the broker is apparently not (by operation of law) entitled to collect the premium or be burdened with it: see the decision in "Kantong Rotterdam", 1 May 1951, *NJ* 1953 no 15 at 32. The broker in terms of mutual insurance will therefore have the right to collect the premium only if the right is stipulated in the agreement between the insurer and the broker. See also Nuytinck et al 26n84.

277 For an example of where the contract of mandate (to collect the premium) was cancelled when the broker was declared insolvent, see the decision in "Hof Arnhem", 30 January 1990, *NJ* 1990 643. For an example of where it was held that the particular insurer was entitled to cancel the broker's right to collect the premium because of the latter's neglect in the collection of the premium, see "Hoge Raad", 22 December 1989, *NJ* 1990 no 312. Van Huizen "Herwaardering" 465 argues that the circumstances in terms of s 14 should be regarded as a restricted number of grounds, and that the courts should not extend the applicability of s 14 to expand the insurer's right to intrude upon the relationship between the broker and his clients. See also Van Huizen "Faillissement" 288 293.

278 Article 682-1 of the *WvK*.

279 Article 682-2 of the *WvK*.

280 See Mesritz 68-69. The fact that credit has been granted to the broker is usually stipulated in the policy, the relevant wording of which has the following effect: "[E]n zulks tegen genot van eene premie van ... ten honderd, voor dewelke wij ondergetekenden den Heer (Assurantiebezorger) in Rekening-Courant hebben belast en alzo den geassureerde quitteeren bij dezen": see Mesritz 69.

281 See Mesritz 69; Molengraaff *Leidraad* 672.

282 See Mesritz 70-71; Van Nieveldt 44. See again par 4.5.2 above, as to the provisions of art 682 of the *WvK*.

283 Article 683 of the *WvK*. See Scholten 66 et seq. Mesritz criticises this limitation of one month imposed by art 683. According to Mesritz brokers usually claim the premiums from their clients (the insured) only once every three months. From this it follows that the protection provided in terms of art 683 is of little practical significance to insurers: see Mesritz 71-72. This was probably the reason why art 683 of the *WvK* was repealed in 1992.

284 See Scholten 67 et seq. See again par 4.5.1 above for the different types of insurance

Because the broker will in most cases be liable for the premium to the insurer, the presumption exists that whenever a contract is concluded through the intervention of a broker, the premium is paid.²⁸⁵ To a large extent this presumption eliminates uncertainty and disputes about whether or not the premium was paid.

4.6 RETURN OF THE PREMIUM

4.6.1 Introduction

The arrangement of the provisions regarding the return of the premium in Dutch insurance law is somewhat unsystematic. Articles 281-282 of the *WvK* regulate the return of the premium in general. Articles 635-636, 652 and 662 of the *WvK* regulate the return of the premium in terms of marine insurance contracts.

As a general rule the premium must be returned when the insurance contract lapses.²⁸⁶ Where the contract is terminated in circumstances other than cancellation by the insured, the insured will be entitled to a return of (a portion of) the premium.²⁸⁷ The insured's right to claim the return of the premium is, however, restricted to cases where he has acted bona fide.²⁸⁸ This is in accordance with the principle in Roman-Dutch law that the premium is not to be returned in the case of fraud on the part of the insured.²⁸⁹ The lapse of the policy due to the mala fides of the insured, for example, where the contract is voidable for intentional misrepresentation by the insured, will therefore not entitle the insured to a return of the premium.²⁹⁰

In all cases where the insurance contract becomes void or expires, in whole or partially, the insured (who has acted bona fide) will be entitled to claim the premium, or a pro rata portion of it, from the insurer.²⁹¹ It has been decided that in the case of mutual insurance, a penalty clause entitling the insurer to avoid liability in terms of the

intermediary.

285 See Mesritz 71; Dorhout Mees *Schadeverzekeringsrecht* 193-194.

286 Article 281 of the *WvK*. See in general Mesritz 22 et seq.

287 Scheltema & Mijnsen 273-274.

288 Article 281 of the *WvK* provides that "[indien] de overeenkomst van verzekering voor het geheel of ten dele vervalt of nietig wordt, en mits de verzekerde te goeder trouw hebbe gehandeld, moet de verzekeraar de premie terug geven, het zij voor het geheel, het zij voor zoodanig gedeelte waarvoor hij geen gevaar heeft geloopt." (my insertion). See also the decision in "Rechtbank 's-Gravenhage", 2 December 1924, *NJ* 1925 796 at 797 where it was confirmed that the insurer is not entitled to claim the premium if there was no risk involved for the insurer.

289 See again ch 3 par 3.7 above.

290 Articles 281-282 of the *WvK*. See also Van Barneveld at 421 who deduces two general requirements from the *WvK* for the insured to be entitled to a return of the premium. First, the insured must have been bona fide. Secondly, the insurer must not have been at risk. See also Mesritz 29; Van Nieveldt 47; Van der Burg 61.

291 See Westermann at 84 who refers to the premium in terms of a contract where the risk has lapsed, as an "onverdiende premie".

contract, but at the same time allowing it to retain the premium should the insured fail to pay subsequent premiums timeously, is valid.²⁹²

The concepts of "return of the premium"²⁹³ and "restitution of the premium",²⁹⁴ are used by some Dutch writers in discussing the return of the premium in terms of a void contract.²⁹⁵ It would appear that there is no apparent distinction between these concepts. The majority of writers refer to the concept of "return of the premium". If the insured resiles from the contract it is, strictly speaking, not correct to refer to the contract as being void. It is more correct to refer to it as being voidable.

A defence by the insured against a claim by the insurer to pay the premium, is equally the basis for a claim by the insured to recover a premium which he has paid to the insurer.²⁹⁶

An important point as regards the return of the premium is that every contract must be executed according to the principles of fairness and good faith.²⁹⁷ The insured is therefore, as a matter of general principle, not entitled to a return of the premium if he has acted *mala fide*. Dutch law does not draw a distinction between the situation where the contract is cancelled by the insurer because of the fraud of the insured, on the one hand, and, on the other hand, the situation where a claim in terms of the contract by the insured is defended by the insurer on the grounds of the fraud of the insured. In both instances the insured is not entitled to a return of the premium.²⁹⁸ The fact that no distinction is drawn between these two situations is in accordance with the general principle of Dutch contract law, namely that a party who has acted fraudulently is in principle not entitled to a return of his performance.²⁹⁹

4.6.2 In the Case Where the Contract Did Not Come into Operation

If the insurer was never at risk, the insured is in principle entitled to a return of the premium provided that he did not try to defraud the insurer. For example, if a merchant insured goods which he planned to ship but the voyage never materialised, he is in principle entitled to a return of the premium.³⁰⁰ This rule is a heritage from Roman-

292 See the decision of the "Hooge Raad", 11 May 1934, *NJ* 1934 1163. For a similar decision in respect of a health insurance policy, see the decision in "Rechtbank 's-Gravenhage", 7 January 1976, *NJ* no 14.

293 In Dutch, "ristorno" or "restorno".

294 In Dutch, "restitutie".

295 See Scheltema & Mijnsen 273.

296 Dorhout Mees *Schadeverzekeringsrecht* 196-197.

297 Article 1374 of the *BW*; art 6.1.1.2(2) of the *NBW*. As to the wide formulation of the principle of good faith in terms of the *NBW*, if compared with, say, other Continental codes and in particular the English common-law system, see Whincup 1209.

298 This distinction is drawn, eg in English law (see ch 6 par 6.6.1 below); Australian law (see ch 7 par 7.6.4 below) and South African law (see ch 8 par 8.6.4 below).

299 Article 3.2.44 of the *NBW*. See also Nieuwenhuis, Stolker & Valk 44. Barneveld 421 describes this sanction which is attached to the insured's fraud as follows: "Wij zouden dit kunnen beschouwen als een straf voor de boosdoener ten bate van zijn candidaat-slachtoffer."

300 See Dorhout Mees *Handelsrecht III* 145.

Dutch law.³⁰¹ If the risk ceases to exist or if the extent of the risk is diminished during the course of the contract, the insured will be entitled to a pro rata return of the premium in exceptional circumstances only.³⁰² The insured will be entitled to a pro rata return of the premium where there is a partial lapse of the insurance, for instance, where a smaller shipment of the goods (than was anticipated at the conclusion of the contract) was loaded.³⁰³ The insurer is entitled to deduct a reasonable fee from the premium for its administrative costs.³⁰⁴

If the insurer has been at risk for part of the duration of the contract, he will be able to claim that part of the premium for which he was at risk, even if the rest of the contract is void and the whole of the premium is still unpaid.³⁰⁵ The meaning of the phrase "voorzoverre de verzekeraar geen gevaar heeft gelopen", which is often encountered in insurance policies, is not clear. According to Van Barneveld it either refers to the situation where, for example, a smaller shipment (than was anticipated at the conclusion of the contract) was loaded, or it refers to the situation where the duration of the contract is shorter than originally intended.³⁰⁶ In the case of marine insurance the *WvK* provides a clear answer.³⁰⁷ The insured in terms of a marine insurance contract is entitled to a pro rata return of the premium in the first situation only, in other words, for that part of the cover for which the insurer was never at risk.³⁰⁸

301 See Meijers *Toelichting* 1168. See again ch 3 par 3.6.2 above.

302 See art 7.17.1.12(2)-(3), 7.17.1.5(3), 7.17.2.5(3) and 7.17.2.7 of the draft *NBW*. See also Meijers *Toelichting* 1168.

303 See Scheltema & Mijnsen 273-274. Article 263 of the *WvK* provides that in the case of the transfer of ownership of the object of the risk, the insurance contract is also transferred to the new owner. This article is criticised as being in conflict with the maxim of "res inter alios acta, aliis nec prodesse potest", ie, things done between strangers ought not to prejudice those who are not parties thereto: Burgers 31. Another point of criticism levelled against this article is that the new owner may decide to delay the payment of the premium as long as possible in anticipation of the possibility of the realisation of the risk. The original insured is, of course, not liable for the premium: Dorhout Mees *Handelsrecht III* 133-134. It is also possible that the new owner prefers not to insure the object of the risk with the particular insurer. If the new owner prefers to cancel the insurance contract, the original insured is in principle entitled to a pro rata return of the premium: art 281 of the *WvK*. Burgers at 52-53 correctly criticises this rule as the rights of the original insured to a return of the premium should not be influenced by the decision of the new owner to continue with the insurance contract or to cancel it.

304 Article 7.17.1.12(1) of the draft *NBW*. This provision applies to the case where the insurer was never at risk and not, eg, if the risk ceased to exist during the course of the contract: Meijers *Toelichting* 1168. Policies often expressly provide for a deduction of a portion of the premium as administrative costs in the event of the return of the premium: see Den Ouden Huijge, Phillips & Renckens 30.

305 See the decision of the "Hooge Raad" 17 February 1950, *NJ* 1950 no 387.

306 See Van Barneveld 421-422. But it is not quite clear why the distinction is drawn between these two situations.

307 Articles 635-636 and 662 of the *WvK*.

308 See Molengraaff "Overeenkomst" 443; Dorhout Mees *Handelsrecht III* 145. For a case illustrating this example, see the decision by the "Hof's Gravenhage" 23 October 1987, 1989 *S & S* 22. In this case, the insurance contract was concluded on 21 September 1983. During the course of the contract, the insured gave notice to the insurer of a change in the risk. Due to this change, the insurer increased the premium. The insured cancelled the contract on 21 February 1984. It was decided that the insurer was not entitled to the premium for 1984/85 before 21 September 1984, but that the insured was also not entitled to a return of the premium for the period for 22 February 1984 until 20 September 1984.

The reason for this limitation appears to have its origin in Roman-Dutch law.³⁰⁹ The insurer in terms of a marine insurance contract is also entitled to keep one half percent of the (returned) premium to cover its administrative costs.³¹⁰ Dorhout Mees is of the opinion that article 281 of the *WvK* should be interpreted in the light of the provisions in the *WvK* on marine insurance. This would entail that in the case of non-marine insurance the partial lapse of the insurance contract as regards the period of cover would equally not be a valid base to claim a pro rata return of the premium.³¹¹

In the case of marine insurance it is necessary to establish whether several voyages are covered by a single insurance contract, or whether a separate insurance contract was concluded for each individual voyage. If one contract was concluded, one premium is payable. If several contracts were concluded, several premiums are payable. If one insurance contract was concluded in respect of several voyages, the full risk attaches as soon as the first voyage commences. The premium paid is regarded as a single premium and is not returned if the contract is cancelled during the duration of the contract. If several insurance contracts were concluded, a separate premium is payable in respect of each individual voyage. Premiums in respect of individual contracts will in principle be returnable should one or more of the voyages not materialise.³¹²

In exceptional circumstances the insured is allowed to claim a return of the premium where the risk has already commenced, provided that the ship has not weighed anchor yet. The insurer is allowed to keep one percent of either the sum insured or the premium, whichever is the smallest, as administrative costs.³¹³

If the insured successfully institutes a claim in terms of the policy, no return of the premium is possible, even if the insurer was never at risk for a certain part of the (initial) risk.³¹⁴ Whether the insured is entitled to a return of the premium where his claim for an indemnity is unsuccessful, is uncertain. The answer to this question would depend on whether or not an insured is allowed to claim an indemnity in terms of the (valid) contract, and in the alternative claim a return of the premium in terms of a (void)

309 See Scheltema & Mijnsen 274 and the authorities referred to there.

310 Articles 635-2 and 662 of the *WvK*. These articles are residues from the Roman-Dutch municipal legislation: see again ch 3 par 3.6.2 above.

311 See Dorhout Mees *Handelsrecht III* 145; Westermann 84; Scheltema & Mijnsen 274; Clausing 3 ed 95. See also the decision of the "Hooge Raad", 17 February 1950, *NJ* 1950 no 387.

312 Mesritz 43-46.

313 Articles 624 and 636 of the *WvK*. See also Mesritz 41; Scheltema & Mijnsen 276. These provisions of the *WvK* are codifications of rules originating from Roman-Dutch law: see again ch 3 par 3.6.2 above.

314 See art 636-2 of the *WvK* which provides that "[d]e volle premie is altijd verdiend, wanneer de verzekerde eenige schadevergoeding, hoe ook genaamd, vordert". Mesritz 42 describes the rationale of this subsection as follows: "[W]ant dan heeft het contract voor den assuradeur alle gevolgen gehad die uit de overeenkomst kunnen voortspuiten."

contract.³¹⁵ It would appear to be fair to allow the insured to claim a return of the premium in these circumstances.³¹⁶

4.6.3 In the Case Where the Contract Is Void

If the insurance contract is void, the insured is in principle entitled to a return of the premium.³¹⁷ An example of such a case would be where the contract is void due to the absence of consensus between the parties.³¹⁸

In the case of a long-term insurance contract which is renewed periodically, no further premium is payable where the contract is void, even if the voidness is due to the fraud of the insured.³¹⁹

4.6.4 In the Case Where the Contract Is Voidable for Misrepresentation

The insurer is entitled to cancel the contract if it becomes aware that the insured has failed to comply with his duty to disclose material facts to it.³²⁰ The insured must disclose all facts to the insurer of which he is aware or ought to have been aware, and which are relevant to the insurer's decision whether or not to accept the risk and, if so, on what terms.³²¹ The misrepresentation of material facts includes the non-disclosure

³¹⁵ le, is the insured in Dutch law allowed to approbate and reprobate the same contract?

³¹⁶ The argument which is raised by Mesritz at 42 in justifying the non-return of the premium where the insured successfully instituted a claim, may also be applied to justify the return of the premium where the insured was unsuccessful in his claim against the insurer. Mesritz argument for the non-return of the premium in the first-mentioned situation is as follows: "[W]ant dan heeft het contract voor den assuradeur alle gevolgen gehad die uit de overeenkomst kunnen voortspruiten." If the insured was unsuccessful in his claim, it can be argued that the contract did not have its *full effect*.

³¹⁷ Article 281 of the *WvK*. See also Mesritz 25-26; Dorhout Mees *Handelsrecht III* 145.

³¹⁸ Article 6.5.2.228(1) of the *NBW*; art 1358 of the *BW*. See also Dorhout Mees *Schadeverzekeringsrecht* 198.

³¹⁹ See Clausing 3 *ed* 95-96.

³²⁰ Article 7.17.1.5 of the draft *NBW*; Nuytinck et al 14-15. Article 7.17.1.6(a) of the draft *NBW* provides that the insurer is not entitled to rely on fraud and mistake as provided for in art 3.2.44 of the *NBW* and art 6.5.2.228 of the *NBW*. Article 3.2.44(1) of the *NBW* provides that "[e]en rechtshandeling is vernietigbaar, wanneer zij door bedreiging, door bedrog of door misbruik van omstandigheden is tot stand gekomen". In terms of art 3.2.44(3) of the *NBW* is fraud present if "iemand een ander tot het verrichten van een bepaalde rechtshandeling beweegt door enige opzettelijk daartoe verzwijgen van enig feit dat de verzwijger verplicht was mede te delen, of door een andere kunstgreep". Article 6.5.2.228(1) of the *NBW* provides that "[e]en overeenkomst die is tot stand gekomen onder invloed van dwaling en bij een juiste voorstelling van zaken niet zijn gesloten is vernietigbaar". The reason why art 7.17.1.6(a) is included in the draft *NBW* is to simplify the regulation of fraud in the case of insurance contracts. As the insurer is entitled to rely on the provisions of art 7.17.1.5 of the *NBW* in the case of non-disclosure or misrepresentation by the insured, the legislature thought it fit to restrict the insurer to the specific remedy provided for in title 7.17. In restricting the insurer to the remedy provided for in title 7.17, the legislature attempted to prevent unnecessary overlapping between the different titles of the *NBW*: see Nuytinck et al 17-19. Article 7.17.1.16(1) provides that the provisions contained in art 7.17.1.6(a) are of an imperative nature.

³²¹ Article 7.17.1.4 of the draft *NBW* provides for the extent of the duty to disclose: see Nuytinck et al 10-14.

of material facts by the insured. The insurer must exercise its right to cancel the contract within two months after it has become aware of the non-disclosure or misrepresentation.³²² If the insurer fails to cancel the contract within this period, it will forfeit its right to do so. The insurer's decision to cancel the contract must be conveyed to the insured in writing.³²³

The insured is in principle entitled to a pro rata return of the premium if the insurance contract is cancelled by the insurer by virtue of the negligent or innocent non-disclosure or misrepresentation of material facts by the insured.³²⁴ Both the insured and the beneficiary in terms of the policy must have been unaware of the true facts.³²⁵

If the contract is voidable for an intentional misrepresentation by the insured, he is not entitled to a return of the premium.³²⁶ If the contract is cancelled by the insured as the result of an intentional misrepresentation by the insurer, the premium must be returned and the insurer is not allowed to keep a certain portion of the premium to cover its administrative costs.³²⁷ If the contract is cancelled by the insured for a negligent or innocent misrepresentation by the insurer, it would appear that the insured is entitled to a return of the premium.

4.6.5 In the Case of Breach of Contract

The insured is in principle entitled to a (pro rata) return of the premium if the insurance contract is cancelled by the insurer.³²⁸ Seen against this general principle, it would appear that the premium must be returned if the contract is cancelled by the insurer in the case of negligent or innocent breach of contract by the insured.³²⁹

If the contract is cancelled by the insurer for an intentional breach of contract by the insured, he is not entitled to a return of the premium.³³⁰ If the contract is cancelled by the insured by virtue of a breach of contract by the insurer, the premium must be returned and the insurer is not allowed to keep a certain portion of the premium to

322 See Nuytinck et al 15.

323 Article 7.17.1.9(1) of the draft *NBW*. See also Meijers *Toelichting* 1166-1167; Nuytinck et al 15. Article 7.17.1.9(2) provides that the provisions contained in art 7.17.1.9(1) are of an imperative nature.

324 Article 7.17.1.5(3) of the draft *NBW*. See also art 7.17.1.12(2) and 7.17.3.17(1) of the draft *NBW*. See Meijers *Toelichting* 1168.

325 Meijers *Toelichting* 1163.

326 See Meijers *Toelichting* 1163-1164. See also art 251 of the *WvK*.

327 Article 1488 of the *BW*; art 6.4.2.203-204 of the *NBW*. See also Mesritz 38.

328 Article 7.17.1.12(2) of the draft *NBW* requires that the cancellation should take place in terms of a cancellation clause if "een van de partijen de overeenkomst krachtens een daarbij gemaakt beding tussentijds opzegt".

329 See again art 281 of the *WvK*.

330 See Meijers *Toelichting* 1163-1164. See also art 281 of the *WvK* which provides for the return of the premium in the case where the contract lapses or becomes void, and the insured acted in good faith.

cover its administrative costs.³³¹ In terms of Dutch law, fault is apparently not a requirement for the cancellation of a contract on the basis of breach of contract. There is therefore no indication from Dutch insurance-law materials whether or not the insured is entitled to a return of the premium in the case of negligent or innocent breach of contract by the insurer.³³² It would appear that the insured will also be entitled to a return of the premium if he cancels the contract in the case of negligent or innocent breach of contract by the insurer.³³³

4.6.6 In the Case Where No Insurable Interest Exists

A distinction must be drawn between indemnity insurance contracts, on the one hand, and non-indemnity insurance contracts, on the other hand. First, the indemnity insurance contract. If the insured never had an insurable interest for the duration of the policy, the premium must be returned. For example, if the insured concluded an insurance contract in anticipation of his acquiring an insurable interest in the object of the risk but such interest was never acquired, the premium must be returned. If the insured acted fraudulently he is not entitled to a return of the premium.³³⁴ This rule is linked with the prohibition in Roman-Dutch law against the insurance of expected profits.³³⁵

If the insured's interest ceases to exist, for example, if he sells the object of the risk, say a motor vehicle, before the end of a particular period of insurance, the premium for which has already been paid, the insured will be entitled to a pro rata return of the premium.³³⁶ Likewise, if the insured's interest ceases to exist, the insurer is not entitled to claim any further premiums.³³⁷

Secondly, the non-indemnity insurance contract. The question whether the insured in terms of a non-indemnity insurance contract is entitled to a return of the premium depends on whether the *WvK* or (in future) the draft *NBW* applies. Section 250 of the *WvK*, which applies to insurance contracts in general, requires an interest in the object insured. It furthermore provides that the insurer does not have to indemnify the

331 Article 1488 of the *BW*; art 6.4.2.203-204 of the *NBW*. See also Mesritz 38.

332 As to the concept of breach of contract in Dutch insurance law, see Dorhout Mees *Handelsrecht* III 147-148.

333 See again par 4.6.5 above where a similar conclusion is drawn in respect of a negligent or innocent misrepresentation by the insurer.

334 Article 281 of the *WvK*.

335 Although it is today acknowledged that the insured usually has an insurable interest in expected profits which he stands to make from a commercial transaction, Roman-Dutch law prohibited the insurance of expected profits. One of the reasons for this prohibition was the view that insurance of expected profit was in the nature of wagering insurance. In the case of wagering insurance it was generally taken that the insured did not have the necessary insurable interest in the object of the risk. As the reasons for the prohibition in Roman-Dutch law became obsolete, the need for the prohibition fall into disuse. See again ch 3 par 3.6.6 above.

336 See Wery 33. See also art 251 of the *WvK* which requires an insurable interest for a valid insurance contract.

337 See the decision in "Kantong Sneek", 26 October 1935, *NJ* 1937 no 615.

insured if no interest in the insured object exists. Specific provision is made in the *WvK* for life insurance.³³⁸ Article 302 of the *WvK* provides that the life of somebody can be insured by or on behalf of a person who is interested in it. Article 303 provides that the contract may be concluded without the knowledge or consent of the insured life. Article 305 of the *WvK* provides that the amount of the sum insured is completely in the discretion of the parties.³³⁹ A life insurance contract which is concluded without the necessary interest is regarded in the Dutch law as gaming or wagering. The first consequence of a contract which is classified as one of gaming or wagering is that it cannot be enforced. Secondly, the party who has paid or performed, is not entitled to a return of that which he has performed.³⁴⁰ If the *WvK* applies it would therefore appear that the insured cannot claim the return of the premium on the basis that he lacks an interest in the life insured.³⁴¹ However, in terms of the provisions of the draft *NBW*, the position is different. The draft *NBW* does not mention the requirement of an interest for the conclusion of a valid and enforceable non-indemnity insurance contract. Although the requirement is not explicitly abolished, it is argued that the fact that it is not mentioned, may be an indication that an interest is (no longer) required for the conclusion of an enforceable non-indemnity insurance contract.³⁴² The insured will therefore not be entitled in terms of the draft *NBW* to a return of the premium merely because of the absence of an interest. But if the contract is against good morals or public policy it will be void³⁴³ and the insured will be entitled to a return of the premium.³⁴⁴

The payment in advance of the premium in terms of a life insurance policy must be returned if the insured life passes away before the premium was actually due.³⁴⁵

4.6.7 In the Case Where There Has Been Over-Insurance

Article 274 of the *WvK* provides that the insurer is allowed to prove if there was over-insurance by the insured. Molengraaff correctly indicates that the insurer should return a pro rata share of the premium in the case of non-fraudulent over-insurance by the insured.³⁴⁶ The insurer is allowed to keep one half percent of the premium to cover its administrative costs.³⁴⁷ It is not clear whether Molengraaff advocates a pro rata return of the premium where the over-insurance was effected with a fraudulent intention. If seen against the general rule prohibiting the return of the premium where there was fraud on the part of the insured, the answer to this question appears to be in the negative.³⁴⁸

338 See art 302-308 of the *WvK*. See also Havenga *Life Insurance* 216n13 and the criticism referred to there against the inclusion of articles dealing with life insurance in the *WvK*.

339 See also Havenga *Life Insurance* 218-219.

340 See Havenga *Life Insurance* 226.

341 See Havenga *Life Insurance* 227.

342 See Stigter/Ploeg 63; Havenga *Life Insurance* 229.

343 Article 6.4.2.203 of the *NBW*.

344 See Havenga *Life Insurance* 230-231.

345 See Stigter/Ploeg 53-54.

346 Molengraaff "Overeenkomst" 472.

347 Van Nieveldt 45-46.

348 See art 281-282 of the *WvK*. See again par 4.6.1 above.

If the insured insures the same interest with more than one insurer, that is, double insurance,³⁴⁹ which results in over-insurance, he is allowed to cancel the latest of these contracts and claim a return of a portion of the premium from the second insurer as well as from further insurers, if any.³⁵⁰

The premium will be returned in the case of non-marine insurance, if an excessive value was placed on the object of the risk and this resulted in over-insurance and the premium was for that reason too high.³⁵¹

4.6.8 In the Case Where the Policy Expressly Provides for the Return of the Premium

The parties to an insurance contract are allowed to agree on the circumstances in which the insured will be entitled to a return of the premium.³⁵² Policies often contain a clause which provides for the return of the premium.³⁵³ A construction of the policy will determine whether the parties' agreement as to the return of the premium coincides with the provisions of article 281 of the *WvK*.³⁵⁴ This article provides in general for the return of the premium where the contract is void, voidable or cancelled, provided that the insured acted in good faith.

A notable example of a case where the policy usually provides for the possibility of the return of a portion of the premium,³⁵⁵ is a mutual insurance policy. At the end of each financial year members of the mutual society are entitled to the surplus (if any) of their initial contribution or premium made at the beginning of the particular year.³⁵⁶ But if that portion of the contribution which is returned to a member, is disproportionately high or low in comparison with his initial contribution, it will not amount to a return of the

349 Double insurance must be distinguished from co-insurance. In the case of double insurance the same interest is insured with more than one insurer, each being liable on the separate policy issued by it and for the amount insured against. Co-insurance, in contrast, entails the situation where more than one insurer undertakes, in terms of a single policy, to indemnify the insured for a limited share of his loss: see Nuytinck et al 67n14.

350 Article 7.17.2.7 of the draft *NBW*. Section 2 of book 7, title 17, provides for indemnity insurance in particular. Although double insurance often entails over-insurance, it is not necessarily the case. The insured is entitled to a return of a portion of the premium, based on the principles of fairness: Meijers *Toelichting* 1174. See also Van Barneveld 422.

351 See Scheltema & Mijnsen 275. If seen against the general rule regarding fraud, one may assume that the insured will be entitled to a return of the premium only if there was no fraud on his part: see art 281-282 of the *WvK*.

352 See Molengraaff *Leidraad* 672; Van Barneveld 423.

353 See Clausing 3 ed 96.

354 Van der Wansem at 71 mentions that in the case of motor-vehicle insurance the return of the premium is usually limited by a term of the policy to those instances where the insurer cancelled the contract. See also Clausing 3 ed 96. See again par 4.6.1 above.

355 In Dutch, "overschotverdeling".

356 See Roeleveld 82-83. Members are, of course, liable to additional premiums (also referred to as calls) if the initial premiums or calls levied are not sufficient to cover all claims and expenses: Roeleveld 83n1. See again par 4.3.7 above.

premium, but to a distribution of dividends.³⁵⁷ This will result in tax disadvantages for both the society, that is, the insurer and the members as the insured. A return of the premium which is disproportionately high or low in comparison with the initial contribution made by the member, will also fly in the face of the general principle regarding the return of the premium.³⁵⁸ In terms of the general rule the insurer is not entitled to a return where the risk has commenced.³⁵⁹

Two other examples which constitute a return of the premium merit a mention. Terms in an insurance contract professing to provide for a no-claim bonus and profit-sharing by the insured respectively, are in reality nothing more than an undertaking to return a portion of the premium in certain circumstances.³⁶⁰ Although a portion of the premium is not actually returned, a discount is given by the insurer on the premium for the following year. If the insured decides not to renew the contract for the following year, the insurer may be compelled to return a portion of the premium, depending on the provisions of the contract.

4.7 FORFEITURE OF THE PREMIUM

It is possible for the contract to provide that the insured will not be entitled to a return of the premium, or that the return of the premium will be limited to a certain amount or percentage of the insured sum.³⁶¹

Likewise, legislation provides for the forfeiture of the premium, notably in the case where there was fraud on the part of the insured.³⁶²

4.8 FUNCTION AND INSURANCE OF THE PREMIUM

4.8.1 Function of the premium

The premium is regarded as the counter-performance undertaken or the price paid by the insured in return for the undertaking by the insurer to bear the risk.³⁶³ The insurer's counter-performance consists in bearing the risk that the uncertain event which is insured against, may materialise.³⁶⁴ The premium therefore represents the price of the possibility of the materialisation of the risk. It is usually expressed as a percentage of the insured sum.³⁶⁵ The function of the premium is therefore to pay for the

357 Roeleveld 84.

358 Roeleveld 103-105.

359 See again par 4.6.2 above.

360 Van Barneveld 425-426. See also the decision in "Hof Amsterdam", 23 February 1923 *NJ* 1924 1261 where the policy concerned was a pure endowment policy which provided for a proportionate return of the premium, should the insured life pass away before the policy reached maturity.

361 See Van Barneveld 422-423; Scheltema & Mijnsen 275.

362 See, eg, art 281-282 of the *WvK*. See again par 4.6.1 above.

363 See Mesritz 46; Dorhout Mees *Handelsrecht III* 143-144 and 216-217. See again par 4.2 above.

364 Molengraaff "Overeenkomst" 25-29.

365 Dorhout Mees *Handelsrecht III* 144.

uncertainty of the risk, as well as its extent, which is born by the insurer. If there is no uncertainty involved regarding the preservation of the object of the risk, insurance in the legal sense of the word is not possible.³⁶⁶

4.8.2 Insurance of the Premium

In principle the *WvK* does not prohibit the insurance of the premium.³⁶⁷ Article 593 of the *WvK* lists the different interests which may be insured in terms of a marine insurance contract.³⁶⁸ This list does not include the cost of insurance (the premium). It would appear, however, that article 593 merely provides a list of examples of different types of insurable interest.

The insurance of the premium is, however, expressly provided for in article 612 of the *WvK*.³⁶⁹ The practice of insuring the premium is also an acknowledged and established fact in Dutch insurance law.³⁷⁰ However, little research has been done on this practice.³⁷¹ The insurance of the premium was (and is) most often encountered in the case of property insurance, but is also prevalent in the spheres of freight insurance, reinsurance, fire insurance and life insurance.³⁷² However, it is correctly argued that the insurance contract is an indemnity contract and that the practice of insuring the premium is in conflict with the principle of indemnity. This principle entails that the insured must be indemnified, but that he must not be placed in a better financial position after the materialisation of the risk than before.³⁷³

If the insured is allowed to insure and recoup the premium, he is placed in a better financial position than he was in before the conclusion of the contract. If he does not actually part with the premium, it means that he enjoys insurance cover without paying anything in return. Van Veen points out that if the insured object, that is, in the case of

366 See art 246 of the *WvK* which stipulates that an insurance contract will indemnify the insured "[voor] schade ... door een *onzeker* voorval zoude kunnen lijden" (my italics). See also Dorhout Mees *Handelsrecht III* 110 who states that "[b]ij [verzekering] is onzeker of, en zo ja hoeveel schade de verzekeraar moeten vergoeden" (my insertion).

367 See art 268 of the *WvK* which provides that "[d]e verzekering kan tot voorwerp hebben alle belang, hetwelk op geld waardeerbaar, aan gevaar onderhevig en bij de wet niet is uitgezonderd". The exceptions listed in the *WvK* do not include the insurance of the premium: see art 247, 250, 253, 256-1(3), 273, 274, 289, 305, and 599 of the *WvK*. But art 269 of the *WvK* does prohibit the insurance of any interest against damage which has already materialised at the time of the conclusion of the contract. It is submitted that the undertaking by the insured to pay a premium, is an example of an expense, ie, a liability, which is already incurred upon the conclusion of the insurance contract to insure the premium.

368 Article 593 of the *WvK*.

369 See also Mesritz 19-20; Van Veen *Premie* 12. But in terms of the now repealed art 599(2) of the *WvK*, the insurance of the premium was not allowed: see Mesritz 62.

370 See Mesritz 19; Van Veen *Premie* 12; Van Nievelde 13. See also Scholten 79, where this practice, avowedly only by implication, is mentioned.

371 See in general, Van Veen *Premie*. Apart from Van Veen's treatise which appeared more than one hundred years ago, little was written on this topic ever since.

372 Van Veen *Premie* 36 63 77 95 97.

373 Van Veen *Premie* 12-14.

the insurance of the premium, the premium itself, is not exposed to any danger or rather, the uncertainty of danger, there can be no question of insurance.³⁷⁴ This, however, does not mean that contracts of insurance of goods "lost or not lost" do not amount to insurance. The uncertainty of this type of contract lies in the fact that both parties are unsure of the condition or preservation of the object of the risk at the time of the conclusion of the contract.³⁷⁵

The practice of insuring the premium appears to be in conflict with article 269 of the *WvK* which provides that the insurance of an interest which at the time of the conclusion does not exist, or does no longer exist, is invalid. The interest of the insured in insuring the premium only exists because the principal insurance contract was concluded in the first place.

The concept of paying a premium has developed, amongst other things, to foster a sense of co-responsibility on the part of the insured.³⁷⁶ The measure of care exercised by the insured in protecting the object of the risk plays an important role in determining the amount of the premium to be paid by the particular insured. If the insured is allowed to insure (and eventually recoup) the premium, it will affect his sense of responsibility towards the protection of the object of the risk.³⁷⁷

4.9 CONCLUSION

The current Dutch insurance law is primarily the product of more than 400 hundred years of trial and error by way of legislation, trade usage and judicial interpretation. Many of the provisions of the *WvK* are therefore codifications either of provisions of municipal legislation from the Roman-Dutch period, or of trade usages from Roman-Dutch law which proved to be viable and acceptable in practice. Dutch insurance law is therefore to a large extent a well-elaborated system consisting of tested and proven principles. A number of these principles regarding the premium merit a mention here.

It is acknowledged that the premium may consist of something other than money.³⁷⁸ This is of importance to certain mutual insurance schemes, the contribution in terms of which sometimes consists of something other than money. The question of whether a particular contract is to be regarded as an insurance contract is important in establishing whether the natural consequences of a particular contract (in this case the insurance contract), as well as the legislative measures applicable to insurance contracts in general, apply to the contract under discussion. The parties may prefer their

374 See Van Veen *Premie* 20 where he states that "[w]aarom de premie niet aan gevaar onderhevig is, kan zij ook niet het voorwerp eener verzekering zijn, want juist het kenmerkende der verzekering ligt in de overname van het gevaar ...". But it is argued that the premium in the case of reinsurance is exposed to danger and does therefore constitute an insurable interest: see Mesritz at 20 and the authority cited there.

375 Mesritz 36.

376 Van Veen *Premie* 21-22.

377 Van Veen *Premie* 22.

378 See again par 4.2 above.

contract to be treated as an insurance contract. By accepting that the premium may consist of something other than money, the contract may be treated as an insurance contract.

The majority of the Dutch writers agree that an "insurance contract" in terms of which no premium or other type of performance is payable, is not an insurance contract. This fact is in accordance with the principle that the insurance contract is a reciprocal contract.³⁷⁹

The concept of a "reasonable price" (and by way of analogous argument also the concept of a "reasonable premium") is not only entrenched in the *NBW* but also followed in insurance practice.³⁸⁰ This concept was not found in the *BW* and the provisions contained in article 7.1.1.4 of the *NBW* not only constitute a novelty, but also take cognisance of the needs of the business community and of day-to-day commercial practices.

Dutch law acknowledges the trade usage derived from Roman-Dutch law that payment of the premium by the insured to the broker is tantamount to payment to the insurer. This trade usage is embodied in the *WvK*³⁸¹ as well as the draft *NBW*.³⁸²

In terms of Dutch law, every contract must be executed according to the principles of fairness and good faith. The insurance contract is subject to the principles of good faith.³⁸³ The return of the premium in the Dutch law turns on the concept of bona fides. Just as was the case in Roman-Dutch law, the return of the premium in Dutch law hinges on the presence (or rather, absence) of mala fides on the part of the insured. An insured who has acted mala fide is, as a matter of general principle, not entitled to a return of the premium or a portion of it.³⁸⁴ The forfeiture of the premium in the case of mala fides by the insured is provided for in the *WvK*.³⁸⁵

Dutch insurance law does not draw a distinction between the situation where the contract is cancelled by the insurer because of the insured's fraud, on the one hand, and, on the other hand, the situation where a claim in terms of the contract by the insured is defended by the insurer on the grounds of the insured's fraud. In both instances the insurer is allowed to keep the premium. This is in accordance not only with the corresponding principle in terms of Roman-Dutch law, but also with a general principle of Dutch contract law, namely that a party who has acted fraudulently is in principle not entitled to a return of his performance.³⁸⁶

379 See again par 4.2 above.

380 See again par 4.3.7 above.

381 See again par 4.5.3 above.

382 See again par 4.5.3 above.

383 See again par 4.6.1 above.

384 See again par 4.6.1 above.

385 See again par 4.8 above.

386 See again par 4.6.1 above.

Finally, the contentious issue of the insurance of the premium receives scant but well-considered cogitation in Dutch insurance law materials. Although it is acknowledged that the practice of insurance of the premium is well established in Dutch law, it does not escape some serious criticism. The main thrust of the criticism is levelled against the fact that the insurance of the premium flies in the face of the indemnity principle as well as the element of risk or uncertainty, both of which are essentials of the insurance contract.³⁸⁷

³⁸⁷ See again par 4.8.2 above.

5.1 INTRODUCTION

The Belgian legal system is a codified one and there are consequently no subsidiary common-law rules.

In Belgium, insurance contract law is therefore regulated primarily by statutes, in the form of codes. These codes are the Belgian Commercial Code and the Belgian Civil Code.² From 11 June 1874 until 25 June 1992 the statutory regulation of Belgian insurance law was to be found in the Commercial Code.³ The Commercial Code is divided into three books, which again are divided into titles, (sometimes) into sections and or chapters, and finally into articles. The general section on insurance law was contained in titles X and XI of book I of the Commercial Code.⁴ Title XI of book I of the Commercial Code dealt with non-marine insurance law⁵ in particular. Marine insurance law is dealt with in title VI of book II of the Commercial Code.⁶

1 In writing this chapter the following general works on Belgian insurance law were consulted: Van Eeckhout *Inleiding* 46 74-76 107-108; Van Puyvelde 1-15; Fredericq *Handboek* vol I 44-45; Fredericq *Handboek* vol II 193-306; Vandeur 53-56; Vandeputte *Inleiding* 81-91 140-141 190-195 214-220; Van de Ryck I.1.3 26f-I.1.3 32; Vandeputte *Handboek* 59-63; Ponet 58-60 123-124.

2 The Belgian Commercial Code of 1872 and the Belgian Civil Code of 1804 respectively. Both these Codes are divided into books which again are divided into titles, (sometimes) into sections and/or chapters, and finally into articles. The Laws which have been promulgated since codification are divided into sections only. In the Belgian Civil Code the articles of the different books are numbered consecutively and for the purpose of reference, citation of the specific articles alone will suffice. However, the Belgian Commercial Code consists of different Codes (which were recorded in the Commercial Code as books and titles) which commenced on different dates. The articles in the Commercial Code were not numbered chronologically. The numbering of articles in each book in the Commercial Code starts afresh, and sometimes the numbering of an individual title also starts afresh. It is therefore necessary to refer to the individual Codes which are collectively known as the Commercial Code. A reference to an article of the Commercial Code must therefore consist of a reference to an article of an individual Code. Individual Codes under the Commercial Code are distinguished by referring to the date on which they became effective. Eg, a reference to "art 1 of the Code of 1874", is a reference to book II, title X, article 1 of the Code on Insurance Law which came into effect on 11 June 1874.

3 In Flemish, "Wetboek van Koophandel".

4 The Flemish title of this part of the Code is "Wet betreffende de Verzekeringen", or, in short, "De Verzekeringwet". Titles X and XI, which contain the provisions pertaining to insurance in general, came into effect on 11 June 1874.

5 In Flemish, "landverzekeringen".

6 The Flemish title of this part of the Code is the "Wet betreffende Zeevaart en Binnenvaart" and came into effect on 21 August 1879. A reference in this chapter to "the Code of 1879" therefore entails a reference to marine insurance which is provided for in book II, title VI of this Code. The numbering of the articles of title VI of book II does not start afresh, and commences with art 191 and ends with art 279.

On 25 June 1992 a new non-marine insurance law came into effect in Belgium.⁷ The Law of 1992 forms part of the Belgian Commercial Code and is contained in title I of book IV. Like the Code of 1874, the Law of 1992 deals only with insurance contract law.⁸ Supervision of the insurance industry and the control of insurance intermediaries are regulated by separate Laws.⁹ Marine insurance is still governed by the Code of 1879.¹⁰

The Belgian civil law is codified in the Belgian Civil Code.¹¹ It contains general provisions which apply to all contracts, including insurance contracts.

The provisions of the different Codes are constantly being considered and interpreted by the Belgium courts. The decisions of the Belgian Supreme Court are therefore a further important source of law.¹²

The Code of 1874, like all its nineteenth-century European counterparts, gradually became outdated and the Law of 1992 serves as a good example of modern thinking on insurance contract law in Europe.¹³ The first point of criticism which was levelled against the Code of 1874 and which created the need for reform, was the lack of protection it provided for the insured. Nineteenth-century European contract law was concerned with the entrenchment of contractual freedom. Contractual freedom, however, tends to favour the interests of the economically powerful rather than the interests of the economically weak.¹⁴ In the sphere of insurance, the insurance company is usually in a stronger position than the insured and dictates the terms of the

7 This Law is known as the "Wet op de Landverzekeringsovereenkomst" (the Flemish title of the Act), and will be referred to in this chapter as "the Law of 1992".

8 The Law of 1992 deals with non-marine insurance ("landverzekering") only. It further distinguishes between, on the one hand, indemnity insurance ("schadeverzekering") which is defined in ss 51-52 and dealt with in ss 37-47, and, on the other hand, non-indemnity insurance ("perzoonsverzekering") which is defined in ss 94-96 and dealt with in ss 48-50. (In the case of indemnity insurance ("verzekering tot vergoeding van schade" or "indemnitaire verzekeringen") the contract is concluded with the aim of indemnifying the insured in the case of loss or damage. In the case of non-indemnity insurance ("verzekeringen tot uitkering van een vast bedrag" or "forfaitaire verzekeringen") the insurer commits itself to the payment of a fixed sum of money, irrespective of the extent of the damage of the insured: see also Nuytinck et al 203-205.) Different types of indemnity insurance contract are distinguished and dealt with in the Law of 1992, eg, property insurance (ss 53-60); fire insurance (ss 61-68); credit and suretyship insurance (ss 70-76); liability insurance (ss 77-89); and legal aid insurance (ss 90-93). Different types of non-indemnity insurance are also distinguished in the Law of 1992, eg, life insurance (ss 97-135) and non-indemnity insurance other than life insurance (ss 136-137). For a schematic exposition of the broad structure of the Law of 1992, see Nuytinck et al 254.

9 The "Wet betreffende de Controle der Verzekeringsondernemingen" as amended (in short, the "Controlewet Verzekeringen") of 9 July 1975, read with Royal Notices of 12 March 1976 & 22 February 1991; the "Wet betreffende de Handelsbeurzen, Wisselagenten en Makelaars" as amended, of 30 December 1967, read with Royal Notice of 30 November 1939: see Ronse, Nuytinck & Cousy vol II. See also Fredericq *Handboek* vol I 21-22; Van Gerven 154.

10 As regards the background to the Law of 1992, see in general Schuermans (1) 689-691.

11 In Flemish, "Burgerlijk Wetboek". The Belgian Civil Code came into effect in 1804.

12 See Fredericq *Handboek* vol I 28-29.

13 See in general Reinecke "Interesting Aspects" 91 et seq.

14 See Lloyd 144-145.

insurance contract.¹⁵ European legislatures and courts have therefore progressively moved away from the principle of freedom of contract and opted for the protection of the weaker party to the insurance bargain.¹⁶ It will be shown that the Law of 1992 was a step in the direction of providing a greater measure of protection to the insured, albeit it a very small step.¹⁷

The second factor which created the need for reform was primarily a product of the twentieth century. A characteristic feature of insurance law in Europe is the growing process of unification and uniformity between the legal systems of the different European countries. In order to remain in step with other European countries, Belgian insurance law required far-reaching legislative revision in the field of insurance contract law.¹⁸

5.2 THE PREMIUM AS AN ESSENTIAL FEATURE OF THE CONTRACT OF INSURANCE

In terms of article 1 of the Code of 1874 the contract of insurance was described as

"een contract waarbij de verzekeraar zich, tegen betaling van een premie, verbindt de verzekerde schadeloos te stellen wegens het verlies of de schade door deze geleden ten gevolge van zekere onvoorziene gebeurtenissen of gevallen van overmacht".¹⁹

In terms of section 1 of the Law of 1992 an agreement of insurance is described as

"een overeenkomst, waarbij een partij, de verzekeraar, zich er tegen betaling van een vaste of veranderlijke premie tegenover een andere partij, de verzekeringsnemer, toe verbindt een in de overeenkomst bepaalde prestatie te leveren in het geval zich een onzekere gebeurtenis voordoet

¹⁵ See Fredericq *Evolutie* 2-3.

¹⁶ See Lando 269-271. Nineteenth-century contract law in Europe (and for that matter contract law worldwide) was besotted with the idea of freedom of contract. State intervention (primarily to protect the consumer) was treated as a great evil: see Lloyd 144-145. See also Cousy "Nieuwe wet" 5-6 on the aims of the Law of 1992.

¹⁷ For a Belgian sentiment on the need for reform, see Cousy "Nieuwe Wet" 5 where he declares as follows: "Niemand zal ontkennen dat de zeer beperkte en aanvullende wetgeving, neergelegd in de wet van 11 juli [sic] 1874, de mogelijkheid schiep voor de sterkere partij, de verzekeraar, om het laken langs zijn kant te trekken. De nieuwe wet doet een uitgesproken inspanning om te komen tot een gelijkwaardige, evenwichtige behandeling van verzekeraar en verzekeringnemer."

¹⁸ See Fredericq *Evolutie* 4-5. For works dealing with the topic of European Community insurance law, see in general Maitland-Walker 6-1 et seq; Paul & Croly 109; De Coninck 156 161. As to the aspect of insurance competition law in Europe, see in general Fitzsimmons 5-30.

¹⁹ This definition is criticised by Fredericq, *Handboek* vol II 193-194, who proposes the following definition of insurance: "[E]en overeenkomst waardoor de verzekeraar volgens de wetten van de statistiek een geheel van risico's compenseert die hij op zich heeft genomen en waardoor hij zich ertoe verbindt, mits een vergoeding die premie of bijdrage wordt genoemd, aan de overeengekomen begunstigde een zekere prestatie te leveren in geval van verwezenlijking van een bepaald risico."

waarbij, naargelang van het geval, de verzekerde of de begunstigde belang heeft dat die zich niet voordoet".²⁰

The general distinction between insurance at a fixed premium (also referred to as insurance for profit or premium insurance) on the one hand, and mutual insurance on the other hand, is also made in Belgian insurance law.²¹ In the case of insurance at a fixed premium, the premium is often a predetermined and immutable amount. In the case of mutual insurance, the amount of the premium is usually fixed only after one or more of the members of the mutual society has suffered a loss²² and the premium is then referred to as the "contribution".²³ This contribution will usually fluctuate depending on the extent of the damage and the number of members of the mutual society.

Different mutual insurance schemes have different premium arrangements. The basic form of mutual insurance provides for a fixed amount of indemnification with a fluctuating premium. In the case of mixed insurance,²⁴ the premium is fixed but the amount of indemnification payable by the mutual insurance society may vary. Finally, certain mutual insurance schemes provide for a varying premium as well as a varying amount of indemnification.²⁵ Generally the provisions of the Codes of 1874 and 1879 apply with equal force to mutual insurance.²⁶

Premium insurance or rather, insurance for profit, is regarded as an act of commerce²⁷ by article 2(6) of the Belgian Commercial Code of 1872.²⁸ Mutual insurance, by contrast, is not regarded as an act of commerce.²⁹ The Belgian Commercial Code of 1872 does not define the concept "act of commerce", but instead lists the different activities which qualify as acts of commerce. Some of these activities will qualify as an act of commerce even if they are not engaged in on a regular basis by the particular

20 See Reinecke "Interesting Aspects" 92-93 for a discussion of these and other attempts at defining the contract of insurance. This definition has been criticised for the insertion of tautological words like "vaste en veranderlijke" and "verzekerde of begunstigde", as they do not contribute to the demarcation of the concepts "premium" and "insured" respectively. Another point of criticism levelled against this definition is that it does not give any indication of who the insurer is: see Cousy "Nieuwe wet" 15.

21 In the case of mutual insurance every member of the society is simultaneously insurer and insured: he is an insured in the sense that he will be entitled to an indemnification but will also be obliged to make a contribution in order to indemnify the other members. A member is an insurer in the sense that he is entitled to be indemnified by the other members, but he is also obliged to see to it that other members are indemnified. For a brief overview of the development of mutual insurance, see Clemeur "Premie" 43.

22 It is, however, also possible in the case of insurance at a fixed premium for the parties to agree to insure at a premium to be arranged or in the case of mutual insurance for the premium to be a predetermined amount.

23 In Flemish, "omslag".

24 I.e., an insurance scheme which shows characteristics of both insurance at a fixed premium and mutual insurance: see Anon *Economie* 17J.

25 See Anon *Economie* 17J.

26 Article 2 of the Code of 1874. See also Simon & De Beus 228.

27 In Flemish, "daad van koophandel".

28 See Fredericq *Handboek* vol I 44.

29 See Fredericq *Handboek* vol I 45.

party. Other activities, again, will qualify as acts of commerce only if they are engaged in on a regular basis and on behalf of a business enterprise.³⁰ Whether a particular contract qualifies as a commercial contract, that is, an act of commerce, or as a civil contract, is important in determining whether the rules of commercial law or of civil law will apply to the contract.³¹ This distinction is also of importance in determining the correct forum as well as the powers of the presiding officer in the event of any disputes resulting from that contract.³²

From the point of view of the insurer, every insurance contract is an act of commerce.³³ From the point of view of the insured, the contract of insurance is of either a civil or a commercial nature, depending on the status of the insured³⁴ or the nature of the risk covered.³⁵ In the case of mutual insurance, there is not normally any motive on the insurer's part to make a profit. In principle mutual insurance can therefore be categorised as being of a civil nature. An exception to this rule is to be found in the case of mutual marine insurance.³⁶

Section 1 of the Law of 1992 describes the premium as

30 See Fredericq *Handboek* vol I 31-54; Gerven 17-20. Articles 2 and 3 of the Belgian Commercial Code of 1872 give a list of the acts of commerce, and they include, inter alia, all purchases of foodstuffs and merchandise (which in turn include, movable incorporeal things), the lease and sub-lease of these things, services rendered (other than those in terms of a service contract), the provision of municipal services, insurance for a premium (mutual insurance is therefore not an act of commerce), the activities of banks, the issuance of negotiable instruments, the activities of an enterprise whose business is the purchase and sale of immovable property, and activities in the sphere of maritime affairs.

31 Although there are not two entirely different sets of rules of contract for commercial contracts and civil contracts respectively, certain rules apply to commercial contracts only and others to civil contracts only. Eg, the ordinary rules of evidence apply to civil contracts while a separate set of less stringent and formal rules of evidence applies to commercial contracts: see Van Gerven 20 57 et seq.

32 Cases concerning acts of commerce are conducted in the Commercial Court (in Flemish, "Rechtbank van Koophandel"): see Fredericq *Handboek* vol I 44-45; Van Gerven 17-20. There is a hierarchy of commercial courts, namely lower courts and higher courts. The presiding officer in the commercial courts, ie, the magistrate in the lower court and the judge in the supreme court, are assisted by a prominent merchant: Fredericq & Merchiers 203-204.

33 Authority for this statement can be found in the fact that an insurer which is not prepared to honour its obligations in terms of the contract of insurance, must be sued in the Commercial Court. See also Fredericq *Handboek* vol I 44.

34 Eg, whether or not the insured is regarded as a merchant (in Flemish, "koopman"). Article 1 of the Belgian Commercial Code of 1872 describes a merchant as someone whose main activity includes or whose supplementary activities include one or more of the acts of commerce. See also Van Gerven 19-20.

35 It will be of a commercial nature if the insured is a merchant and he signs the contract in that capacity. Eg, if the insured is an industrialist he will be regarded as a merchant. If this industrialist concludes a fire insurance contract on his factory, the insurance contract will be regarded as an act of commerce. But if this industrialist concludes a fire insurance contract on his private dwelling, the insurance contract will not be regarded as an act of commerce: see Fredericq *Handboek* 44-45.

36 See Fredericq *Handboek* vol I 45.

"iedere vorm van vergoeding door de verzekeraar gevraagd als tegenprestatie voor zijn verbintenissen".³⁷

The premium in terms of a life insurance contract is defined as

"[de] bedrag betaalbaar door de verzekeringnemer als tegenwaarde van de verbintenis van de verzekeraar".³⁸

There seems to be a distinction between life insurance and other forms of insurance in that the premium in the case of life insurance must consist of money. The same restriction is apparently not applicable to the premium in other forms of insurance. The Law of 1992 contemplates that the premium may also consist of something other than money. This appears from the definition of "premium" which describes a premium as "*iedere vorm van vergoeding door de verzekeraar gevraagd*".³⁹

The undertaking by the insured to pay a premium to the insurer is an essential of the insurance contract. It is not necessary for the parties to mention the amount of the premium in their contract but it must refer to the fact that a premium will be paid or that a contribution⁴⁰ will be made.⁴¹

The insurance contract is a reciprocal contract and the respective obligations of the insurer and the insured are rendered in return for one another.⁴² The undertaking by the insured to pay a premium is given in return for the undertaking given by the insurer to bear the risk.⁴³

The insurance contract is a consensual contract.⁴⁴ This entails that it takes effect as soon as the parties have reached agreement on all the essentials of the contract.⁴⁵

37 My italics.

38 My insertion and italics. See annexure II s 9 Royal Notice of 17 December 1992, in respect of life insurance contracts.

39 My italics.

40 I.e., in the case of mutual insurance.

41 See Fredericq *Handboek* vol II 193-194 where he explains the essential requirement of a premium as follows: "[Verzekering is] een overeenkomst waardoor de verzekeraar volgens de wetten van de statistiek een geheel van risico's compenseert die hij op zich ertoe verbindt, *mits een vergoeding die premie of bijdrage wordt genoemd [in de overeenkomst]*" (my insertions and italics). He concludes at 195 that "[h]et is niet onontbeerlijk dat het bedrag van de premie of van de bijdrage in het contract bepaald weze; het volstaat dat het kan berekend worden met behulp van de elementen van de overeenkomst".

42 See Fredericq *Handboek* vol II 194.

43 See Fredericq *Handboek* vol II 194-195. The nature of the insurer's performance usually has a bearing on the question whether it is a continuous performance which, in turn, may influence the divisibility of the performance. The divisibility of the parties' performance may affect a number of contractual aspects, including the right of the insured to claim a return of the premium. But as the return of the premium is regulated by the different Codes, the Belgian writers are not concerned with the effect which the nature of the insurer's performance may have on the return of the premium. See further par 5.6 below.

44 In Flemish, "solo consensu".

45 Article 25 of the Code of 1874. See Simon & De Beus 234; Fredericq *Handboek* vol II 194 202; Nuytinck et al 205.

Although section 4 of the Law of 1992 requires that a policy which contains the terms of the parties' contract must be issued, the policy merely serves as proof of the contract and writing, that is, the issuance of the policy, is not a requirement for the validity of the contract.⁴⁶

The question of the legal tenability of the concept of "premiumless" or "free" insurance, is not treated in any detail in the Belgian insurance law materials. But reference is sometimes made to "premiumless" life insurance. Fredericq argues that a contract of insurance can exist without an agreement to pay a premium. As an example of this so-called premiumless contract of insurance, he refers to the case where the insured in terms of a non-indemnity policy elects not to claim the surrender value of his policy. In such an instance the insurer usually decides not to levy any further premiums on the particular policy.⁴⁷ It is clear, however, that this example of "premiumless" life insurance is not a true example of "free" insurance as the premium is paid from the reserve fund, which consists of a certain portion of the premiums already paid by the insured. It is not possible, by contrast, for the insured to pay a premium without any insurance contract being in existence.⁴⁸

Four aspects relating to the premium are pertinently covered by the Law of 1992, namely, the time of payment of the first premium, the place of payment of the premium, payment to a mandatary, and the consequences of non-payment.⁴⁹

5.3 THE PAYMENT OF THE PREMIUM

5.3.1 Introduction

Different duties rest upon the insured. Some of them arise before the conclusion of the contract.⁵⁰ Others come into play upon the conclusion of the contract, while a

46 See Nuytinck et al 206. Section 196 of the "Wet tot Organisatie van de Openbare Kredietsector" of 17 June 1991 provides for an interesting acknowledgement of the cogency of modern information systems. Section 196 provides that "[d]e fotografische, mikrofotografische, magnetische, elektronische of optische afdrucken van de stukken van ... de verzekeringsondernemingen die onderwerpen zijn aan het toezicht van de Controledienst voor de Verzekeringen, zijn bewijskrachtig zoals de originele stukken waarvan zij, behoudens bewijs van het tegendeel, worden verondersteld een afschrift te zijn indien zij werden opgesteld door één van deze vennootschappen of onder haar toezicht": see Nuytinck et al 207n8.

47 See Van Eeckhout 75-76; Fredericq *Handboek* vol II 287; Nuytinck et al 222.

48 The facts in the decision of the "Hof van Beroep" at Antwerp, 30 October 1991, reported in (1992) *Tijdschrift voor Verzekeringen* 117-120, at first appear to come close to contradicting this principle. The facts of this decision are as follows. The insurer cancelled the insurance contract but continued to claim and receive the "premium" for a further period of five years. It was decided that both parties had acted under mistake and that the contract did not revive through the payment and acceptance of the premiums. But it may be argued that the sums paid in terms of this "contract" were not "premiums" in the true sense of the word as no insurance contract (or any other type of contract for that matter) existed.

49 See Cousy "Uitvoering" 52. One notable omission from the Law of 1992 is the insurability of the premium. Article 15 of the Code of 1874 and art 191 of the Code of 1879 provided explicitly for this matter. See also par 5.8.2 below.

50 Eg, the pre-contractual duty of the insured to disclose material facts to the insurer.

further category of duties comes into effect only during the existence of the contract.⁵¹ The duty to pay the first premium belongs to the second category of duties. The payment of the first premium is usually made a suspensive condition for the coming into being of the contract.⁵² A term that the contract will not take effect before the payment of the first premium is not an essential term of an insurance contract, but is nevertheless enforceable.⁵³ The duty to pay ensuing premiums belongs to the third category of obligations.⁵⁴

Except if stipulated otherwise by the parties, the payment of the first premium in the case of life insurance is a condition of the contract's coming into being.⁵⁵ The payment of the first premium in the case of non-indemnity insurance will be a suspensive condition only if the parties have agreed that that is to be the case. The payment of ensuing premiums in terms of both types of insurance lies within the discretion of the insured and is therefore of a facultative nature. This is especially apt in the case of life insurance which is in essence a saving device.⁵⁶

The general principles regarding the payment of debts, for example, the place of payment, by whom the debt is to be paid, and to whom the debt is to be paid, are also applicable to contracts of insurance.⁵⁷ However, if the insurance contract contains a term which is irreconcilable with these general principles, such contractual term will prevail.⁵⁸ Likewise, where a particular Act or Code contains a provision which aims at specifically regulating a legal issue in terms of an insurance contract, such specific provision will enjoy preference to the general principles of contract.

5.3.2 The Time of Payment of the Premium

Most indemnity as well as non-indemnity insurance policies contain a clause which requires the payment of the (first) premium before the contract will have any effect.⁵⁹ Such a clause is valid and enforceable. Article 103 of the Law of 1992 provides

51 Eg, the duty which rests upon the insured to assist the insurer to enforce its right of subrogation. See also François-Bredat 27.

52 This type of condition is usually present in non-indemnity policies as well as indemnity policies: see Fredericq *Handboek* vol II 217.

53 See Fredericq *Handboek* vol II 218.

54 See François-Bredat 30-31.

55 See s 103 of the Law of 1992.

56 See Fredericq *Handboek* vol II 284; s 10 Royal Notice of 17 December 1992 in respect of life insurance contracts which provides that the payment of the premium is voluntary and that the policy must contain a reference to this principle.

57 Eg, in terms of the general principle regarding the time of payment of the price in terms of a contract of sale, or the payment of the rent in terms of a lease, the debt is due on the date as agreed on by the parties: see art 1650 and art 1728(2) of the Belgian Civil Code. But the Belgian Civil Code does not prescribe the time of payment of the debt as regards contracts in general. See also the discussion in par 5.3.2 - 5.3.7 below.

58 Eg, s 103 of the Law of 1992 provides that the premium in terms of a life insurance contract must be paid upon the conclusion of the contract except if the parties agreed otherwise.

59 See also s 12 Royal Notice of 14 December 1992 which prescribes the payment in advance of premiums in terms of the standard agreement for compulsory motor-vehicle liability insurance.

that in the absence of a contradicting contractual term, any life insurance contract comes into effect on the payment of the first premium. Thus, in the absence of an agreement to the contrary, a life insurance contract will come into operation only on payment of the first premium. Payment of the premium may take place either by way of a single payment or by way of regular recurring payments.⁶⁰ The incidence of the payment of the premiums obviously lies within the discretion of the parties.⁶¹

The general principles in respect of the payment of debts, as codified in the Belgian Civil Code, will apply as far as the payment of any further premiums is concerned. If the contract provides for a date of payment, payment must be effected on that date.⁶² If no time for payment of the premium was agreed upon, it would appear that payment must take place when the policy is delivered to the insured (in the case of the first premium), and at each date of renewal thereafter (in the case of subsequent premiums).⁶³

Often the policy provides that in the case of non-payment of the premium, the cover in terms of the contract will be suspended.⁶⁴ Such a clause does not amount to a penalty clause.⁶⁵

The time of payment of the premium in the case of mutual insurance depends on the type of mutual insurance under discussion.⁶⁶

First, in the case where the amount of indemnification is fixed but the premium is subject to variation, the following three different times of payment of the premium are possible:

- the payment of the premium takes place immediately after the occurrence of the risk; or
- the payment of the premium takes place at the end of each financial year; or
- the payment is merely one of a provisional estimated premium, with any deficit or surplus in the premium being recovered or returned at the end of each financial year.

Secondly, where the premium is fixed but the amount of indemnification is not, a payment in advance is effected as soon as the risk has materialised. At the end of each financial year a final assessment is made and further payments demanded if there is

60 So-called "eenmalige premies" or "termijnbetalingen": see Van Eeckhout 46.

61 The Law of 1992 does not prescribe the incidence of payment of the premium.

62 See art 1650 of the Belgian Civil Code which provides that the debtor in terms of a contract of sale must pay the price on the day as stipulated in the contract. See also François-Bredat 32.

63 Article 1651 of the Belgian Civil Code provides that if no time for payment was agreed upon by the parties to a contract of sale, payment must take place at the time when delivery is made.

64 For an example of such a clause, see the decision of the "Hof van Beroep" at Antwerp, 7 October 1985, reported in (1986) 19 *Tijdschrift voor Belgische Handelsrecht* 295.

65 See the decision of the "Vredegerecht" at Lennik, 28 March 1988, reported in (1991) 24 *Tijdschrift voor Belgisch Handelsrecht* 1131.

66 See again par 5.2 above and the different types of mutual insurance referred to there.

any money left in the fund created by the advance payments. In some instances it is impossible to determine the exact amount of the premium in advance. This would be the case where, for example, the premium is based on the turnover of a business. The premium will then be payable only after the period of cover in terms of the contract.

The premium in terms of insurance contracts in general is calculated and expressed as an annual premium.⁶⁷ Due to practical considerations most premiums are calculated annually. Most insurance companies' financial statements are prepared annually, and turnovers and profits are usually also calculated annually. Although the premium is calculated annually, payment of it is not necessarily made annually. As a matter of convenience for the insured, most insurers allow premiums to be paid in instalments.⁶⁸

Since the insurer is liable to indemnify the insured fully during the duration of the contract, the insurer generally deems the premium to be indivisible for that period of cover. This entails that the insurer is entitled to the total amount of the premium as soon as it is at risk. Nowadays, however, insurance contracts frequently provide that in certain circumstances a portion of the premium will be returned to the insured.⁶⁹

Mere acceptance of a late premium by the insurer does not constitute a waiver by it of the right to resile from the contract.⁷⁰

5.3.3 The Mode of Payment

Apart from specific guidelines as to the time and place of payment of the premium, the Law of 1992 is silent on the different methods of payment of the premium. This can be ascribed to the fact that it aims at stating only the principles exclusive to insurance contract law. Principles which are relevant but not necessarily exclusive, are generally not dealt with in the Law of 1992.

In terms of the general rule, the person who claims execution of an obligation must prove that the obligation has been performed. The debtor (insured) is therefore under a duty to prove the payment of the debt (premium).⁷¹ The Belgian Civil Code does not prescribe any specific methods of payment for particular types of debt. For example, in the case of contracts of lease, it merely provides for the payment of the debt by way of the agreed method.⁷²

67 In Flemish, "jaarpremie".

68 See Erpicum & Lambert 17.

69 See Fredericq, Cousy & Rogge 391-392. See also par 5.6.7 below.

70 See the decision of the "Hof van Beroep" at Antwerp, 13 March 1991, reported in (1991) *De Verzekeringen* 867-871.

71 Article 1315 of the Belgian Civil Code.

72 Article 1728(2).

It can therefore be taken that the premium in terms of Belgian law may be paid by whatever method the parties may choose.⁷³ There are indications that the overwhelming majority of insurance premiums in Belgium are paid by way of the electronic transfer of funds.⁷⁴

Finally, the expenses resulting from a particular method of payment are generally for the account of the debtor.⁷⁵

5.3.4 The Place of Payment of the Premium

In terms of the Belgian Civil Code the general principle entails that the payment of a debt is to be effected at the place designated by the contract, or in the absence of a term to that effect, at the domicile of the debtor.⁷⁶ This provision is frequently excluded from the insurance contract by the insurer by the insertion of a contradicting contractual term.⁷⁷ Such a term is permissible and is not against public policy. If the contract was concluded through the intervention of a broker, the insurer generally prefers that the broker collects the premium from the insured. In this way the insurer may ensure that the broker keeps in touch with the insured. Exceptionally, the contract sometimes provides that the first premium must be delivered by the insured. Such a provision is normally linked to the condition that the insurer will be at risk only after the payment of the first premium. In practice the insurer usually includes a term in the contract to the effect that cancellation of the contract because of non-payment of the premium will be subject to a notice of non-payment by the insurer to the insured.⁷⁸

Section 13(1) of the Law of 1992 confirms the general principle of the law of contract, namely that the payment of the insurance premium must take place at the domicile of the debtor (insured). The necessity of this provision has been questioned.⁷⁹ In the light of developments in the field of electronic payments, a provision like that in section 13(1) has become obsolete. This section is obviously not supposed to entail anything more than a confirmation of the principle that the insurer will send a reminder to the insured in respect of a (late) premium.⁸⁰

73 As to the different methods of payment available in the Belgian commercial sphere, see Van Gerven 217-259; Hammerstein 1-8; Van Crombrughe & Arendt 150-154.

74 The debit order and stop order are the prime examples of this type of payment: see Cousy "Uitvoering" 53.

75 Article 1248 of the Belgian Civil Code.

76 See art 1247; Van de Ryck I.1.3 30; Van Herreweghe 24.

77 For an example of, and the effect of the non-compliance of such a clause, see the decision of the "Hof van Beroep" at Ghent, 8 January 1975, (1976-1977) *Rechtskundig Weekblad* 1319-1320. See also François-Bredat 30.

78 This practice is regarded as satisfactory and it was correctly contemplated that the legislature would entrench this practice by way of legislation: see Vandeputte *Inleiding* 82. See also s 15 of the Law of 1992 as well as par 5.4 below.

79 See Cousy "Uitvoering" 52-53n5.

80 See Cousy "Uitvoering" 53.

Thus, the general rule is that the premium must be collected by the insurer.⁸¹ Although the Law of 1992 does not prescribe a particular method of payment of the premium,⁸² it does, however, confirm the principle that the premium is a collectable debt⁸³ and must therefore, as general rule, be collected by the insurer.⁸⁴

If the contract provides that the insured (debtor) must deliver the premium to the insurer (creditor), delivery must take place at the business premises of the insurer or at the office of the broker concerned. If the premium is to be collected by the insurer, the insured is entitled to wait for the insurer to call on him before payment of the premium will be due. If there rests a duty upon the insured to tender or pay the premium to the insurer,⁸⁵ late payment of the premium will result in the suspension of the insured's right to claim an indemnity. The suspension will be cancelled on payment of the premium.⁸⁶ In the case of life insurance, the insured is allowed a period of grace in which to pay the premium. However, if the days of grace have lapsed and the insured life has died, the insurer is under no obligation to accept the late premium.⁸⁷

5.3.5 By Whom the Premium Is to Be Paid

In terms of the general principles of contract embodied in the Belgian Civil Code, a debt (premium) may be discharged by any person who has an interest in its discharge. A debt (premium) may also be discharged by a third party who has no interest in the discharge of the debt, provided that such discharge by the third party is made in the name of the debtor.⁸⁸ An obligation to render a performance may not be discharged by a third party against the wishes of the creditor (obligee) when the latter has an interest that it be fulfilled by the debtor (obligor) himself.⁸⁹

The definition of insurance in section 1 of the Law of 1992 does not require that the premium be paid by the insured alone.⁹⁰ It is possible for certain third parties to obtain an interest in the continuation of an insurance contract. Examples of such third parties are a beneficiary in terms of the policy, a creditor of the insured, or a lessee of property.⁹¹ The policy may provide for the payment of the premium by such a third

81 See art 1247 of the Belgian Civil Code; Van Herreweghe 24.

82 The fact that the Law of 1992 contemplates freedom of choice for the parties as to the method of payment of the premium, is also illustrated by the provisions of s 60 which provides that "[de voorrecht van de verzekeraar] geldt slechts voor een bedrag gelijk aan twee jaarpremies, ongeacht de wijze van betaling van de premie" (my insertion and italics).

83 In Flemish, "haalskuld".

84 See s 13 of the Law of 1992.

85 In Flemish, "haalskuld".

86 See François-Bredat 31-32.

87 See the decisions of the "Hof van Beroep" at Antwerp, 7 October 1985, reported in (1986) 19 *Tijdschrift voor Belgische Handelsrecht* 295-297; "Hof van Beroep" at Antwerp, 15 March 1989 (1989) *De Verzekeringen* 616-617.

88 Article 1236 of the Belgian Civil Code.

89 Article 1237 of the Belgian Civil Code.

90 See again par 5.2 above.

91 Article 40 of the Code of 1874 provided for the leaseholder or lessee of leasehold land to pay the premium in terms of a contract of insurance in respect of the property, and to claim the amount of the premium from the lessor.

party. If the policy is silent on the possibility of the payment of the premium by a third party, it is uncertain whether a third party is entitled to keep a contract of insurance in force by paying the premiums contrary to the wishes of the insured.⁹² It would appear that a third party is entitled to keep an insurance contract in force contrary to the wishes of the insurer if the premium consists of money, but not if the premium consists of something else.⁹³ If the premium consists of something other than money, the nature of the performance (premium) may require a measure of skill or expertise,⁹⁴ and the insurer may be entitled to reject performance by a party other than the insured.

The Law of 1992 provides that in the case of the insolvency of the insured, his creditors are allowed to pay the premium on his behalf.⁹⁵ In terms of a group-insurance scheme, the insured employee may contract with his employer that the latter will pay the premium on his behalf.⁹⁶ In principle the insurer's consent is, of course, not a requirement for the validity of such an arrangement between the insured and a third party.

5.3.6 To Whom the Premium Is to Be Paid

In terms of the general principles of contract embodied in the Belgian Civil Code, payment must be made to the creditor or someone who is authorised by the creditor or by the Court to receive payment on behalf of the creditor. Payment to someone other than the creditor will be valid if the creditor ratifies such payment, or if he benefits from such payment to a third party.⁹⁷ Payment to a creditor who is incapable of receiving it is not valid, except if the debtor can prove that the payment worked to the benefit of the creditor.⁹⁸ Payment made by a debtor to his creditor to the prejudice of an attachment or a garnishment is not valid with regard to the attaching or garnishing creditors.⁹⁹

Generally the insurer must have the necessary capacity to act as insurer and to bind himself commercially. It therefore accepts and receives premiums from insured in its capacity as an insurer.¹⁰⁰

In terms of section 13 of the Law of 1992, the general rule is that the premium is payable to the insurer. However, if the premium is paid to a third party which is

92 See Vandeputte *Inleiding* 215-216n47 where reference is made to the position in the French law where a third party is allowed to keep the contract in force by paying the premium. A similar approach in the application of art 1236 of the Belgian Civil Code is put forward by Vandeputte *Inleiding* 216.

93 Cf art 1237 of the Belgian Civil Code.

94 Eg, where the employee (insured) of an insurance company enjoys insurance cover from his employer, in return for the rendering of services by him (the employee).

95 See s 32, 33 and 66(2) of the Law of 1992; Schuermans (1) 713; Nuytinck et al 221.

96 See s 105 of the Law of 1992; Vanderspikken 83.

97 Article 1238 of the Belgian Civil Code.

98 Article 1241 of the Belgian Civil Code.

99 Article 1242 of the Belgian Civil Code.

100 See Fredericq *Handboek* vol II 203.

ostensibly the mandatary¹⁰¹ of the insurer, such payment will release the insured.¹⁰² This provision is an exception to the general rule that the broker or other intermediary is regarded as the agent of the insured and not of the insurer. Cousy criticises the use of the phrase "klaarblijkelijk mandaat". Judicial interpretation of this phrase in 1988 showed that it entails more than an apparent relationship of mandate. In terms of this interpretation, a wide rather than a narrow interpretation ought to be attached to the concept "klaarblijkelijk mandaat". An apparent mandate is present where the mandatary has by mistake obtained the authority to act on behalf of the mandator. An apparent mandate is also present where the third party laboured under a wrong but justifiable impression that the mandatary had the necessary authority to act on behalf of the mandator.¹⁰³

Before the enactment of section 25 of the Control Act of 9 July 1975,¹⁰⁴ uncertainty existed as to whom the premium should be paid in the case of the transfer of a part of the business of the insurer concerned to another insurer.¹⁰⁵ Case law indicated that an insured could validly refuse to pay the premium to the latter insurer. This approach was based on the fact that the first insurer was not allowed to cede its rights and transfer its obligations in terms of the policy without the consent of the insured.¹⁰⁶ In order to avoid problems in this regard, insurance companies employed a complicated system in terms of which the second insurer acts as mandatary of the first insurer for purposes of the collection of the premium. In terms of the said section 25, any transfer of insurance business between two insurers must be approved by the supervisory body for insurance.¹⁰⁷ This approval is a general requirement for the validity of the transfer. The approval also obviates the need for specific consent by all the parties (including that of the insured) to such transfer of business.¹⁰⁸

Section 105 of the Law of 1992 provides that an insured may bind himself to a third party¹⁰⁹ to continue the payment of premiums in terms of a life insurance contract.¹¹⁰ But such undertaking will have no bearing on the relationship between the insurer and the insured.

101 In Flemish, "klaarblijkelijk mandaat".

102 See s 13 of the Law of 1992; Fredericq, Cousy & Rogge 393.

103 See Cousy "Uitvoering" 53; Nuytinck et al 213-214. See also the decision in "Hof van Cassatie" of 20 June 1988, referred to by Cousy in "Uitvoering" 53.

104 In Flemish, the "Wet betreffende de Controle der Verzekeringsondernemingen". See again par 5.1 above.

105 The transfer of the business of an insurer entails the cession of its rights, eg, to claim premiums from the insured, as well as the transfer of its obligations, eg, to indemnify the insured in the case of the materialisation of the risk.

106 The insurance contract is concluded, at least from the point of view of the insured, intuitu personae (ie, in contemplation of a particular person). The insured's consent is therefore required before the insurer may transfer its obligation in terms of the insurance contract to a second insurer. For an unsubstantiated critique of this rule, see Fredericq, Cousy & Rogge 393.

107 In Flemish, "de Controledienst voor de Verzekeringen".

108 See Fredericq, Cousy & Rogge 393-394.

109 Eg, the creditor in terms of a money-lending transaction: see Vanderspikken 82.

110 See also Vanderspikken 82.

5.3.7 The Amount of the Premium

In terms of the general principles of contract embodied in the Belgian Civil Code, the parties must reach agreement on the obligations of both parties to the contract.¹¹¹ But it is not necessary for the parties to agree on the exact amount (premium) payable in terms of their contract, as long as it is determinable.¹¹² Article 193 of the Code of 1879 provides that any amount in a marine insurance policy which is expressed in a foreign currency, must be converted to the Belgian currency at the rate which applied at the time of the conclusion of the contract.

The amount of the premium is in principle determined by consensus between the parties to the insurance contract. In terms of section 10(2)(7) of the Law of 1992, the amount of the premium, or a method of calculating the amount of the premium, must be specified in the contract.¹¹³ The amount of a "premium to be arranged" can be determined by resorting to, amongst other things, the other elements of the particular contract.¹¹⁴ For example, the duration of the contract, the nature and extent of the risk and the carefulness of the particular insured may all influence the amount of the premium.

In the case of insurance for profit, the amount of the premium is in principle fixed. But legislation does provide for exceptions to this principle. Both indemnity and non-indemnity insurance provide for exceptions to the principle of a fixed premium, in that they provide in certain circumstances for a proportionate decrease in the premium if there is a decrease in the risk.¹¹⁵ The most common example of a non-fixed premium is to be found in the case of fire insurance.¹¹⁶ Where there is an increase in the fire risk, the insurer is entitled to increase the premium. If, however, there is a diminution in the risk, the insured is entitled to claim a discount on the premium.¹¹⁷ Non-indemnity insurance is not subject to an increase in the premium if there is an increase in the risk.¹¹⁸ The parties are allowed to contract out of this right to rely on an increase or

111 Article 1126 of the Belgian Civil Code.

112 Article 1129 of the Belgian Civil Code.

113 See Fredericq *Handboek* vol II 195.

114 See Fredericq *Handboek* vol II 195. In terms of s 14(1)-(3) Royal Notice of 3 February 1992, a policy in terms of the Law of 1992 must contain certain technical information as to the calculation of the premium in a particular instance. Eg, factors which have affected the calculation of the "additional premium" must be stated: see par 5.8.1 below for a list of the different types of premium.

115 This decrease in the premium is justified by a reliance on art 1134 of the Belgian Civil Code which provides that "agreements must be executed in good faith": see Vandeputte *Inleiding* 91n81 and the authority cited there. See also Ponet 32. It would appear therefore that the amount of the increase or decrease of the premium is an aspect which is determined by consensus between the parties.

116 See Ponet 58. See also s 15 Royal Notice of 14 December 1992: Ronse, Nuytinck & Cousy vol IV.

117 This right of the insured is based on the underlying idea of the reciprocity of the insurance contract. The amount of the premium should correspond with the extent of the risk: see Vandeputte *Inleiding* 90-91.

118 See Vanderspikken 90-91.

decrease of the risk.¹¹⁹ If a marine insurance contract provides for an increase in the risk without indicating the method by which the increase must be determined, article 196 of the Code of 1879 provides that the Court may determine the increase in the amount of the premium. The Court must take cognisance of the extent of the risk, surrounding circumstances, as well as the other terms of the contract.

A distinction is usually drawn between the nett premium and the gross premium. The nett premium is the real cost to the insurer of taking over the risk, while the gross premium is the amount actually paid to the insurer by the insured.¹²⁰ The gross premium includes, for instance, the broker's commission, the cost of drawing up the necessary documentation, expected expenses in investigating any claims, and the insurer's profit.¹²¹

It is undesirable, if not unrealistic, to charge all insured the same premium. The amount of the premium is therefore influenced by, amongst other things, the personal circumstances of every insured, including his sense of social responsibility.¹²² It is a reality that no two risks are the same. But at the same time it is also desirable that the difference between premiums paid by different insured for the same type of risk, should always be kept within particular parameters. This principle is acknowledged by Belgian motor-vehicle liability insurance. In terms of this type of insurance, the premium levelled on the "worst driver" may never be more than double the premium paid by the "best driver".¹²³ This is therefore an example of parameters for premium rates being laid down by law. Belgian law also provide for the statutory fixing of premium rates.¹²⁴

The amount of the premium is influenced by different factors. In principle the amount of the premium is affected by the magnitude, duration and nature of the risk. These factors differ depending on the nature of the specific insurance contract. Different types of indemnity insurance contract allow for different factors to be taken into account.¹²⁵

In certain circumstances the amount of the premium will also be affected by whether the premium can be regarded as divisible or indivisible. On the one hand, the

119 Vandeputte *Inleiding* 90.

120 See Van Eeckhout 46.

121 See Erpicum & Lambert 16; François-Bredat 30. See also par 5.8.1 below.

122 See Clemeur "Premie" 48; Clemeur "Rechtsbijstand" 130.

123 See Clemeur "Premie" 50-51.

124 See, eg, the annual adaptation by the legislature of premium rates for motor-vehicle liability insurance: ss 36-37 Royal Notice of 14 December 1992: Ronse, Nuytink & Cousy vol IV.

125 One or two examples will suffice to illustrate the variety of factors which may influence the amount of the premium. First, in the case of export credit insurance, the amount of the premium is affected by considerations like the agreement on the method of payment between creditor and debtor, the financial standing of the debtor, the nature of the business of the debtor, the nature of the goods to be delivered, the country of final destination and the commercial status of the debtor: see Heerkens 39. Secondly, in the case of legal aid insurance, aspects like court costs and the fees of practitioners should be taken into consideration and reviewed from time to time: see Clemeur "Rechtsbijstand" 128-129.

premium is regarded as indivisible since it serves as counter-performance for the insurer's undertaking to bear the risk. On the other hand, the premium is sometimes regarded as divisible, especially when seen against the duration of the risk. This is particularly relevant in the case of indemnity insurance where the premium is usually paid in monthly instalments, and each payment represents an offer by the insured to renew the insurance contract for the coming month. In order to side-step problems in this regard,¹²⁶ insurance contracts increasingly provide that the total amount of monthly premiums which are paid during a particular year are deemed to be indivisible.¹²⁷

5.4 NON-PAYMENT OF THE PREMIUM

5.4.1 Introduction

In terms of the Belgian Civil Code the obligations of the creditor are terminated if the debtor fails to pay the debt. This principle is in accordance with the reciprocal nature of the insurance contract.¹²⁸ Belgian writers hold that this provision in the Civil Code applies *mutatis mutandis* to the insurance contract, and that the obligations of the insurer are terminated if the insured fails to pay the premium.¹²⁹ The insurer is therefore also allowed to rely on the *exceptio non adimpleti contractus*.¹³⁰ In the case of the imminent insolvency of the insurer, the insured will not be allowed to withhold the payment of the premium by relying on the *exceptio non adimpleti contractus*.¹³¹

In terms of the general rules regarding contracts, the debtor (insured) will be in default, either through notice by the creditor (insurer) or, if a time for payment has been fixed in the contract, by the failure of the debtor (insured) to perform (that is, to pay the premium) on or before the day appointed for performance.¹³² Insurance contracts in general usually provide for the suspension of the contract in the case of non-payment of the premium. The application of this suspension depends on the terms of the particular contract. Suspension of the cover in terms of the contract does not necessarily imply termination of the contract itself.¹³³ If the contract does not provide for termination because of non-payment of the premium, the insurer nevertheless has the choice

126 Eg, if the object of the risk is sold and the insured no longer has an interest in the object of the risk, or if the contract is cancelled by the insurer for non-disclosure by the insured of an increase in the risk: see Vandeputte *Inleiding* 90.

127 See Epicum & Lambert 17; Van Herreweghe 24. However, s 1219 of the Belgian Civil Code provides that a stipulation in a contract that an obligation is indivisible does not necessarily make it indivisible.

128 Article 1102 of the Belgian Civil Code.

129 See François-Bredat 32. Protection of the insured in these circumstances has been propagated for some time by Belgian legal commentators, and the requirement of a notice to the insured satisfies this shortcoming: see Fredericq *Evolutie* 11.

130 I.e., the exception of the unfulfilled contract. See Vandeputte *Inleiding* 84. See again par 5.3.1 above.

131 The *exceptio* is applicable only in the case of proven and completed malperformance: see Fredericq, Cousy & Rogge 395.

132 Article 1139 of the Belgian Civil Code.

133 See Schuermans (1) 704.

of either compelling the insured to pay the premium¹³⁴ or of terminating the contract.¹³⁵ Whether suspension of cover also entails termination of the contract will depend on the terms of the contract. Subsequent payment of the premiums by the insured may reinstate the cover in terms of the contract. The insurer is, however, entitled to resile from the contract during the period of suspension by serving notice on the insured of its decision.¹³⁶

5.4.2 Non-Payment of the Premium in Terms of Indemnity Insurance Contracts

Non-payment of the premium in terms of an indemnity insurance contract will, as a matter of general principle, lead to the suspension of the insurance cover. Non-payment of the premium by the insured will result in breach of contract by the insured only if the insured was placed in mora by way of a letter of demand, or if a time for payment was fixed in the contract and the insured failed to pay the premium before or on such date.¹³⁷ Before 1992 it was sufficient if the insurer was able to prove that he had in fact sent a notice of demand, even if the insured never actually received the notice.¹³⁸ Since 1992, it has become necessary for the insurer to prove that the insured has actually received the letter of demand, before it will have the consequence of placing the insured in mora.¹³⁹

The letter of demand required by section 15 of the Law of 1992 must be in the form of a summons¹⁴⁰ or a registered letter. In terms of such a summons or letter, the insured must be reminded to pay the premium within a specified period. This period must not be less than fifteen days. This period of fifteen days is calculated from the day of service or from the day after the letter was posted.¹⁴¹ Section 16 of the Law of 1992

134 le, to request the court for an order of specific performance.

135 Article 1184 of the Belgian Civil Code; Fredericq *Handboek* vol II 218.

136 See François-Bredat 32-33. Protection of the insured in these circumstances has been propagated by Belgian legal commentators, and the requirement of a notice to the insured satisfies this shortcoming: see Fredericq *Evolutie* 11.

137 See s 14 of the Law of 1992. Van Herreweghe 24 states that policies usually provide that the insurer will give the insured a written notice to pay the premium within a period of fifteen days (after the original due date). Before the enactment of the Law of 1992 it was permissible for the insurer to stipulate that the cover in terms of the contract would be suspended or even terminated in the case of late payment of the premium. This was permissible even without a letter of demand being sent: see Vandeputte *Inleiding* 84.

138 See the decision of the "Cour d'appel" at Brussels, 7 December 1988, (1990) *De Verzekeringen* 269.

139 See s 15 of the Law of 1992. The provisions contained in s 15 are rules which have their origin in insurance practice: Nuytinck et al 214-215.

140 In Flemish, "deurwaardersexploot".

141 See s 15 of the Law of 1992. For an example of a pre-1992 decision in terms of which the late or non-payment of the premium led to the automatic and immediate suspension of the insurance cover, see the decision of the "Hof van Beroep" at Ghent, 8 January 1975, reported in (1976-1977) *Rechtskundig Weekblad* 1319. A term which leads to the automatic suspension of the cover in terms of an insurance contract is deemed to be an application of the exceptio non adimpleti contractus principle. The Court (at 1323) referred to the unfairness of such a term and indicated that an insurer which is aware of such non-payment, but does not inform the insured about its intended resilement from the contract, acts contrary to the principle of good faith which underpins all contracts. See also art 1134 of the Belgian Civil Code which provides that all contracts must be executed in good faith.

determines three different possibilities in the content of the letter of demand. First, the suspension of the cover in terms of the contract, where the suspension will come into effect if the premium is still unpaid after expiration of the period stipulated in the letter of demand. If the insurer has not notified the insured in the first letter of demand that non-payment of the premium will cause the contract to be cancelled by the insurer, a second letter of demand to this effect must be served on the insured. Secondly, the suspension of the cover coupled with the possibility of cancellation of the contract, in which case the contract will be automatically cancelled if the premium is unpaid after expiration of the stipulated period in the letter of demand. Cancellation will take effect without any further letter of demand. Thirdly, there is the possibility of cancellation only. In terms of this type of letter of demand, the contract is cancelled from the moment of service.¹⁴² A similar procedure is also provided for in the case of non-payment of the premium in terms of compulsory motor-vehicle liability insurance.¹⁴³

The suspension of cover in terms of the contract of insurance as provided for in section 14 of the Law of 1992 does not preclude the insurer from claiming any further premiums. The insurer is, however, restricted to claiming premiums for a maximum further period of two years.¹⁴⁴ Such a clause will qualify as a penalty clause.¹⁴⁵

In terms of article 23 of the Code of 1874, the insurer, in the case of the insolvency of the insured, enjoyed a right of preference on the insured object in respect of its (the insurer's) claim for any unpaid premiums. This right of preference was applicable to movable objects of risk only.¹⁴⁶ This right conferred a preference on the insurer's claim which ranked immediately after the costs of sequestration.¹⁴⁷ This protection of the insurer is repeated in the Law of 1992. The insurer's claim is limited to an amount of twice the annual premium, irrespective of the method or incidence of payment of the premium.¹⁴⁸

Payment of the premium at a stage when the premium is already in arrears but before the insured is placed in mora, will not have a retroactive effect. This entails that if

142 See Cousy "Uitvoering" 54; Schuermans (1) 704.

143 See s 13 Royal Notice of 14 December 1992: Ronse, Nuytink & Cousy vol IV.

144 See s 17 of the Law of 1992; Cousy "Uitvoering" 55; Nuytink et al 215. At first glance there seems to be a contradiction between s 17 and 30. Section 30 provides that a contract of insurance may not exceed a period of one year. Section 17 prohibits the insurer from claiming more than two years' premiums in the case of suspension of the cover in terms of the contract. Since the maximum duration of any one insurance contract may not exceed one year, it does not seem possible for the insurer to claim more than one year's premium. See also s 73 of the Law of 1992 which provides that the insurer may "definitely" deny liability under the contract if the premium is still unpaid one month after the insured has been given notice of his default. Section 73 is part of subsection II of part II, of the Law of 1992. Section II deals with particular types of indemnity insurance, while subsection II deals with credit and surety insurance.

145 There is a difference of opinion about whether such a clause is enforceable: see Fredericq, Cousy & Rogge 395-396.

146 See Van Herreweghe 25.

147 See Vandeputte *Inleiding* 85-87 for the difficulties experienced in the application of these provisions.

148 See ss 59-60 of the Law of 1992.

an insured is in arrears with the payment of the premium and the risk materialises during this period of delay, a subsequent payment of the late premium will not create a right to claim in respect of the already materialised risk. Such payment will, however, ensure reinstatement of cover in the future.¹⁴⁹

A term in a contract of insurance which provides that the cover in terms of the contract will come into operation only after payment of the first premium, is a valid and enforceable condition.¹⁵⁰

5.4.3 Non-Payment of the Premium in Terms of Non-Indemnity Insurance Contracts

The non-payment of the premium in respect of a life insurance contract will lead only to the suspension and termination of the contract. Save for the first premium, the insurer will not have a claim on the remainder of the premiums.¹⁵¹ It is possible, however, for the insured to bind himself to the unconditional payment of the premiums by way of a second independent contract.¹⁵² It is also possible for the insured to bind himself indirectly to the unconditional payment of premiums. An example of this would be where a loan is granted to the insured by the insurer (or by a third party) and the insured guarantees the repayment of the loan,¹⁵³ the continuation of the loan being linked to the punctual payment of premiums.¹⁵⁴

In the case of a non-indemnity insurance contract, for example, a life insurance contract, in terms of which the payment of the premium, as a general rule, is not enforceable against the insured, suspension of the cover is, of course, not possible or, rather, not practical.¹⁵⁵ Any outstanding premiums are subtracted from the reserve fund¹⁵⁶ until it is exhausted. Cancellation of the contract will then follow inevitably.¹⁵⁷

149 See Vandeputte *Inleiding* 85.

150 See s 14 of the Law of 1992.

151 This statutory protection of the insured was first introduced by a Royal Notice of 17 June 1931: see Vandeputte *Inleiding* 85n63. It is confirmed by s 104 of the Law of 1992.

152 See s 105 of the Law of 1992. This novelty is in accordance with the reform suggested by Belgian insurance lawyers. According to these suggestions the aim of any legislative reform should be to limit the powers of the insurer. The legislature and not the insurer should decide on the sanction in the case of non-payment or late payment of the premium: see Fredericq *Evolutie* 7. This also illustrates the recent trend in European insurance legislation to sacrifice the contractual freedom of the parties in favour of the protection of the insured: see again note 14 above.

153 See Ponet 5.6/4.

154 See Vandeputte *Inleiding* 215.

155 It would be impractical and in conflict with actuarial principles for the insurer to suspend the cover in terms of, eg, a life insurance policy. Premiums in terms of life insurance contracts are levelled so that the amount of the first premium for the policy's first period is the same as the amount of the premium for the policy's last period. As the premiums are determined by considering the insured's life expectancy, any suspension of the cover as a result of the non-payment of the premium, will inevitably result in a re-calculation of and an increase in the premium.

156 The "reserve fund" may be defined as the amount of all premiums received minus a certain percentage of these premiums which is deposited in a separate account, and which is used to provide for eventual payment on the death of the life insured: see Vanderspikken 89.

157 See Vanderspikken 83; Schuermans (2) 743.

5.5 THE ROLE OF BROKERS AND OTHER INTERMEDIARIES IN THE PAYMENT OF THE PREMIUM

5.5.1 Introduction

An insurance contract is based on consensus between two parties, namely the insurer and the insured. More often than not, though, the insurer and the insured never meet and the insurance contract is concluded on their behalf by an insurance intermediary.¹⁵⁸

Three different types of intermediary are recognised in Belgian commercial law. First, there is the broker.¹⁵⁹ He acts as an intermediary between two parties without entering into a contract of service with any of them.¹⁶⁰ He offers his services at will to the general public. Secondly, there is the commissioner,¹⁶¹ who concludes contracts in his own name but on behalf of his principal. Thirdly, there is the commercial agent,¹⁶² who concludes contracts on behalf of and in the name of his principal.¹⁶³

The activities of a broker in his professional capacity amount to an act of commerce.¹⁶⁴

5.5.2 The Relationship Between the Insured and the Insurer

An insurance contract is almost inevitably concluded by a broker, on behalf of the insured, with the insurer. This fact causes the relationship between the insured and the insurer to remain, to a large extent, in the background.¹⁶⁵

Both the insured and the insurer generally enforce their respective rights in terms of the insurance contract by means of the intervention of the broker. But in principle the insurer may sue the insured for the premium,¹⁶⁶ and the insured may claim directly from the insurer.¹⁶⁷

158 See Fredericq *Handboek* vol II 202-203 302-303.

159 In Flemish, "de makelaar".

160 This does not mean, however, that there is no relationship at all between the broker and the insured, or between the broker and the insurer. See also par 5.5.3 and 5.5.4 below.

161 In Flemish, "de commissar".

162 In Flemish, "de handelsagent".

163 See Fredericq & Merchiers 212; Van Gerven 151-154. For purposes of this chapter, the concept "broker" will be used to denote an insurance intermediary although a large number of Belgian insurance intermediaries would also qualify as commercial agents.

164 See Fredericq *Handboek* vol I 33 48. See again par 5.2 above.

165 See Fredericq *Handboek* vol II 202-203 302-303.

166 See the decision of the "Tribunal civil" at Brussels, 26 June 1987, reported in (1988) *De Verzekeringen* 122-123.

167 Vandeputte *Inleiding* 214-217.

5.5.3 The Relationship Between the Broker and the Insured

The relationship between the broker and the insured is governed by the principles of the contract of mandate. In the conclusion of the insurance contract with the insurer, the broker acts as the mandatary of the insured. However, in the process of collection and receipt of the premiums though, the broker acts as mandatary of the insurer.¹⁶⁸ Two different contracts of mandate can thus be identified.¹⁶⁹

The contract of mandate between the broker and the insured is established when the insured instructs the broker to pay the premium to the insurer.¹⁷⁰ The broker is not entitled to sue the insured if the latter fails to pay the premium to the broker. Only the insurer may sue the insured for the premium.¹⁷¹

5.5.4 The Relationship Between the Broker and the Insurer

The relationship between the insurer and the broker is governed by generally accepted usages and principles. Many of the current legislative provisions dealing with the relationship between insurers and brokers are merely the enactment of usages and trade practices. Until 30 December 1867,¹⁷² the insurance broker was a civil servant appointed by the King and was responsible for the drafting and attestation of the insurance contract. After that date the broker's involvement in the conclusion of the insurance contract is restricted to that of an intermediary.¹⁷³

The broker is regarded as the insurer's "agent" for purposes of the receipt of the premium. In Belgian insurance practice the insurer commonly sends the broker a reminder about the payment of premiums due on insurance contracts effected by that particular broker. This practice entails the broker's acting as mandatary of the insurer in respect of the collection and receipt of premiums.¹⁷⁴ Payment of the premium by the insured to the broker, and a receipt acknowledging this payment, therefore constitutes payment to the insurer.¹⁷⁵ Thus, in the conclusion of the contract the broker acts as the

168 See Sollie 621-622.

169 A third contract of mandate, to wit the mandate of average (in Flemish, "averijmandaat"), is not particularly relevant for present purposes. In terms of the mandate of average, the duties of the broker entail the following: the broker informs the insurer of the realisation of the risk; the broker, in consultation with the insurer, appoints an expert to investigate the claim; the broker establishes the amount of the indemnity and submits the claim to the insurer; the insurer pays the indemnity to the broker who, in turn, pays the insured: see Sollie 621 625-626.

170 See Vandeputte *Inleiding* 190.

171 See the decision of the "Tribunal civil" at Brussels, 26 June 1987, reported in (1988) *De Verzekeringen* 122-123.

172 I.e., the date when the law in respect of brokers and other types of intermediary was first codified. The Flemish title of this Law is "de Wet betreffende de Handelsbeurzen, Wisselagenten en Makelaars". The latest amendment of this codification is contained in Royal Notice of 30 November 1939: see Fredericq *Handboek* vol I 24. See again par 5.1 above.

173 See Sollie 621.

174 See the decision of the "Rechtbank van Koophandel" at Oudenaarde, 13 December 1984, reported in (1984-1985) *Rechtskundig Weekblad* 2836 at 2838.

175 See Vandeputte *Inleiding* 192n35 and the authorities cited there; Ponet 60; Sollie 621.

mandatary of the insured, but in the process of the collection and the receipt of the premiums the broker acts as mandatary of the insurer.¹⁷⁶

The insurer is liable for the payment of the broker's commission. In the case of life insurance, this commission consists of an initial payment for every contract concluded, and subsequent payments based on the subsequent receipt of premiums in terms of such contracts.¹⁷⁷ In terms of a trade usage which dates back to 1867,¹⁷⁸ the broker is personally liable for the premium if he fails to inform the insurer that the insured is more than fifteen days in arrears with the payment of the premium. This usage was qualified by a decision in 1904 to the effect that the broker can be held liable only if, due to his negligence, the insurer is unable to collect the premium.¹⁷⁹ A decision in 1921 recognised a trade usage in Antwerp burdening the broker with the collection of premiums.¹⁸⁰ However, it frequently happens that the parties include a provision in their contract which excludes this usage. Such a provision can be either to lighten the broker's work load,¹⁸¹ or to protect the interests of the insurer and the insured.¹⁸²

The general practice in Belgium is for the broker to have an account with the insurer. Any commissions earned by the broker is credited against his name. Premiums to be received by the broker on behalf of that insurer are debited against his name. This account is not the same as a current account: although each entry into the account retains its own character, the insurer is entitled to set off outstanding commissions earned and premiums received by the broker should the latter be declared insolvent.¹⁸³ No merging of debts takes place. The parties may, however, agree that merging of debts will take place.¹⁸⁴ It sometimes happens that the broker informs the insurer that a particular insured has paid the premium while this may not actually be the case. Although there are contradicting opinions as to whether the insured would be covered in such circumstances, it would appear that he is covered.¹⁸⁵ Although no reasons are given for holding the insurer liable, such liability may possibly be founded on the principle of estoppel, since insurers often issue receipts for premiums they know were not received.¹⁸⁶

176 See Sollie 621-622.

177 See Fredericq *Handboek* vol II 304.

178 Ie, the year in which the Law dealing with the control of insurance intermediaries came into effect.

179 See Sollie 623.

180 See Sollie 623.

181 See Sollie at 625 where he refers to a practical example of this type of contract which was concluded between the Belgian Society of Transport Insurers and Feprabel (a firm of insurance brokers). In terms of this agreement the brokers were to collect premiums on behalf of the insurer, but were not liable for any unpaid premiums.

182 Eg, if the insurer suspects the broker of being of careless nature or if it is aware of the imminent insolvency of the broker, the insurer may prefer not to make use of the services of the broker in the collection and receipt of the premium: see Vandeputte *Inleiding* 192-193n37.

183 See the decision of the "Hof van Beroep" at Antwerp, 17 May 1984, reported in (1985) *De Verzekeringen* 471-474. See also the comment on this decision by Thys at 474-475 where he approves this acknowledgement of the existence of a contract of commission between insurer and broker.

184 See Vandeputte *Inleiding* 193n41.

185 See Vandeputte *Inleiding* 193-194 and the different views expressed there.

186 See Vandeputte *Inleiding* 194n44.

5.6 RETURN OF THE PREMIUM

5.6.1 Introduction

In general the premium must be returned where the risk has never commenced.¹⁸⁷ If the insurer has been at risk, but the risk has ceased to exist during the duration of the contract, it is allowed to keep a pro rata proportion of the premium.¹⁸⁸

The same principles or circumstances which entitle an insured to claim a return of the premium determine the insured's right to withhold payment of the premium. For example, if the insured sells the object of the risk during the period of insurance, he is either entitled to claim a return of a portion of the premium for that period during which he has no insurable interest in the object of the risk, or he is released from the further payment of premiums, if they are still unpaid.¹⁸⁹

The premium need not be returned where the applicant for insurance acted *mala fide*.¹⁹⁰

The insured is, as a matter of general principle, entitled to a return of the premium when the contract is cancelled by the insurer. The premium must be returned within fifteen days of the cancellation of the contract.¹⁹¹

5.6.2 In the Case Where the Contract Did Not Come into Operation¹⁹²

If the insurance contract was concluded but no risk was incurred by the insurer, the insured is entitled to a return of the premium.¹⁹³ Article 219 of the Code of 1879 provides for an exception to this rule in the case of marine insurance. The parties to a marine insurance contract are allowed to insure on the basis of "lost or not lost".¹⁹⁴ If it later appears that no risk was incurred by the insurer, the premium is nevertheless not returned to the insured.¹⁹⁵ If, in the case of marine insurance, the insured was aware at the time of the conclusion of the contract that the ship has already reached its destina-

187 Article 28 of the Code of 1874 explained the underlying principle to this rule as follows: "De verzekering kan geen gevolg hebben wanneer de verzekerde zaak aan geen risico is onderworpen of wanneer de voorziene schade reeds bestont ten tijde van de overeenkomst".

188 Section 18(2) of the Law of 1992. See also Simon & De Beus 228.

189 See Fredericq *Handboek* vol II 194-195 230.

190 See s 96 of the Law of 1992.

191 Section 18(1) of the Law of 1992; Nuytinck et al 219.

192 In this paragraph the effect of the non-commencement as well as an increase or decrease in the risk are discussed. Although an increase or decrease in the risk does not necessarily affect the operation of the contract, it is nevertheless treated here for practical reasons.

193 See art 28 of the Code of 1874; s 24 of the Law of 1992.

194 In Flemish, "vermeend risico", in French "risque putatif".

195 As the Law of 1992 does not apply to marine insurance, the exception provided for in terms of art 219 of the Code of 1879 is left unaffected and (still) applies to marine insurance contracts concluded after 1992: see Schuermans (1) 708-709.

tion, he has to pay to the insurer an amount double that of the premium by way of a penalty for his fraud. This situation corresponds with the case where the insured was aware at the time of the conclusion of the contract that the ship was already lost. If the insurer was aware at the time of the conclusion of the contract that the ship had already reached its destination, it has to pay to the insured an amount double that of the premium by way of a penalty for its fraud.¹⁹⁶

If, in the case of a marine insurance policy, there is a change in the direction of the journey, or a change of ship which carries the insured goods, the insurer will not be liable. The insurer is allowed to retain the premium if the risk has commenced.¹⁹⁷

If the insured acted *mala fide* in the conclusion of the contract, for example, if he tried to deceive the insurer into accepting the risk, the premium need not be returned by the insurer.¹⁹⁸ Likewise, if the loss or damage to the object of the risk was caused by the intentional conduct of the insured, he is not entitled to a return of the premium. But if the insured has acted *bona fide*, he is, as a matter of general principle, entitled to a *pro rata* or full return of the premium, depending on the circumstances.¹⁹⁹

Section 26 of the Law of 1992 provides in detail for the situation where there has been an increase in the risk.²⁰⁰ In terms of section 26 the insured must inform the insurer of any change in the state of affairs which may adversely affect the risk. Only changes which are of a material²⁰¹ and permanent²⁰² nature need be conveyed to the

196 See art 220 of the Code of 1879. Article 220 corresponds with a rule from Roman-Dutch law which provided for a similar penalty in these circumstances: see again ch 3 par 3.6.2 above.

197 See art 205 of the Code of 1879. See also art 218 of the Code of 1879 which provides that if the insured sends the ship to a more remote destination (than the destination agreed upon in the contract), the insurer will not be liable in terms of the contract, and it will be entitled to retain the premium. If the ship is sent to a destination which is closer (than the destination which was agreed upon in the contract) but which is still on the same route, the insurer will be liable, apparently without any return of a portion of the premium.

198 See art 11 of the Code of 1874; and s 24 of the Law of 1992 which provides that "[w]anneer de verzekeringnemer ... te kwader trouw heeft gehandeld bij het sluiten van de overeenkomst of een onverschoonbare vergissing heeft begaan, behoudt de verzekeraar de premie die verschuldigd is voor de periode die loopt vanaf de dag waarop de overeenkomst van kracht wordt tot de dag waarop hij het niet-bestaan van het risico verneemt".

199 Article 10 of the Code of 1874. Article 10 applied to insurance for profit as well as mutual insurance. The principle of public policy underpinned the insured's right to a return of the premium where he acted *bona fide*: see Simon & De Beus 231.

200 See also art 31 of the Code of 1874 which provided that if there was an increase in the risk, and such increase was caused by the insured, the insurer was in principle entitled to cancel the contract. The insurer had to prove that it would not have concluded the contract if the increased possibility of the materialisation of the risk was present at the time of the conclusion of the contract: see also Simon & De Beus 236. The concept of "increase in the risk" (in Flemish, "risicoverzwaarig") was described in a recent decision as "een omstandigheid die de waarschijnlijkheid of de omvang van het risico duurzaam vergroot in zodanige mate dat de verzekeraar de verzekering niet zou hebben aangegaan of daarin slechts op andere voorwaarden zou hebben toegestemd, indien de nieuwe staat van zaken ten tijde van het sluiten van de overeenkomst had bestaan": see Schuermans (1) 709.

201 In Flemish, "aanmerkelijke".

202 In Flemish, "blijvende".

insurer.²⁰³ The insurer must, within one month after being notified of the increase in the risk, amend the contract with retroactive effect from the date of such increase, and present it to the insured for his acceptance. If the insured turns down the amended contract or if he fails to accept it within 30 days, the insurer may cancel it within fifteen days after such decision (or failure to decide within the 30 days) by the insured. If the insurer fails to cancel the contract within this period of fifteen days, it is not allowed to rely at a later stage on the increase in the risk to cancel the contract. If the risk materialises after the insurer has been informed of the increase in the risk but before the insurer has amended the contract, it will nevertheless be liable in terms of, and to the extent stipulated in, the original contract.²⁰⁴

If the insured fails to inform the insurer of the increase in the risk the following rules will apply. First, if the failure to inform the insurer was not the fault of the insured, the insurer will be liable as stipulated in the contract.²⁰⁵ Secondly, the insurer's liability will be limited to such an amount as represents the proportion between, on the one hand, the premium which is paid by the insured, and, on the other hand, the premium which the insurer would have levelled had it been aware of the increase in the risk. Thus, where there has been an increase in the risk after the conclusion of the contract, the insurer will be liable to pay only an amount which is in relation to the premium paid by the insured.²⁰⁶ Thirdly, if the insured intentionally withheld the information as to the increase in the risk from the insurer, the latter is not liable to indemnify the insured and it is further entitled to retain the premium as damages or rather, as a penalty. If the insurer can prove that it would not have concluded the original contract at all, it will not be liable at all and must return all premiums to the insured.²⁰⁷

In the case where there has been a decrease in the risk after the conclusion of the contract, the insured will be entitled to a return of a portion of the premium.²⁰⁸

In the case of marine insurance, article 209 of the Code of 1879 provides for the situation where the (full) risk as contemplated by the parties upon the conclusion of the contract, does not commence. If the insured has shipped goods to an outward destination and also insured the expected return cargo from the outward port, the insurer will be entitled to two-thirds of the (full) premium if no cargo was loaded on the return voyage. The parties are allowed to include a term in their contract which excludes the operation of article 209.

203 This post-contractual duty to disclose does not apply to life, illness, and credit insurance: see s 26(1) of the Law of 1992. The reason for this appears to be the fact that an increase in the risk is a characteristic in these types of insurance. See also ch 4 par 4.3.7 for a similar exception in Dutch law.

204 See s 26(2) of the Law of 1992; Schuermans (1) 710.

205 See s 26(3)(a) of the Law of 1992.

206 See s 26(3)(b) of the Law of 1992.

207 See s 26(3)(c) of the Law of 1992; Schuermans (1) 710.

208 See s 25 of the Law of 1992; Schuermans (1) 709; Nuytinck et al 209-210.

5.6.3 In the Case Where the Contract Is Void

In the absence of mala fides on his part, the insured may recover the premium he has paid to the insurer if the insurance contract is void. This rule follows from the general principle that someone is not allowed to retain a performance to which he is not entitled.²⁰⁹ If the contract is void due to the fraud of the insured, for example, the intentional non-disclosure of material facts, the insured is not entitled to a return of the premium.²¹⁰ If the insured in terms of a marine insurance policy fraudulently concludes the contract while being aware that the risk has already materialised, the contract will be void and the insured will not be entitled to a return of the premium. In addition to forfeiting the premium, the insured will be liable to pay a double premium as a penalty.²¹¹

Section 18 of the Law of 1992 provides that in the case of the termination of the contract of insurance, the premiums must be refunded within a period of fifteen days after the termination of the contract.²¹² In the case of a partial termination²¹³ of the cover in terms of the contract²¹⁴ or any other reduction in the benefits due under the contract, there must be a pro rata return of the premium.²¹⁵

209 See art 1235 of the Belgian Civil Code; art 10 and 11 of the Law of 1874; s 18 of the Law of 1992; Schuermans (1) 705. See also Fredericq *Handboek* vol II 214. Simon & De Beus 231 are of the opinion that art 10 of the Code of 1874 applies to mutual insurance contracts as well as insurance for profit contracts. It may be of interest to note that if an insured has concluded a life insurance contract with the sole aim of prejudicing his creditors, eg, by paying a very high premium, the premiums paid will be protected (by way of the actio Pauliana) against the claims of the creditors, except in so far as the insurer was aware of this fraud: see Fredericq *Handboek* vol II 298.

210 Section 6 of the Law of 1992. See also Schuermans (1) 698; Nuytinck et al 208-209. Section 6 of the Law of 1992 provides that "[w]anneer het opzettelijk verzwijgen of het opzettelijk onjuist meedelen van gegevens over het risico de verzekeraar misleidt bij de beoordeling van dat risico, is de verzekeringsovereenkomst *nietig*" (my italics). It is not clear whether or not the contract will indeed be void ("nietig") or merely voidable ("vernietigbaar") in the case of a fraudulent misrepresentation or non-disclosure by the insured. But if one considers that s 7(1) of the Law of 1992 provides that an unintentional misrepresentation or non-disclosure will not result in the insurance contract being void, one has to assume that the legislature has indeed intended the contract to be void in the circumstances described in s 6. As to the effect of an unintentional misrepresentation or non-disclosure on the insurance contract, see par 5.6.4 below. Article 9 of the Code of 1874 provided that the contract was void if the misrepresentation or non-disclosure of the insured caused the insurer to conclude the contract. The contract was void irrespective of whether or not the misrepresentation or non-disclosure was made fraudulently, negligently or innocently. See also Simon & De Beus 230.

211 See art 220 of the Code of 1879. See also art 16 of the Code of 1874.

212 See Schoorens 38; Cousy "Uitvoering" 64.

213 In Flemish, "gedeeltelijke opzegging".

214 Eg, if an insured insures his fleet of vehicles with an insurer against all fire and theft, but the parties decide at a later stage to exclude certain vehicles from the contract, there will be a partial termination of the cover in terms of the contract.

215 In Flemish, "premiëkrediet". See s 18(2) of the Law of 1992 as well as s 7(1)-(2) Royal Notice of 17 December 1992 in respect of life insurance contracts. In terms of s 7(3) of this Royal Notice every life insurance contract must refer to the right of cancellation and the subsequent right to a pro rata return of the premium.

Generally all insurance contracts in terms of which the lives of children under the age of five years are insured are void.²¹⁶ Also void are certain other types of life insurance in terms of which the insured has no insurable interest in the life insured.²¹⁷

5.6.4 In the Case Where the Contract Is Voidable for Misrepresentation

If the insurance contract was induced by an unintentional non-disclosure²¹⁸ or misrepresentation, the contract will not be void but merely voidable.²¹⁹ The insurer (merely) has the option of resiling from the contract.²²⁰ If the unintentional non-disclosure or misrepresentation is discovered only after the occurrence of the risk, the insurer will be liable to pay only a certain portion of the proved claim. The insured is entitled to a portion of the proved claim in the proportion of the actual premium to the premium the insurer would have levied had there been not a non-disclosure or misrepresentation. If the insurer is able to prove that he would not have concluded the contract at all were it not for the non-disclosure or misrepresentation, it will not be liable at all under the contract, but it will be liable to the insured for an amount equal to the premiums paid.²²¹

However, if the contract has been induced by an intentional non-disclosure or an intentional misrepresentation of material facts by the insured, the contract will not be merely voidable, but void.²²² The insurer will be entitled to retain all premiums paid up to the moment at which the insurer became aware of the non-disclosure or misrepresentation.²²³

5.6.5 In the Case of Breach of Contract

The insured is in principle entitled to a return of the premium if the insurance contract is cancelled by the insurer on the ground of breach of contract.²²⁴ However, if

216 An exception to this rule exists where the King has given his approval to such a contract: see s 96 of the Law of 1992. The reason for the exception appears to be to facilitate those instances where the parents or guardian wish to arrange insurance cover for possible medical and funeral expenses of a child: Fredericq *Handboek* vol II 288. See also Schuermans (2) 742.

217 Eg, art 41 of the Code of 1874 provided that "[d]e verzekering op het leven van een derde is nietig, wanneer wordt bewezen dat de contractant generlei belang had bij het bestaan van deze derde". See further par 5.6.4 below.

218 See s 5 of the Law of 1992 as to the duty of disclosure which rests on the insured. In terms of this statutory duty the insured must disclose all material facts to the insurer. Whether or not a fact is material depends on the question of whether a particular fact may influence the insurer's opinion as to the risk it is incurring: see also Nuytinck et al 208.

219 See s 7(1) of the Law of 1992.

220 Ie, the contract is voidable.

221 See s 7(3) of the Law of 1992; Schuermans (1) 699-700; Nuytinck et al 208-209.

222 See again par 5.6.3 above.

223 See s 6 of the Law of 1992.

224 Section 18 of the Law of 1992; see also Cousy "Uitvoering" 64-65; Schuermans (1) 705.

the insured intentionally commits such breach of contract, he is not entitled to a return of the premium.²²⁵

Section 11 of the Law of 1992 provides that an insurance contract may not provide for the (total or partial) lapse of the insured's right²²⁶ to an indemnity or other benefit in terms of the policy, except in the case of non-compliance with an express obligation of the insured. The non-compliance with a contractual obligation must have caused the loss or damage. An insurer is therefore to a large extent deprived of the right to rely on a mere breach of contract to cancel the contract.²²⁷

5.6.6 In the Case Where No Insurable Interest Exists

If the insured has no interest in the object of the risk, the insurance contract is void.²²⁸ The insured is in principle entitled to a return of the premium if the contract is void for want of an insurable interest.²²⁹ For example, if both the insured and insurer laboured under the wrong impression as to the existence of a (putative) interest of the insured in the object of the risk, the contract will be void if it is clear that the insured does not have the required interest.

If the insured acted fraudulently in concluding the insurance contract, the insurer will be allowed to retain the premium.²³⁰ Thus, if the insured deceived the insurer as to the existence of his alleged interest in the object of the risk, the insured will not be able to rely on the absence of such interest to claim a return of the premium.

5.6.7 In the Case Where There Has Been Over-Insurance

If the insured has concluded the insurance contract with the fraudulent intention of gaining an enrichment through over-insurance, the contract will be void.²³¹ If the insured unintentionally or negligently over-insured the object of the risk, the whole contract is not void but only that portion of the insured value which represents the over-insurance. The insured is in principle entitled to a return of that portion of the premium which represents the over-insured value of the object.²³²

225 Section 24 of the Law of 1992 provides for the non-return of the premium in the case where the insured has acted *ma la fide*. Although this section does not specifically deal with breach of contract it can be argued that, as a matter of general principle, an insured should not be allowed to set up his own breach of contract to resile from the contract and claim a return of the premium.

226 Or that of the beneficiary.

227 See Nuytinck et al 218.

228 In the case of life insurance policies, s 48 of the Law of 1992 provides for an exception to the rule that the insured must have an insurable interest in the object of the risk. Section 48 requires that the beneficiary, and not necessarily the insured, must have an interest in the insured life: see also Nuytinck et al 239-240.

229 See s 18 of the Law of 1992; Cousy "Uitvoering" 64-65.

230 Section 24 of the Law of 1992.

231 Article 11 of the Code of 1874; art 211 of the Code of 1879. See Fredericq *Handboek* vol II 240; Vandeputte *Inleiding* 141n155.

232 See art 212 of the Code of 1879. See also Fredericq *Handboek* vol II 240.

The Law of 1992 provides for two instances in particular when the contract will be void due to the insured's fraud resulting in over-insurance. First, if the insured has insured the same insurable interest with more than one insurer in order to make a profit, all the contracts are void and the insurers will be allowed to retain the premiums.²³³ The insurers will only be entitled to retain the premiums if they acted in good faith.²³⁴ This is an example of double insurance.²³⁵ Secondly, if the insured has intentionally, or with gross negligence, misled the insurer as to the existence or extent of the risk,²³⁶ any premium paid will not be returned. This is an example of over-insurance with a single insurer. The insured will be liable for the premium from the commencement of the contract until the insurer becomes aware of the non-existence of the risk.²³⁷

It would then appear that the insured is entitled to a return of the premium in the case of unintentional over-insurance.²³⁸

5.6.8 In the Case Where the Policy Expressly Provides for the Return of the Premium

The parties may expressly agree on the return of the premiums, notwithstanding any of the provisions of the Code of 1874 or the Law of 1992 regarding the forfeiture of premiums by the insured.²³⁹

5.7 FORFEITURE OF THE PREMIUM

The policy often provides expressly for the forfeiture of the premium.²⁴⁰ Thus, the parties may agree that the premium will not have to be returned in certain circumstances. But they are not allowed to agree that the insurer will keep the premiums if it has acted fraudulently.²⁴¹

Section 18 of the Law of 1992 provides that in the case of the cancellation of the contract, and irrespective of the reasons for cancellation, the premium for the expired portion of a divisible insurance contract is forfeited. The pro rata portion of the premium for that period for which the insured will not enjoy insurance cover, must be returned to

233 See s 12-14 of the Code of 1874; s 43 of the Law of 1992; Schuermans (1) 719.

234 See Schuermans (1) 719.

235 See Fredericq *Handboek* vol II 240-241.

236 Eg, if the insured concludes an "all-risk" insurance contract in respect of his fleet of motor vehicles, and a greater number of vehicles than the insured actually owns are insured in terms of the contract.

237 See s 24 of the Law of 1992. See also Schoorens 40.

238 See, in this regard, s 42 of the Law of 1992; Schuermans (1) 719. See also Fredericq *Handboek* vol II 241.

239 See Vandeputte *Handboek* 62; Cousy "Uitvoering" 64-65.

240 Vandeputte *Handboek* 62-63.

241 See Cousy "Uitvoering" 64-65. See again note 234 above.

the insured within fifteen days after the cancellation of the contract.²⁴² If the contract is void or voidable from the beginning (for reasons other than the fraud of the insured), the insured is in principle entitled to a return of the premium.²⁴³ Thus, if the contract is void or voidable because of the fraud of the insured, he forfeits the premium.

5.8 FUNCTION AND INSURANCE OF THE PREMIUM

5.8.1 Function of the Premium

The premium is composed of different elements. Usually the premium consists of the reserve, the insurers' profit, administration costs,²⁴⁴ costs involved in the calculation and settlement of claims,²⁴⁵ and the broker's commission.²⁴⁶

The premium serves primarily as counter-performance for the obligations undertaken by the insurer in terms of the insurance contract. However, the premium also funds a specific mathematical reserve established and maintained by the insurer.²⁴⁷ The role and function of this reserve depend on the type of insurance. In the case of indemnity insurance, of which some types are referred to as "simple insurance",²⁴⁸ the insurer aims at creating an equilibrium between annual payouts on the one hand, and annual premium income on the other hand. To uphold this balance, Belgian legislation imposes a post-contractual duty on the insured to disclose facts to the insurer which affect the assessment of the risk. These facts are restricted to those under the control of the insured.²⁴⁹ Only facts which would have influenced the insurer in accepting the risk or affecting the terms on which the risk was accepted have to be reported. The onus rests on the insurer to prove that the facts concerned were relevant to the assessment of the risk.

The premium in terms of non-indemnity insurance, for example, life insurance, is also calculated with reference to actuarial²⁵⁰ principles. The expected duration of the

242 See s 18 of the Law of 1992. See again par 5.6.1 above.

243 See also Schuermans (1) 705.

244 Eg, salaries of office staff, rent and furniture, municipal costs, travel expenses, contributions to professional bodies, and information services: see Clemeur *Premie* 46.

245 Eg, reports by accident experts and other types of expert, professional fees of medical doctors and lawyers: see Clemeur *Premie* 46.

246 See Erpicum & Lambert 16 where the premium is subdivided in the "basic premium" ("de zuivere premium"), the "additional premium" ("de bijtelling") and the "commercial premium" ("de handels-of tariefpremium"). The commercial premium is the total of the basic premium and the additional premium. See also par 5.3.1 for the distinction between the nett and the gross premium.

247 See in general Vandeputte *Inleiding* 218-220. For an exposition of the importance of insurance premiums from an investment point of view, see Van Puyvelde 2 et seq.

248 In Flemish, "elementaire verzekeringen".

249 Eg, if the insured starts smoking or participating in potentially dangerous activities like hang-gliding or parachuting.

250 Ie, the science of calculating risks and probabilities involving uncertain future events. The concept "actuarial" is often loosely used to describe the process of calculating the extent of the risk in terms of indemnity insurance contracts. However, it is a concept which, strictly speaking, should be used in the context of non-indemnity insurance contracts (and more specifically life insurance contracts) only: see Collins 14.

insured life is of paramount importance in determining the amount of the premium in the case of life insurance. In the case of life insurance the risk has a progressive tendency. This implies that the insurer ought to levy a lower premium during the early years of the policy, while the premium will be subject to a steady increase as the years pass and the risk of death increases. For practical reasons, however, insurers prefer to levy a constant premium for the anticipated duration of the policy.²⁵¹

Belgian legislation prescribes the manner in which the premium fund of certain types of insurance contracts must be invested by the insurer. These contracts include life insurance, labour accident insurance and motor accident liability insurance.²⁵²

All the provisions regarding the insurance premium imposed by the Law of 1992, are underpinned by three general principles of the law of contract and insurance. First, the provisions regarding the payment of the premium (as well as its return in certain circumstances) confirm the reciprocal nature of the insurance contract. Secondly, these provisions also restore the equilibrium between premiums paid by the insured and benefits paid by the insurer. This equilibrium supports the concept of indemnity²⁵³ and the "price", that is, the premium, paid by the insured to be indemnified by the insurer upon the materialisation of the risk.²⁵⁴ Thirdly, these provisions are merely illustrations of the principle that the insurance contract, like all contracts, is a contract to be concluded and executed in good faith.²⁵⁵

5.8.2 Insurance of the Premium

Although there is legislative authorisation in Belgian law for the practice of insuring the premium, the legal tenability of this practice has not yet come under scrutiny by either the Belgian writers or the Belgian courts.²⁵⁶ One must therefore assume that the insurance of the premium is not seen by Belgian jurists as being in conflict with either the general principles underlying the idea of insurance,²⁵⁷ or the function of the premium in the broader context of the relationship between the insurer and the insured.²⁵⁸

251 See Fredericq *Handboek* vol I 283-284; Schoorens 36-37.

252 See Ericum & Lambert 18; s 22 Royal Notice of 17 December 1992 in respect of life insurance premiums.

253 Section 51 of the Law of 1992 provides that "[e]lke schadeverzekering beoogt de vergoeding van schade".

254 See Cousy "Uitvoering" 52-53; Schuermans (2) 729.

255 See art 1134 of the Belgian Civil Code; Cousy "Uitvoering" 5-7 52-53.

256 See art 15 of the Code of 1874 which provided that "[d]e verzekerde kan de verzekeringspremie laten verzekeren." Simon & De Beus 232 in their commentary on the Belgian Commercial Code refer to this article without any comment. This article has, however, not been repeated in the Law of 1992. See also art 191 of the Code of 1879 which provides that "[d]e verzekering kan omvatten ... de bodemerijpremie ...".

257 See again par 5.8.1 for a discussion of these principles.

258 See again par 5.8.1 above.

5.9 CONCLUSION

The Law of 1992 provides a good example of modern and enlightened regulation of insurance law. A random selection of some of the aspects illustrating this include the following:

The principle of freedom of contract is sacrificed in favour of consumer protection.²⁵⁹ A balance is struck between, on the one hand, the right of the insurer to receive premiums and, on the other hand, the obligation of the insured to pay premiums. Insured are protected against the unfair unilateral cancellation of insurance contracts by the insurer in the event of an innocent or negligent non-disclosure or misrepresentation or a single non- or late payment of the premium. This facilitates equity and certainty. The return of the premium hinges to a large extent on the question of whether the insured acted in good faith. If the insured acted in bad faith, he is, as a matter of general principle, not entitled to a return of the premium.²⁶⁰ This rule is in accordance with principles of equity and fairness and is also conducive to honest conduct on the part of insured.²⁶¹

In terms of the definition of the concept of "premium", the premium may consist of something other than money.²⁶²

The method of payment of the premium is a matter left to the discretion of the parties.²⁶³

It is not necessary for the parties to mention the exact amount of the premium in the contract, provided that it can be determined at a later stage. The option to omit the amount of the premium in the policy provides for situations where the parties want to agree to insure at "a premium to be arranged" or even "at a reasonable premium".²⁶⁴

Payment of the premium by the insured to the broker is regarded as payment to the insurer.²⁶⁵

The Law of 1992 provides in detail for the legal consequences following the late payment of the premium by the insured. Generally the insurer is required to send the insured a letter of demand informing him that the premium is unpaid and that the contract will be cancelled if payment is not made within a fixed statutory period. An insurer which wishes to cancel the contract for non-payment of the premium, must prove that it has complied with the requirements laid down in the Law of 1992.²⁶⁶ This is in stark

259 See again par 5.1 above.

260 See Cousy "Uitvoering" 5-6; Schuermans 698 (1). See again par 5.6.2-5.6.7 above.

261 See again par 5.6 above.

262 See again par 5.2 above.

263 See again par 5.3.2 above.

264 See again par 5.3.7 above.

265 See again par 5.5.3 above.

266 See again par 5.4 above.

contrast with the Law of 1874 which was brief²⁶⁷ and often ambiguous with the emphasis on the obligations of the insured.²⁶⁸

In general the Law of 1992 treats in great detail the position of the parties regarding the return of the premium in the case of an increase in the risk,²⁶⁹ where the contract is cancelled by the insurer,²⁷⁰ where the contract is voidable for misrepresentation,²⁷¹ where there is a breach of contract,²⁷² where the insured has no insurable interest in the object of the risk,²⁷³ and where there has been over-insurance by the insured.²⁷⁴

267 It consisted of 43 articles only.

268 Schuermans (1) 691-692.

269 See again par 5.6.2 above.

270 See again par 5.6.3.

271 See again par 5.6.4 above.

272 See again par 5.6.5 above.

273 See again par 5.6.6 above.

274 See again par 5.6.7.

6.1 INTRODUCTION

Unlike the majority of legal systems in Europe,² there is no general code of insurance law in England. The English law of insurance is to be found in rules emanating from judicial decisions,³ statute and trade usages.⁴ Alongside these formal sources of English law, stands the concept of "Equity". The principles of Equity form a system of jurisprudence which is founded on principles of natural justice and fair conduct. It supplements common law by providing a remedy where none exists at law.⁵

The English law of insurance is characterised by the following features. First, despite a history of more than three hundred and fifty years, many of the original rules, characteristics and jargon⁶ still remain. Secondly, the insurance contract is simply another type of contract and as a result insurance contracts are, as a matter of principle, governed by the principles common to contracts in general.⁷ Strictly speaking, the concept "law of insurance contracts" is therefore a misnomer, as for the most part there is no distinct law of insurance contracts at all. The rules relating to the formation and termination of the insurance contract, as well as those relating to causation, measurement of loss, illegality in formation and in performance, and subrogation are thus

1 In writing this chapter the following general works on the English insurance law were consulted: Arnould par 1323-1343; Ivamy *Marine* 80-86 109; Ivamy *General* 181-205; MacGillivray & Parkington par 881-1068; Colinvaux 131-140; Birds 146-152; Chalmers; Clarke 293-316.

2 Eg, see ch 4 par 4.1 and ch 5 par 5.1 above.

3 Which, by definition, constitute the English common law. The English common law is a judge-made system of law, originating in ancient customs, which were clarified, much extended and universalised by the courts: see Keenan 4.

4 See Merkin 83. But evidence of a trade usage would not be permitted to prove a custom which contradicts a written term of the contract: see MacGillivray & Parkington par 961. The distinction between a trade usage and a custom is peculiar to English law and was not known, eg, by Roman-Dutch law: see Christie 188-189. A custom is a rule which has existed either actually or presumptively from time immemorial and has obtained the force of law in a particular locality. Trade usages, by contrast, lack three of the distinguishing features of customs. First, they need not have existed from time immemorial. Secondly, they need not necessarily be confined to a limited locality. Thirdly, if a trade usage is contrary to the positive law the courts will not give effect to it: *Halsbury's* vol 12 par 401-402 405.

5 See also Keenan 4 8-9 for a discussion of the period of conflict which existed between the common law and Equity.

6 Eg, the concept "assured", instead of the (nowadays) more acceptable "insured", is still employed in English law. Likewise, in terms of the archaic distinction, the word "assurance" is used to denote an indemnity against an event which *must* happen, eg, "the attainment of the age of 60 years or earlier death", whereas "insurance" denotes indemnity against an event which *may* or *may not* happen, eg, "damage or destruction through fire".

7 See, eg, Henley 88 who states that "[t]he usual principles of contract law apply to the formation of any contract of insurance". To this one may add that the general principles of contract law apply in principle to *all* aspects of the insurance contract.

ordinary principles of English law.⁸ Thirdly, as much of the law is still open, it rests upon practice rather than legal principle.⁹ Fourthly, as a result of scant intervention by the legislature, the principle of freedom of contract still thrives in English insurance contract law.¹⁰

The difference between marine and non-marine insurance is very much evident and emphasised in English insurance law.¹¹ England was for centuries one of the truly great nautical powers of the world.¹² Sea-voyages and the perils of the sea were therefore considerations which had to be catered for by the law from early on. This led to the rapid development of the English marine insurance law, in contrast with its non-marine counterpart which developed much more slowly.

The first insurance disputes which were heard by the English courts all concerned policies of marine insurance. The English Marine Insurance Act 1906¹³ codified the rules of marine insurance which had emanated primarily from judicial decisions. The English rules of non-marine insurance, by contrast, are not codified and the courts, where appropriate, rely by analogy upon principles of marine insurance in reaching decisions involving policies of non-marine insurance.¹⁴

6.2 THE PREMIUM AS THE CONSIDERATION IN TERMS OF THE CONTRACT OF INSURANCE

6.2.1 Introduction

An important principle of the English law of contract must be briefly referred to at this stage. In English law a promise is generally not binding as a contract unless it is

8 See Merkin 85. For a list of the special insurance rules, ie, those rules which are (purportedly) applicable to insurance contracts only, eg, insurable interest and indemnity, utmost good faith, warranties and conditions, and agency, see Merkin 87-90.

9 This entails that many matters which come before the courts will be decided on the basis of trade usages within the insurance sphere, the proof and contents of which hinge to a large extent on the discretion of the court.

10 See Merkin 83. For an example of radical state intervention in respect of the concept of "freedom of contract" in the sphere of insurance, see the discussion of Australian insurance law in ch 7 below.

11 For a table in which the differences between marine and non-marine insurance are succinctly set out, see Colinvaux 9-10. The most primary if not important difference concerns the form of the contract. A contract of marine insurance cannot be enforced unless it is embodied in a formal policy: see s 22 of the Marine Insurance Act 1906. A contract of non-marine insurance, by contrast, is required to be in no special form, and is enforceable even if it is only oral.

12 However, for many centuries England, as well as the rest of the British Isles, took little part in commercial and cultural exchanges with other nations. During the fifteenth century, Britain began to develop as a powerful sea-going nation. The south-coast and Atlantic-facing ports developed, and Englishmen explored and traded throughout the known world and Britain became a great commercial sea power: see *Atlas* 34.

13 6 Edw VII c 41. This is a way of referring to, or "citing" of a statute. It refers to the year of the reign in which the Act received the Royal Assent (ie, in this case in the sixth year of the reign of King Edward VII) and the number of the statute in that particular session of the parliament, the "c" being an abbreviation of "chapter". The Marine Insurance Act 1906 was the work of Sir Mackenzie Chalmers. As to the influence of this Act on marine insurance world-wide, see Colinvaux 391.

14 See Merkin 83-84.

either made under seal¹⁵ or supported by some "consideration". English law therefore limits the enforceability of agreements not under seal by reference to a complex body of rules known as "the doctrine of consideration".¹⁶ The underlying idea of the doctrine of consideration is the principle of reciprocity. "Something of value in the eye of the law"¹⁷ must therefore be given in return for a promise, in order to make that promise enforceable as a contract, that is, to create a promise which is legally binding.¹⁸ An ordinary contract, that is, one not made under seal, and which is not supported by some consideration, is valid but not legally enforceable by the promisee against the promisor.¹⁹

In English law "consideration" is traditionally defined as either some detriment to the promisee (in that he must give value) or some benefit to the promisor (in that he must receive value).²⁰ This definition has, however, not escaped criticism because it is in principle wrong to talk of benefit and detriment when both parties expect to, and actually may, benefit from the contract.²¹ It has been suggested that consideration is simply "the price for which the promise is bought".²² However, this latter definition is too vague to give any meaningful help in determining whether there is a consideration in any particular case.²³ An important point which must be made at this stage is that

15 The concept "contract under seal" is the archaic way of referring to deeds, because they are literally required to be sealed. A deed is a written promise or set of promises which derives its validity from the form, and the form alone, of the executing document. In order for a document to qualify as a deed, it should be intended as such, and should be signed and witnessed, and "delivered". An important requirement for the validity of ordinary contracts which is not required in the case of deeds, is that no consideration is required for a promise to be binding if such promise is contained in a deed. Deeds are not infrequently used for this very reason, for instance, by charitable organisations when appealing for funds. Deeds are also required by law for various transactions which are not all of a purely contractual nature, eg, a conveyance of a legal estate in land: see Atiyah 41-42. The law does not require an insurance contract "to be made under seal", ie, to be contained in a deed, for it to be valid. Insurance contracts are seldom if ever made under seal: see Birds 146. But the parties are, of course, free to do so if they so wish. For a discussion of the sealing of policies of insurance, see MacGillivray & Parkington par 333 et seq. Simple or ordinary contracts, which have to be supported by some consideration, are the opposite of deeds.

16 See Treitel 51.

17 See the decision in *Thomas v Thomas* (1842) 2 QB 851 at 859.

18 Treitel 51.

19 See Atiyah 118.

20 See Treitel 52. In layman's terms the legal concept of consideration is described as "the promise or object given by one party to persuade another to enter into a contract".

21 See Atiyah 120-121. As to the topic of benefit as a consideration, see Atiyah 135 et seq.

22 Treitel 53. This definition has also been approved in the House of Lords: see *Dunlop Pneumatic Tyre Co Ltd v Selfridge Ltd* [1915] AC 847 at 855. This definition does, of course, contain tangencies with the definition or function of the premium which is in essence "the price for which the promise (by the insurer to bear the risk of the materialisation of the uncertain event) is bought": see par 6.2.2 and 6.8.1 below.

23 See Treitel 53-54.

English law is concerned with the consideration for a promise, and not with the consideration for a contract.²⁴

English courts have over the years developed a number of guidelines to determine whether consideration exists on a given set of facts. They are the following. The first rule stipulates that the courts will not judge adequacy.²⁵ Secondly, past consideration is not regarded as valid consideration.²⁶ Thirdly, it is required that the consideration must move from the promisee to the promisor.²⁷ Fourthly, the consideration must be of some value.²⁸

These guidelines should be regarded as the bare essentials of the doctrine of consideration. This doctrine involves a complicated set of rules and exceptions and is constantly being interpreted, applied and adopted by the courts to provide for a variety of situations.²⁹

The concept of "consideration" is as important for the contract of insurance as for any other type of contract.³⁰ The undertaking by the insurer to bear the risk of the materialisation of the uncertain event is regarded as the consideration (counter-performance) for the undertaking by the insured to pay the premium. Conversely, the premium is regarded as the consideration given by the insured in return for the undertaking by the insurer to bear the risk of the materialisation of the uncertain

24 See Treitel 52. Atiyah's description best illustrates the rule that the law is concerned with the consideration for a promise. He explains (at 122) that "it is essential that the promises themselves should be regarded as consideration for each other, otherwise there could be no such thing as a contract consisting of mutual promises at all – a bare agreement can only be a binding contract if the promises are treated as consideration for each other as soon as an offer is accepted".

25 This entails that the courts do not ask whether adequate consideration or value has been given. The fact that a person paid "too much" or "too little" for a thing does not in itself affect the validity of the contract: see Treitel 57-58; Atiyah 126 et seq. The rule regarding adequacy does not, however, entail that the deliberate use of a nominal consideration, eg, where A promised to give £1 in return for £100 to be simultaneously paid by B, will be regarded as a form to make a gratuitous promise binding. Thus, although the courts do not judge adequacy, they will not allow the parties to use this rule to avoid the requirement of a realistic consideration: see Treitel 58-60.

26 Eg, if A gives a piano to B and two years later B promises to pay to A £500, there is no consideration for B's promise as A did not give B the piano in return for the promise of the £500. The test which the courts apply to establish whether consideration is past, is whether the consideration and the promise are substantially one transaction. In the final instance the test is one of fact and the order in which the events occurred is not decisive: see Treitel 60 et seq; Atiyah 123 et seq. For a discussion of the exceptions to the rule that past consideration is not valid consideration, see Atiyah 124 et seq.

27 This entails that a person to whom a promise was made can only enforce it if he himself provided consideration for it. Thus if A promises to pay B £100 if C does the same, and C pays B £100, B will not be able to enforce the promise from A. This rule supports the view that the essence of consideration is detriment to the promisee: see Treitel 65-66. It explains why the legal concept of a stipulation in favour of a third party is unknown in English law.

28 This entails that the consideration must have commercial value and that a consideration which is in reality illusory, will be disregarded. Consideration will be illusory when, eg, it is impossible to perform and that is known to both parties: see Treitel 66 et seq.

29 For a detailed discussion of the doctrine in general, see Treitel 51 et seq; Atiyah 118 et seq.

30 See again par 6.1 above.

event.³¹ The premium must therefore comply with the different requirements formulated by the courts for a consideration to be regarded as valid, for it to qualify as the consideration promised by the insured in terms of an insurance contract.

6.2.2 The Premium as Consideration in Terms of the Insurance Contract

The insurance contract is defined as

"any contract whereby one party assumes the risk of an uncertain event, which is not within his control, happening at a future time, in which event the other party has an interest, and under which contract the first party is bound to pay money or provide its equivalent if the uncertain event occurs".³²

A marine insurance contract is defined as

"a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure".³³

The premium is described as the consideration which the insurer receives from the insured in exchange for its undertaking to pay the sum insured or to undertake its obligations in the event insured against, of which the undertaking to bear the risk is its primary obligation.³⁴ Briggs and Edwards emphasise that the premium is the con-

31 See Brown *Principles* vol 1 57; Templeman 58. See further par 6.2.2 below.

32 See Birds 11. The insurance contract is a reciprocal contract which entails that at least two parties are involved. An ("captive") insurance contract which is concluded between the insured (the holding company) and the insurer (a captive insurance company) raises an interesting question as to whether it qualifies as a (insurance) contract. A captive insurance company (the insurer, which is the subsidiary company) is formed by another company (the holding company) to act as in-house insurer for the latter. The rationale behind the creation of a captive insurance company is that it would be more convenient and economical for the holding company to form its own insurance company. The premiums paid are usually deductible from tax in the same way as they are to a normal insurance company. If no losses occur during a particular period, the premium can then be retained within the company group: see Bawcutt 9. This amounts in principle to a form of self-insurance, which, it has been argued, is a misnomer as self-insurance does not qualify as insurance: see again ch 2 par 2.1 note 6 above. Furthermore, self-insurance does not entail a contract as a contract involves at least two different parties to create an obligation. It is submitted that if the captive insurance company is registered as a company which will cause it to have juristic personality, a reciprocal contract will come into being between the holding company and the captive insurance company.

33 Section 1 of the Marine Insurance Act 1906. See also Templeman 3; Chalmers 1-3.

34 See Ivamy *General* 181; MacGillivray & Parkington par 890. As authority for this statement the English writers rely on the South African decision in *Lewis v Norwich Union Fire Insurance Co* 1916 AD 509 at 519. Although Arrow 134 refers to the fact that insurance is usually classified as a type of service, Briggs & Edwards (at 96) emphasise that the premium is not a payment for services rendered. Arrow at 134 describes insurance as follows: "[I]nsurance [is] an exchange of money for money, not money for something which directly meets needs. The closest analog in ordinary economic theory to an insurance policy is a bond or a note, an exchange for money now for money later. But an insurance is a more subtle kind of contract; it is an exchange of money now for money payable contingent on the occurrence of certain events." From this description by Arrow it is clear that an insurance contract is primarily aimed at the transfer of the risk from the insured to the insurer. Benjamin 114 describes the operation of insurance as a service which is offered for sale in a free market, and is governed by a price mechanism.

sideration for the insurer's commitment to bear the risk.³⁵ Colinvaux refers to the premium as the *price* for which the insurer undertakes its liabilities.³⁶ The concept of "price" reflects the connection between the insurance contract and other types of contract, for example, the contract of sale.³⁷

Generally, no formalities are required for an insurance contract to take effect. Section 22 of the Marine Insurance Act provides that a marine insurance contract must be embodied in a policy to be admissible as evidence. But section 22 does not require the contract to be in writing for it to take effect. It merely prevents the enforcement of a marine insurance contract which was made orally.³⁸

An insurance contract, like all other reciprocal contracts, takes effect through the acceptance of an offer.³⁹ To be capable of acceptance, the offer must be complete in all material respects. This means that the offer must deal either expressly or impliedly with all the essential elements of the insurance contract. Failure to agree on all the essential elements of the contract will result in the contract being void for vagueness.⁴⁰ The parties must, for example, reach agreement on the fact that a premium will be paid. The insured is generally regarded as the offeror.⁴¹ The insured's offer to the insurer will usually be construed as one to insure at its (the insurer's) usual premium for the particular type of risk. However, if the insurer decided to charge the insured a higher or lower premium than the usual premium for the particular type of risk, it may constitute a counter-offer on the part of the insurer.⁴² The insured is free to reject the insurer's offer in respect of the amount of the premium.⁴³ However, it is not necessary for the parties to reach agreement on the exact amount of the premium, provided that they have defined a method to determine the amount of the premium.⁴⁴

The premium usually consists of money but not necessarily so.⁴⁵ In the case of mutual insurance, the premium may consist of a guarantee or other arrangement, or of

35 See at 96.

36 See Colinvaux 131.

37 See again par 6.1 above.

38 See Parks vol I 39; Colinvaux 132; Chalmers 37-38.

39 See Henley 88-89.

40 See MacGillivray & Parkington par 211 et seq; Jess 95-96.

41 See Briggs & Edwards 119; Jess 95.

42 See Henley 88-89.

43 See Jess 101-102 as to the role of the premium in the insurance contract's taking effect.

44 See MacGillivray & Parkington par 216. See also par 6.3.7 below.

45 In the decision in *Prudential Insurance Co v Commissioners of Inland Revenue* [1904] 2 KB 658 at 663 an insurance contract is described as "a contract whereby for some consideration, *usually but not necessarily for periodical payments* called premiums, you secure to yourself some benefit" (my italics).

an undertaking to contribute to the losses of other members of the society.⁴⁶ The decision in *British Marine Mutual Insurance Co v Jenkins and others*,⁴⁷ which dealt with the nature of the premium in terms of a mutual insurance contract, decided that the consideration by the insured in terms of the mutual insurance contract consisted of the insured finding a third party who was prepared to bind himself in terms of the mutual insurance contract to contribute to the losses of the other insured. The Court concluded that "[s]uch consideration appears to be very improbable, but it is legally possible".⁴⁸

Likewise, in the case of a contract of insurance for profit it has been confirmed that the premium may take the form of something other than money. In the decision in *Parsons v BNM Laboratories*⁴⁹ it was decided that "in the one case the employee [insured] paid a premium and in the other he has a contract of employment and his services given under it form the reward (equivalent to a premium) which entitles him to the benefit [in terms of the insurance contract]".⁵⁰

Section 85(1) of the Marine Insurance Act provides that where two or more persons mutually agree to insure each other against marine losses, they have effected a mutual insurance contract.⁵¹ It has been said that "[mutual insurance] is a system by which every one insured is at once underwriter and assured".⁵² Section 85(2) provides that the provisions of the Marine Insurance Act relating to the premium⁵³ do not apply to mutual insurance, but a guarantee or such other arrangement agreed upon, may be substituted for the premium.⁵⁴ The system of levying calls rather than charging premiums is a feature central to the concept of mutuality.⁵⁵ It appears also in Protecting

46 This fact was acknowledged in the decision in *Lion Mutual Insurance Co v Tucker* [1883] 12 QB 176 at 187 where it was stated that "usually [the] premium is a sum of money, but it is not necessary that it should be such, and it may be some other liability than the payment of money". Kirkwood 9 refers to the following definition of insurance as formulated by Stair, a Scottish common-law writer: "[T]he contract of insurance, where money or things are given, for the hazard of any thing that is in danger" (my italics): (from *Stair's Institutes* Book I Title X § 12). Baker-Welford & Otter-Barry 189 accentuate the fact that the premium in terms of a mutual insurance contract consists of the liability of the insured towards his fellow-members, ie, his fellow-insured. This is as a result of the fact that, at least in terms of the common law, the mutual insurance society is not a separate entity and the insured are at once insured and insurer: see Chalmers 140 and the authority referred to there. See also Hartley 14; Ivamy *General* 181; Colinvaux 131; Chalmers 1.

47 [1900] 1 QB 299.

48 At 302-303.

49 [1963] 2 All ER 658 (CA).

50 My insertions. See at 669.

51 See Chalmers 141n1 who is of the opinion that the wording of s 85(1) is technically incorrect, because in principle all mutual associations are required to be incorporated. Consequently the insured is then insured by the body corporate and not by the individual members. This, however, does not detract from the fact that s 85(1) is an acknowledgement that the premium may take the form of something other than money.

52 See Chalmers 140.

53 Ie, ss 52-54. See also par 6.5 below.

54 See Arnould vol 1 par 129; Chalmers 141n2.

55 See Hazelwood 127.

and Indemnity Club insurance (in short, P and I Club insurance), which is a type of mutual insurance. The P and I Club is a self-insurance fund set up by an association of shipowners to provide protection for losses not covered by their (ordinary) insurance contracts. Liabilities other than those arising from collisions are normally all covered by the P and I Club rather than by the marine insurers.⁵⁶ The policies issued by mutual insurance associations to their members usually omit the usual provisions as to the premium. Instead they refer to the rules of the association which regulate members' contributions in the event of losses suffered by members.⁵⁷ Such mutual insurance policies therefore have to be construed together with the rules and regulations of the association in question.⁵⁸ The amount of the premium as well as other factors such as the time of the payment are therefore often omitted from the policy but the source (that is, the set of rules) is indicated in the policy where, for example, the method for calculating the amount of the premium is set out.⁵⁹ The premium in the case of P and I Club insurance is referred to as the "call" which is levied upon members.⁶⁰

The relationship between calls which are due by members and claims instituted by them, especially where a member has entered, that is, insured, more than one ves-

56 See Hansell 26. In view of the provisions of s 85(2) of the Marine Insurance Act, the law and practice relating to the "premiums" leveled by P & I Clubs have to be gathered from Club rules and the few relevant decisions on this topic: see Hazelwood 127-128. As to the nature and development of the concept of P & I Clubs, see Brown vol 3 314-315.

57 For an example of a P & I Club insurance policy which illustrates this principle by providing that "the [insured] is insured on [the ship] in accordance with the rules, conditions, and regulations annexed thereto, which by mutual agreement are to form part of and be of the same force and effect as if inserted in the body of the [contract]" (my insertions): see the decision in *Williams v British Marine Mutual Insurance Association Ltd* (1886) 57 LT 27 (QB) at 29.

58 In the decision in *The Standard Steamship Owners' Protection and Indemnity Association (Bermuda) Ltd v Gann and another* [1992] 2 Lloyd's Rep 528 (QB) the Court was concerned with the difference between the obligation to pay fixed premiums in terms of insurance for profit, and the obligation to pay calls and supplementary calls in terms of P & I Club insurance. On a construction of the relevant rules of the Association as well as subsequent correspondence engaged in by the parties, the Court decided that the insurance contract provided for calls and the defendant (insured) was liable to pay the supplementary calls: see at 533. See also Arnould par 129-135; Brown *Principles* vol 3 314; Hazelwood 127; Chalmers 141n9.

59 The same holds true for the "premium" or call in terms of a P & I Club. The price or premium which a member pays for his insurance with the Club is not the calls or the sums of money which he actually pays, but rather his undertaking to be liable to pay calls in the manner provided by the rules of the Club. It is this undertaking to pay calls which constitutes the consideration which moves to the other members: see Hazelwood 127-128. A similar arrangement is sometimes present in the case of insurance for profit. Eg, in the case of a business interruption insurance contract, the parties often agree on a provisional premium which is usually 75 percent of the average premium leveled over the preceding few years. Whether or not the balance of 25 percent of the premium is payable, will depend on the gross profit of the insured during the previous financial year. The insured has to furnish the insurer with certificates issued by its auditors, within a specified period after the conclusion of the contract. The insurer is bound to the information supplied in the certificate issued by the auditor. An onerous responsibility and legal liability therefore rests on the auditor concerned to supply correct information in the certificate: see Riley 246-247. For an example where the insured successfully sued his auditor for loss suffered by him through being underinsured as a result of incorrect information supplied in the certificate, see the decision in *De Meza and Stuart v Apple, Van Straten, Shene and Stone* [1975] 1 Lloyd's Rep 498 (CA), referred to by Riley 247.

60 See Colinvaux 418.

sel in different classes with the Club, raises the question of set-off. In the decision in *First National Bank of Chicago v West of England Shipowners Mutual Protection and Indemnity Assn (Luxemburg)*⁶¹ the shipowner mortgaged a certain vessel (the "Evelpidis Era") in favour of the plaintiff. The vessel was entered with the defendant Club. The shipowner assigned the benefit of the entry with the Club in favour of the bank. The vessel sank and the bank sought payment of repatriation expenses. The shipowner had other vessels entered in different classes with a Club related to the defendant. The defendant Club sought to set off unpaid calls in relation to the other vessels against the moneys claimed arising out of the loss of the "Evelpidis Era". The Court rejected the Club's approach, holding that it was impossible to justify a mixture of claims and cross-claims to arrive at a settled account and that such a procedure required an express or implied authority from the owners as members (insured) and the bank as assignee.⁶² Such express or implied authority may apparently be found in the rules of the Club.⁶³

The courts will not imply a condition that the prepayment of the premium is required for the contract to take effect.⁶⁴ Except in the case where the contract expressly requires the payment of the premium for the cover in terms of the contract to take effect, the presumption is that cover takes effect upon the conclusion of the contract.⁶⁵ In principle it is therefore possible for the insured to claim compensation in terms of a contract of insurance although no premium has yet been paid, and even if no policy has yet been issued.⁶⁶

A condition that the cover in terms of the insurance contract will not take effect before the actual payment of the premium, is usually inserted in the policy. Such condition is not always free from ambiguity. It is possible to argue that where the payment of the premium is a requirement for the cover to take effect, the insurance contract is subject to a condition precedent. This construction entails that should the premium be paid, the insurer is liable for all losses, including those which may have occurred before the payment of the premium. In contrast, it is possible to argue that the contract takes effect only upon the payment of the premium, and that the insurer is thus not liable for any losses which occurred before the payment of the premium.⁶⁷

Two instances have been identified where the insurer will be bound although the premium has not been paid as required in the contract.

First, in *Roberts v Security Co*⁶⁸ the contract provided for the suspension of the cover in terms of the contract until payment of the first premium was received from the

61 [1981] 1 Lloyd's Rep 54 (Court of Session).

62 See at 65.

63 See ch 7 par 7.2.2 below for a similar approach in Australian law.

64 See MacGillivray & Parkington par 891. As authority for this statement the authors rely on the South African decision in *Lake v Reinsurance Corporation Ltd* 1967 (3) SA 124 (W). See also ch 8 par 8.2 below.

65 See Emanuel 60; MacGillivray & Parkington par 881.

66 See Emanuel 60n3 and the authority cited there.

67 See MacGillivray & Parkington par 894.

68 [1897] 1 QB 111 (CA).

insured. The insurer mistakenly declared that it had received the first premium and was held liable in terms of the contract even though the premium had in fact not been paid as stipulated in the contract. The decision of the Court to hold the insurer liable for its declaration was an application of the doctrine of estoppel by deed.⁶⁹ It was decided, albeit obiter, that if the policy mistakenly declares the premium paid while it is in actual fact not paid, the insurer will be precluded from relying on a condition precedent which requires the pre-payment of the premium for the contract to take effect, even though the policy is still in the hands of the insurer.⁷⁰ But the correctness of the decision in *Roberts* was doubted in *Equitable Fire and Accident Office Ltd v The Ching Wo Hong*.⁷¹ In *The Ching Wo Hong* the payment of the first premium as well as the payment of renewal premiums were made conditions precedent for the liability of the insurer in terms of a fire insurance contract. Notwithstanding the non-payment of the premium, the insurer executed the policy and delivered it to the insured who was in possession of the policy at the time of the destruction of the insured property by fire. The Court decided that the fact that the executed policy had been handed to the insured was not a waiver of the payment of the premium as a condition precedent for the liability of the insurer.⁷² The Court in *The Ching Wo Hong* refrained from passing judgment on the correctness of the decision in *Roberts* and preferred to distinguish between the two cases on their facts.⁷³

A second instance where the insurer will be bound although the premium has not been paid as required in the contract, is the case where there is a waiver by the insurer of the condition of prepayment of the premium. Waiver by the insurer could take place by its acceptance of a post-dated negotiable instrument or where credit is given for the payment of the premium.⁷⁴

69 See Pickard 62-63; MacGillivray & Parkington par 896. The concept "estoppel by deed" entails a rule of evidence in terms of which a person is precluded from denying that previous conduct of his has misled another person as to the correctness of a set of facts.

70 At 114-115. MacGillivray & Parkington par 896-897 are of the opinion that although the doctrine of estoppel by deed applies in principle only to policies under seal (ie, if the insurance contract is contained in a sealed deed: see again par 6.2.1 above as to the meaning of the concept "contract made under seal") the doctrine is most likely to apply to Lloyd's policies as well. Although Lloyd's policies are usually not made under seal, the policy invariably provides that the premium has been paid even where it has neither been paid by the insured nor received by the underwriter. This is the usage at Lloyd's as the broker is directly responsible to the insurer for the payment of the premium. Because of the broker's liability towards the insurer, the latter will not be prejudiced by being held to its declaration that the premium has been paid, as the insurer looks to the broker for payment of the premium. As to the role of the broker in the payment of the premium in terms of a Lloyd's policy, see further par 6.5 below.

71 [1907] AC 96 (PC).

72 See at 100 where the Court stated that "[w]hat was handed to the [insured] was the instrument with the clause [which required payment of the premium] in it, and that was notice to [the insured], and made it part of the contract that there would be no liability until the premium was paid. It is not a question of conditional execution, but of the construction of what was executed" (my insertions).

73 At 100-101.

74 See Pickard 63; MacGillivray & Parkington par 899.

Policies sometimes provide that a certain risk will be covered for a definite period of time without making any provision for a renewal of the cover in terms of the policy. However, the policy more often expressly provides that it is for an indefinite period, as long as the insured pays and the insurer accepts the premium. In these circumstances the acceptance of the premium indicates a willingness on the part of the insurer to accept the insured's offer (made by the payment of the premium) to conclude a new insurance contract for a further period.⁷⁵ In the case of life insurance, the insured usually has the right to ensure the continued cover under the contract by the prompt payment of the premium.⁷⁶

Due to the general requirement of a consideration in the English law of contract, neither insurance practice nor insurance law has in principle been concerned with the question of whether insurance cover can be provided gratuitously.⁷⁷ One must assume, therefore, that in view of the fact that the requirement of a consideration will not be satisfied in the case of "free" insurance, a contract in terms of which the insurer undertakes to indemnify the insured gratuitously will not be a valid contract and will therefore not be enforceable in English law.⁷⁸ The solitary exception is the case where the policy is under seal and hence does not require consideration to support it.⁷⁹ However, it is suggested that this situation is hardly likely to arise.⁸⁰

Some references to "premiumless insurance" are nevertheless encountered in the insurance materials of the English law.

First, the phenomenon where a life insurance policy is converted into a "paid-up" policy is sometimes referred to as an example of premiumless insurance. Such conversion usually takes place if the insured is no longer willing or able to keep up the payment of the premiums, and the insurance contract is kept "alive" at a reduced sum insured free from the payment of future premiums.⁸¹ However, as the reserve fund,

75 See MacGillivray & Parkington par 944.

76 See MacGillivray & Parkington par 946.

77 So-called "free" insurance. In contrast, see ch 4 par 4.2 for the lively debate in Dutch law on the question of whether or not "premiumless" insurance is legally possible.

78 See again par 6.2.1 above. Colinaux (at 2) mentions that difficulties have been encountered in the past where insurance forms a part of some wider arrangement, so that sums payable by the insured have been in consideration of a non-insurance benefit with insurance being provided incidentally and free. He continues (at 2n13) by referring to cases where it has been held that in the absence of an apportionable premium, the contract was not one of insurance. According to him the modern view would doubtless be that in the world of commerce there is no such thing as a free gift, and that some part of the payment which is made by the insured, will be subjected to a notional apportionment as the consideration for the cover.

79 For a discussion of the concept "made under seal", see again par 6.2.1 note 15 above.

80 See Birds 146.

81 See Talyer & Tyler 8. For a similar type of example of "free" insurance, see Riley 245 who is of the opinion that one of the advantages arising from over-insurance is that in certain circumstances a certain amount of "free" insurance is obtained. This situation, according to Riley, arises where there is a progressive increase of gross profit for the insurer over the years and the sum insured is revised annually on the correct basis of an estimate of earnings for, say, two years ahead. However, when an auditor's certificate is furnished at the end of a financial year, the figure declared is the actual amount earned in that particular year (by the insurer), and the return of premium is calculated accordingly. The insurer therefore receives no premium for the additional liability carried during the "second year". But this is a specious argument. As the premium for the

which consists of premiums already paid, is utilised to keep the policy "alive", this does not strictly qualify as an example of "free" insurance.⁸²

Secondly, it is said that where the insured is granted a period of grace to pay the premium, "free" insurance may occur in certain circumstances. If the contract concerned is a continuing contract of insurance which endures until the insured effectively terminates it by non-payment, the insured is covered until the last day of the period of grace. It is argued that in these circumstances the insured may obtain several days of insurance cover for which he has not paid, and that he will be paid by the insurer should the loss contemplated by the insurance contract occur during that time. If no loss occurs, so it is argued, the insured has had free cover.⁸³ But this argument too is flawed. In practice a portion of the insurance premium for the ordinary period of cover is allocated to provide for the cover provided during the period of grace. The mere fact that a premium has been paid at some stage is usually a strong indication that the cover was not provided gratuitously by the insurer. Any statement by the insurer that the insured will enjoy free insurance cover for a particular period of time is nothing more than sales talk and not a reflection of the true legal position.

The third reference to "free" insurance concerns coupon insurance which is sometimes put forward as an example of free insurance. In terms of coupon insurance one enjoys "free insurance cover" when, for example, buying a newspaper or a railway or air ticket. Ivamy correctly points out that this type of insurance cover applies only to passengers who have paid the necessary fare. The logical conclusion from this statement is that the premium is included in the price of the ticket, in the case of travel insurance, or in the price of the newspaper or magazine, in the case of coupon insurance.⁸⁴

6.3 THE PAYMENT OF THE PREMIUM

6.3.1 Introduction

The payment of the premium is the primary obligation of the insured in terms of the contract of insurance. The insured must tender the correct amount of the premium to the insurer. The insurer is entitled to reject the tender of only a portion of the premium due to it.⁸⁵

additional liability during the second year is already included in the premium paid during the first year, this does not constitute a valid example of "free" insurance. As to the return of an excess premium in the case of over-insurance, see par 6.6.7 below.

82 For an example of a life insurance contract which provided for the application of its surrender value to the payment of the premiums, see *Equitable Life Assurance Society of the United States v Reed* [1914] AC 587 (PC).

83 See Henley 129.

84 See Ivamy *Life* 66-67; MacGillivray & Parkington par 889.

85 See the decision in *Dixon v Clarke and another* (1848) 5 CB 365, 136 ER 919 at 923. But the fact that the insured has tendered the premium is a defence to an action by the insurer to rely on the forfeiture of the benefits in terms of the insurance contract: see the decision in *Williams v British Marine Mutual Insurance Association Ltd* supra at 29.

The obligation to pay the premium is in principle absolute and no sickness or absence will excuse non-payment and prevent the forfeiture of benefits in terms of the contract.⁸⁶ However, this should not be understood to imply that the insured will forfeit the benefits in terms of the policy in all cases of non-payment. For example, the policy may provide that the cover in terms of the contract will continue on condition that the overdue premium is paid within a certain period of time.⁸⁷

6.3.2 The Time of Payment of the Premium

In terms of the general principles of the law of contract, the time of payment of a debt is not of the essence of the contract, unless the contract expressly provides to the contrary or unless the creditor has given notice to the debtor to pay the debt within a reasonable time.⁸⁸

It has been said that it is not in the nature of an insurance contract that the premium should be payable at any particular point in time.⁸⁹ But in the case of life insurance policies, the punctual payment of the premium is usually made a condition precedent to the liability of the insurer in terms of the contract.⁹⁰ The premium must be paid at the time stipulated in the contract. If no time for payment has been stipulated, the premium must be paid within a reasonable time after the conclusion of the contract.⁹¹

The effect of late payment of the premium is generally governed by the terms of the contract.⁹² When the premium is paid and accepted after the due date, such payment is generally taken to have retrospective effect.⁹³ This implies that payment of the premium is deemed to be have been paid upon the due date. The fact that the contract often requires the premium to be paid in advance, has an important bearing on the rate of the premium, because the insurer may earn interest on a premium which is paid in advance. Thus, the interest which an insurer earns on a premium which is paid in advance causes the rate of such premium to be lower than a premium which is paid in arrears.⁹⁴

86 See MacGillivray & Parkington par 967.

87 For a discussion of the effects of the non-payment of the premium, see further par 6.4 below.

88 In the decision in *Kirby v Cosindit Societa Per Azioni* [1969] 1 Lloyd's Rep 75 (QB) it was decided that the question of whether a notice to the insured to pay the premium allowed a reasonable time for payment has to be considered in the light of the circumstances of each case. In this decision it was decided (at 79-80) that a period of ten days was not a reasonable time. See also Baker-Welford & Otter-Barry 196; Henley 130; Clarke 300.

89 See Ivamy *General* 185n15.

90 See Ivamy *General* 185n18; Clarke 300-301.

91 See Clarke 293 300-301.

92 See Clarke 293. The insurer may decide to waive its rights of timeous payment of the premium as stipulated in the contract and unilaterally extend the time of payment of the premium, ie, to give the insured credit: see MacGillivray & Parkington par 959.

93 See Baker-Welford & Otter-Barry 196.

94 See Hansell 221.

The insurer sometimes gives credit to the insured for the payment of the premium.⁹⁵ If the insured is an individual or a partnership, an agreement to provide him or it with credit for the payment of the premium in an amount not exceeding £15 000, will qualify as a consumer-credit agreement within the meaning of sections 8 and 189(1) of the Consumer Credit Act 1974 (c 39). An (insurance) agreement which is regulated by the Act has to comply with certain regulations as to the form, content and execution of the agreement.⁹⁶

In terms of mutual insurance, credit is often extended for the payment of the premium or contribution. The system of "pay-as-you-go" which is in force in most P and I Clubs⁹⁷ as well as in other mutual insurance contracts, is a typical example of insurance on credit. In terms of this system, the estimated total "premium" (call) is calculated at the beginning of the financial year. Members are expected to pay a certain percentage, say 75 percent, as an advance call, leaving the remaining 25 percent to be collected by way of supplementary calls. Credit is therefore given for the payment of the remaining 25 percent of the "premium". The advance call is often paid in instalments.⁹⁸

Forfeiture by an insured of his rights in terms of a policy on the ground of non-payment or late payment of the premium, may be waived by a subsequent demand for or an acceptance of the premium by the insurer. But the mere acceptance of a premium after forfeiture has occurred is not sufficient to constitute waiver by the insurer of its right to cancel the contract for late payment of the premium.⁹⁹ If the insurer has knowledge about a forfeiture, but accepts a premium through inadvertence, it will probably be able to return the premium and still rely on the forfeiture.¹⁰⁰ An agent who has authority to conclude the contract on behalf of the insurer would be held to have an

95 Evidence of a trade usage would not be permitted to prove a custom of giving credit for the payment of the premium in certain circumstances, if such trade usage contradicts an express term of the contract: see MacGillivray & Parkington par 961.

96 See ss 60-65 of the Act. See also MacGillivray & Parkington par 928. The Act regulates the (written) notice of default to be given to the debtor (insured) before any remedies in the nature of forfeiture can be claimed against him: see ss 87-89. There are three important exceptions when the Act will not apply to the contract. In these cases the common law will govern the situation where there has been default by the insured. First, where the insurer allows credit for the payment of the premium and the agreement provides for repayment in not more than four instalments. Secondly, the tripartite agreement between insurers, building societies and mortgagors is also exempted from the provisions of the Act. In terms of this tripartite agreement the building society pays the premium for the insurance of the mortgaged property to the insurer and recovers the amount in instalments from the mortgagor. In this case there are no restrictions on the number of instalments. Thirdly, certain transactions in connection with international trade are also excluded: see MacGillivray & Parkington par 927.

97 As to the nature and aims of P & I Clubs, see again par 6.2.2 above.

98 See Hazelwood 128-129.

99 See MacGillivray & Parkington par 962.

100 See MacGillivray & Parkington par 973. In the decision in *Kelly v Solarl* (1841) 9 M & W 54, 152 ER 24 the insurer paid a loss in forgetfulness of the fact that the policy had lapsed for non-payment of the premium. The Court decided that the insurer was entitled to recover the money so paid by mistake.

apparent authority to give credit for the payment of the premium.¹⁰¹ And an agent who is a general agent with authority to contract on behalf of the insurer probably has authority to waive forfeiture and revive lapsed policies due to non-payment or late payment of the premium.¹⁰²

As regards marine insurance contracts, section 52 of the Marine Insurance Act provides that, unless otherwise agreed by the parties, the duty of the insured or his agent to pay the premium, and the duty of the insurer to issue the policy, are concurrent conditions, and the insurer is not bound to issue the policy until payment or tender of the premium has taken place.¹⁰³ The concept of "payment" in section 52 is not a technical term and it includes a settlement in account when such settlement is the agreed way of doing business between the insurer and the insured.¹⁰⁴ Section 52 does not apply to insurance contracts other than marine insurance contracts.¹⁰⁵

The exact time at which payment has been effected will be co-determined by the method of payment.¹⁰⁶ It may be necessary to determine the exact time of payment of the premium as the policy may provide that the cover in terms of it will only take effect from the moment that the premium is paid.¹⁰⁷

101 See MacGillivray & Parkington par 977.

102 See MacGillivray & Parkington par 981.

103 See also Ivamy *General* 186-188; Henley 131.

104 See Chalmers 76. As to the practice of a running account between a broker and an underwriter (insurer) at Lloyd's, see further par 6.5.4 below.

105 See Colinvaux 132.

106 As to the different methods of payment of the premium, see par 6.3.3 below.

107 Eg, in the case of payment by way of a cheque as cash, payment is effected at the time when the creditor's (insurer) account is credited with the amount: see the decision in *A/S Awilco v Fulvia SpA di Navigazione, The Chikuma* [1981] 1 All ER 652 (HL) at 657. But if the cheque is given in lieu of cash, payment is deemed to be effected when the cheque is delivered to the creditor (insurer): see the decision in *Clay Hill Brick & Tile Co Ltd v Rawlings* [1938] 4 All ER 100 (KB) at 106 where it was decided that "a cheque payable to the agent's order -- when it is cashed, is equivalent to cash, and that, therefore, if the agent is authorised to receive payment in cash, then, if he received a cheque in this form, that is equivalent to cash, and the payer is discharged". An explanation of the phrases "payment by way of a cheque as cash" and "payment by way of a cheque *in lieu of cash*" is called for. If a cheque is taken "as cash" it implies that it is capable of being cashed on the spot, since it is equivalent to cash. Thus, if the cheque is accepted by the creditor "as cash", the debtor guarantees by implication that it will be paid as if it is cash when it is presented for payment. The "guarantee" by the debtor will only be fulfilled if and when the creditor receives the amount of the cheque. However, if a cheque is taken "in lieu of cash" the debtor does not guarantee by implication that the cheque will be capable of being cashed on the spot, and the creditor therefore waives his right of "payment in cash on the spot" by accepting a cheque "in lieu of cash". Thus, if a cheque is taken "in lieu of cash", the debt is deemed to be discharged at the time which the cheque is delivered to the creditor. This distinction between the phrases "as cash" and "in lieu of cash" involves, of course, the question as to the time of payment of the debt: see Clarke 295 298-299. If the payment of the premium is effected through a bank transfer between accounts at the same branch, payment is made when the bank accepts the insured's instructions and does whatever is necessary to initiate the bank's transfer process: see *Momm and others (t/a Delbrueck & Co) v Barclays Bank International Ltd* [1977] QB 790 at 803.

6.3.3 The Mode of Payment

6.3.3.1 Introduction

Payment of the premium must be made in the form stipulated in the contract. In principle payment must be made in cash,¹⁰⁸ unless payment by another method is expressly or implicitly authorised in the contract.¹⁰⁹ The courts will be reluctant to infer that cash was implied in the case of a large debt.¹¹⁰ But the general rule is that a debtor must seek out and pay his creditor¹¹¹ and therefore, if the insured sends, on his own initiative, cash or any other negotiable instrument by post, any loss resulting from his chosen method will be for his own account.¹¹² However, if the insurer expressly or implicitly authorised payment of the premium by post, it bears the risk of any delay or loss of the payment in the postal system.¹¹³

If a particular method of payment is requested by the creditor (insurer) for its own convenience, there is a rebuttable presumption that payment by way of that method is absolute.¹¹⁴ This implies that if the creditor (insurer) does not receive payment due to an inherent defect in the method or system chosen by it, it will not be able to rely on non-payment of the debt (premium).

Nowadays the majority of insurance premiums are not paid in cash but by way of one of the more "modern" methods of payment.¹¹⁵ The use of a particular method of payment depends to a large extent on the type of insurance involved.¹¹⁶ Some of these methods include the following.

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- 108 See *Papè v Westacott* [1894] 1 QB 272 (CA) at 279-280 where it was stated that "[a]s a general rule, when a person employs an agent to receive a debt, the agent must receive it in money". The Court (at 281) did, however, qualify this statement by saying that "unless he can shew a *usage to the contrary*, his duty is to receive payment in cash, and by that I mean money" (my italics).
- 109 In *Johnston v Boyes* [1899] 2 Ch 73 at 78 it was decided that "[no] custom has been proved to oblige vendors to receive [a] cheque even of a person in good credit, though it is, doubtless, usual to do so" (my insertions).
- 110 In *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp* [1977] AC 850 (HL) the Court decided (at 880) that "there is no real difference between a payment in dollar bills and a payment by payment orders which in the banking world are generally regarded and accepted as cash". Moreover, if payment by cheque is not authorised, but a cheque is accepted and honoured, it amounts to payment of the debt: see *Bridges v Garrett* (1870) LR 5 (Exch Ch) 451 at 454. See also Clarke 295.
- 111 See Colinvaux 133.
- 112 See MacGillivray & Parkington par 925.
- 113 See Clarke 298-299.
- 114 See the decision in *Anderson v Hillies* (1852) 12 CB 499, 138 ER 1002 at 1004 where it was decided that "if the [creditor] had asked the [debtor] to procure him a letter of credit ... nobody could doubt that that would have been a good payment" (my insertions). See also MacGillivray & Parkington par 917.
- 115 For a discussion and examples of some of the more modern methods of payment which are collectively known as electronic payment systems, see Palfreman 257 et seq.
- 116 Eg, if the premium consists of a non-recurrent payment, a cheque or credit card is usually used. However, if the particular insurance contract requires a regular occurring payment, the banker's standing order, direct debit system or bank giro system would be a more suitable method of payment: see Birds 146-147. See also par 6.3.3.2, 6.3.3.3 and 6.3.3.4 below.

6.3.3.2 *Bankers' Standing Orders*

The banker's standing order is an order signed by the payer (insured) and addressed by him to his bank, instructing it to transfer money from his account to the account of the payee (insurer).¹¹⁷ Although this method of payment is initiated by the payer (insured),¹¹⁸ it is often employed at the express request of the payee (insurer) which supplies the printed form to the insured and invites him to return the completed form for onward transmission to the insured's bank.¹¹⁹

Insurers often prefer to collect the premium by way of a banker's standing order instead of, for example, collecting it from the insured through an agent.¹²⁰ When a payer (insured) gives his bank a "standing order", it is generally understood that it may be stopped or modified by the insured at any time.¹²¹

If the insured sends a duly completed banker's standing order to the insurer, it must be regarded as at least a conditional payment by the insured. If the order is not carried out by the bank owing to a lack of funds in the account indicated by the insured in the order, the case is analogous to that of a dishonoured cheque. If the order is not carried out because of negligence or default on the part of the bank, the position is uncertain.¹²²

6.3.3.3 *Direct Debit System*

Direct debiting is a system which enables the payee (insurer) to claim payment through his bank (the collecting bank) from the payer (insured) via his bank (the paying bank). In contrast to the banker's standing order, which is initiated by the payer

117 Standing orders are widely used for such regular payments as insurance premiums, subscriptions etc: see *Oxford* 812.

118 See *Palfreman* 252.

119 Some writers are of the opinion that a banker's standing order sufficiently resembles a cheque to enable the analogous application of the principles from the law governing cheques: see *MacGillivray & Parkington* par 939. See also par 6.3.3.5 below as to the payment of the premium by way of a cheque.

120 The reasons for this practice are obvious. A banker's standing order involves a smaller security risk, it is a less expensive method of collection (any costs involved in a payment by way of a banker's standing order are usually borne by the insured), it is more time efficient, and the insurer is, to a large extent, ensured of prompt payment of the premium: see *Taylor & Tyler* 9-10. The banker's standing order is often used to pay the premium on certain endowment policies, particularly those used in conjunction with a mortgage for the purchase of a house: see *Birds* 147.

121 See *Ellinger* 35.

122 It can be argued that the insured's banker is acting as his agent, and that any failure to pay on the part of the banker is tantamount to a failure by the insured. But it can also be argued that if the insurer not only suggested or insisted on the use of the standing-order system, but also undertook to set the machinery in motion by sending the order to the insured's bank, the insurer must have assumed the risk of any defect inherent in the system: see *Colinvaux* 133; *MacGillivray & Parkington* par 940.

(insured), a direct debit is initiated by the payee (insurer) and can be used to pay varying amounts at varying intervals, as well as fixed amounts at fixed dates.¹²³

If applied to the payment of the premium in terms of an insurance contract, the direct debit system entails that the insured's bank (the paying bank) accepts an order from the insurer (payee) to debit a specified sum to the account of the insured (payer) and transfer it to the account of the insurer. There is no written instruction from the insured as the paying bank assumes that if a direct debit order is received from a payee (creditor/insurer) of sufficient standing, it may be taken to have the tacit approval of the payer (debtor/insured).¹²⁴

If the direct debit order is not carried out owing to a lack of funds in the account of the insured, the case is analogous to that of a dishonoured cheque.¹²⁵ If the direct debit order is not carried out because of negligence or default by the insured's bank, the insurer will not be allowed to rely on non-payment of the premium. The insured has no further obligations than to keep his account in funds.¹²⁶ If the insurer suggested or insisted on the use of the direct debit system, it has assumed the risk of any defect inherent in the system.¹²⁷

6.3.3.4 *Bank Giro System*

Another method which may be employed to effect payment of the premium to the insurer is the bank giro system. The bank giro system is the name generally given to the credit transfer system by which credit vouchers are transferred between banks. Due to the automatism of the system, the vouchers are processed in a manner similar to cheques.¹²⁸

The bank giro system is often used in conjunction with a renewal notice for motor-vehicle or property insurance.¹²⁹ In terms of this system, the insured may

123 A direct debit can only be initiated by an organisation, in contrast with an individual, as such debit is sponsored by the paying bank which is, as a matter of general principle, not prepared to sponsor individuals. A standard agreement is used by all banks which contains an indemnity clause enabling the paying bank to debit the payee's (insurer's) account through the clearing process, as soon as it advises the collecting bank that the wrong amount has been claimed or the payer (insured) has revoked his mandate: see Woods 85 90-91; Palfreman 252. Thus, unlike the standing order (see again par 6.3.3.2 above) the amount to be paid in terms of a direct debit is not specified as the payer trusts the third party to claim an appropriate sum of money: see *Oxford* 231.

124 See MacGillivray & Parkington par 941.

125 See Goode 21; MacGillivray & Parkington par 942; Palfreman 253.

126 See MacGillivray & Parkington par 942. For a discussion of the legal consequences which apply to the relationship between the payer and the paying bank, where the paying bank pays the amount to the payee after the payer has revoked the mandate, see Palfreman 252-253.

127 See Woods 84; MacGillivray & Parkington par 941.

128 See Robinson 6; *Oxford* 344.

129 See Birds 147.

deposit the amount of the premium at any branch of a bank participating in the system for transmission to any account at any other participating branch.¹³⁰

6.3.3.5 Cheques

Prima facie an insurer is not bound to accept a cheque as payment of a premium. If the insured wishes to pay the premium by way of a cheque, the parties must agree expressly or implicitly that a cheque will be acceptable as the method of payment. If the insurer accepts a cheque in payment of the premium, the premium will be regarded as paid only if and when the cheque is honoured.¹³¹ Posting of the cheque by the insured is not allowed except if the insurer has expressly or implicitly agreed that the cheque may be posted, and then any delay in the postal system will be borne by the insurer.¹³² If the insured posts a cheque without the permission of the insurer, the insured will bear any loss resulting from a defect inherent in the postal system.¹³³

If payment by cheque was expressly or implicitly agreed on, but the cheque is not honoured, the legal position depends on whether payment by cheque was intended by the parties to be conditional payment or absolute payment of the debt. The general rule as regards cheques and bills of exchange is that where a debt is "paid" by a cheque or a bill of exchange, there is a rebuttable presumption that such payment is conditional on the cheque or bill being honoured.¹³⁴ But this presumption does not apply to all methods of payment where payment is to be effected through a third party. In *Re Charge Card Services Ltd*,¹³⁵ it was decided that each method of payment has to

130 In order to determine if and when payment has taken place, one must investigate whether the insured used the bank giro system on his own initiative or whether the insurer has suggested or insisted that this system be used. If the former, the insured bears the risk for non-payment or late payment of the premium; if the latter, the insurer will bear the risk of non-payment or late payment of the premium due to an inherent defect in the system. The insured has no further obligation than to deposit the amount of the premium with a participating bank on or before the due date: see *MacGillivray & Parkington* par 943.

131 See *MacGillivray & Parkington* par 921. An agent who receives the premium on behalf of the insurer is not generally entitled to accept a cheque or a bill in lieu of cash payment. However, if seen against the frequency at which cheques are accepted in the modern commercial world, an agent probably has an implied authority to take a cheque in payment: see *MacGillivray & Parkington* par 976.

132 In *Mitchell-Henry v Norwich Union Life Insurance Society Ltd* [1918] 2 KB 67 (CA) it was decided (at 69) that when the debtor is authorised by the creditor to "remit" payment, this implicitly authorised payment by post. But this decision is not authority that the debtor may send bank notes by post. If the creditor authorises the debtor to send payment by post, it is taken that such authorisation amounts only to a request to send payment by post in a way appropriate for the amount of money involved: see at 69-70.

133 See *MacGillivray & Parkington* par 924.

134 See *Re Charge Card Services Ltd* [1989] Ch 497 (CA) at 707. See also *MacGillivray & Parkington* par 918.

135 *Supra*. In this decision the method of payment (in terms of a contract of sale) was a credit card. English law is not unfamiliar with the phenomenon where the payment of the premium is effected by way of a credit card. Section 75 of the Consumer Credit Act 1974 (c 39) provides that the insured has a concurrent claim against the credit card company in the case where the insured has a claim for misrepresentation or breach of contract against the insurer. The credit card issuer is entitled to be indemnified by the insurer in the event of its having to meet any such claim by the insured: see s 75(2). See also *MacGillivray & Parkington* par 929.

be considered in the light of the consequences and other circumstances pertaining to the particular type of payment in question.¹³⁶

The acceptance by the insurer of a cheque for the payment of the premium does not necessarily amount to waiver of all conditions relating to the punctual payment of the premium, but merely to suspension of the operation of these conditions. If the cheque is honoured, payment of the premium dates from the time that the cheque was received by the insurer from the insured and not (only) from the time it was honoured.¹³⁷

6.3.4 The Place of Payment of the Premium

The place of payment of the premium is important to determine whether payment has been made,¹³⁸ as well as whether or not a particular court has jurisdiction over disputes arising out of the contract of insurance.¹³⁹ For example, in the decision in *Robey & Co v The Snaefell Mining Co Ltd*¹⁴⁰ it was decided that

"[t]here was no definite agreement as to where the money [in terms of the contract] was to be paid. We think that so far as regards the question of jurisdiction the contract was to be executed within the jurisdiction, and that the debtors having to pay for the goods it was their duty to send or bring the money to the creditors".¹⁴¹

The place of payment is often indicated in the policy.¹⁴² If the parties fail to indicate the place of payment of the premium, such place has to be determined on the basis of analogous principles and trade usages. In terms of the general principle of the law of contract, the debtor is obliged to seek out his creditor and pay him at his residence or place of business.¹⁴³ If applied to the insurance contract, this rule means

¹³⁶ See at 707. Eg, in the case of payment by way of a credit card it has been decided that acceptance of the card by the supplier constitutes absolute payment in the particular case: see *Re Charge Card Services Ltd* supra at 710.

¹³⁷ See the decision in *Marreco and others v Richardson* [1908] 2 KB 584 (CA) at 589-590. See also MacGillivray & Parkington par 921.

¹³⁸ Eg, if the policy provides that payment of the premium has to be made at a particular place and the insured pays the premium elsewhere, it may be argued by the insurer that payment of the premium has not taken place as agreed upon.

¹³⁹ See Clarke 294n15. Section 4 of the Policies of Assurance Act 1867 (30 & 31 Vict c 144) provides that "[e]very assurance company shall, on every policy issued by them ... specify their principal place or principal places of business". The place of business of the insurer is important in determining where payment of the premium should take place in those cases where the parties failed to agree in their contract on the place of payment of the premium.

¹⁴⁰ (1887) 20 QB 152.

¹⁴¹ See at 153-154.

¹⁴² See MacGillivray & Parkington par 911.

¹⁴³ See the decision in *Robey & Co v The Snaefell Mining Co Ltd* supra at 154 where the Court referred to the rule that "the obliger of a bond must go to the obligee in order to pay it". From this rule the Court deduced a general principle that the debtor must seek out the creditor and pay him. See also the decision in *Rein v Stein* [1892] 1 QB 753 (CA) where it was decided that the duty of the debtor was to pay the creditor at the latter's place of business. Although this decision is often quoted as authority for this principle, the decision did not lay down a general principle, but was decided on a construction of the relevant wording of the contract between the parties.

that the insured must make payment to the insurer at its principal place of business.¹⁴⁴

Any past practice between the particular parties in respect of the payment of the premium may authorise the payment of the premium by the insured to a broker or to the agent of the insurer. In cases of doubt, the insurer may be under a duty to notify the insured of the agent authorised to receive payment (and by implication of the proper place of payment).¹⁴⁵

As performance in terms of a contract is a bilateral act,¹⁴⁶ and of which the payment of the premium in terms of an insurance contract is an example, the place of payment is the place where the insured actually received the premium and not necessarily the place where payment was made by the insured.

6.3.5 By Whom the Premium Is to Be Paid

Generally the insured or his agent must pay the premium to the insurer. The insurer is in principle entitled to reject payment by someone other than the insured, unless the payment is ratified by the insured.¹⁴⁷ If the insurer accepts the premium from the third party but nevertheless sues the insured for the (same) premium, the insurer's conduct will amount to fraud.¹⁴⁸ The party responsible for the payment of calls in terms of a mutual insurance contract is the member who is contractually bound to the society.¹⁴⁹

Payment can be made by any third party contemplated by the parties to the contract. Apart from the case where a third party is contemplated by the parties to the con-

144 The place of payment of the premium, the place where the policy was issued and the principal place of business of the insurer, are, of course, not necessarily the same. Although the parties may agree that the premium has to be paid at the principal place of business of the insurer where, incidentally, the policy had been issued, such agreement is not necessarily standard. In the absence of an express agreement on the place of payment, the place where the policy was issued or the principal place of business of the insurer may be indicative of the intention of the parties as to an implied term concerning the place of payment of the premium.

145 See Clarke 294.

146 A bilateral act requires the assistance or co-operation of another party to be completed. See Atiyah 42 et seq for an analogous discussion involving the distinction between bilateral and unilateral contracts.

147 See *Royal Exchange Assurance v Hope* [1928] Ch 179 (CA) at 194 where it was decided that "[there is] no reason why a payment actually made to and accepted by the [insurer] for the purpose of improving a policy of theirs in the hands of the holder and owner should not have that effect, although the payment comes from a third party" (my insertion). See also Ivamy *General* 183; Henley 128.

148 See the decision in *Hirachand Punamchand and others v Temple* [1911] 2 KB 330 (CA) where the father of a debtor tendered an amount, which was less than the actual amount of his son's debt, to the creditor in full settlement of the debt. The Court decided at 339-340 that the creditor was not allowed to cash the draft, retain the proceeds, and proceed to sue the son (debtor) for the balance of the debt.

149 See Hazelwood 129 in respect of the liability of a member of a P & I Club. A member is usually defined as "any person who, on behalf of himself or of any other person, insures any ship with the club and went on to make the members liable for payment of calls": see Hazelwood 130-131 and the authority referred to there.

tract, the following third parties have been held to have an interest in paying the premium in terms of an insurance contract. First, in the case of solvency insurance, the premium may be paid by the person whose solvency is insured.¹⁵⁰ Secondly, in the case of life insurance, the premium may be paid by the beneficiary in terms of the contract. Thirdly, if a life insurance policy is used as security for a loan, the lender has an interest in paying the premium.¹⁵¹ Fourthly, trustees and other fiduciaries are entitled to preserve a life policy for the beneficiary, and to pay the premium if the person who is primarily responsible for such payment fails to do so.¹⁵² A trustee who pays the premium out of his own pocket because there are no trust funds available, is entitled to a first charge on the policy to indemnify himself.¹⁵³

It may happen that a third party with no apparent interest whatsoever in a life insurance contract decides on his own initiative to pay the premium in terms of the contract where neither the insured nor the beneficiary is able to pay or to continue to pay the premium.¹⁵⁴ This is known as a salvage premium. As a matter of general principle, the third party has no right to be reimbursed by the insured or the beneficiary.¹⁵⁵ However, a court will not require very strong evidence to show an implied promise by the insured or the beneficiary to repay the third party. The inference of an implied promise by the insured or the beneficiary to repay the third party can be drawn from the surrounding circumstances, for example, previous dealings between the parties.¹⁵⁶ Where a third party is specifically requested by the insured or the beneficiary in terms of the contract to pay the premium on his behalf and the requester promises to repay the

150 See Ivamy *General* 183n19 and the authority referred to there.

151 In *Farquharson v Pearl Assurance Co Ltd* [1937] 3 All ER 124 (KB) a life insurance policy was taken out as security for a loan. The mortgage which was the subject of the loan, provided that the mortgagee was allowed to pay the premium should the insured (mortgagor) be in default in the payment of the premium. On 9 April 1936 the mortgagee became aware of the mortgagor's financial difficulties and offered the insurer the premium. The insurer rejected the mortgagee's offer. On 20 April 1936 the mortgagor (insured) passed away. It was held (at 131-133) that the mortgagee's offer was a tender of payment and that the insurer, as against the mortgagee, was not allowed to repudiate the policy for non-payment or late payment of the premium. See also *MacGillivray & Parkington* par 1059; *Clarke* 297n37-39 and the authorities cited there.

152 See *MacGillivray & Parkington* par 1061.

153 See *MacGillivray & Parkington* par 1062.

154 Eg, the wealthy father of the insured life may decide to pay the premium on behalf of his child, where the child, ie, the insured life, is the breadwinner of his household and is unable to pay the premium. By paying the premium on behalf of his child the father ensures that provision will be made for his child's family in the event of his, ie, the child's, premature death.

155 See *Pickard* 78; *MacGillivray & Parkington* par 1052. The question of whether the third party has a right to be reimbursed from the proceeds of the policy by the beneficiary, or whether the third party as a salvor is entitled to a lien for salvage remuneration, is discussed by *MacGillivray & Parkington* par 1052. Their conclusion is that the doctrine of salvage is peculiar to maritime law (insurance) and cannot be extended to other types of insurance. A stranger who steps in uninvited and pays the premium in terms of a non-marine insurance contract is therefore neither entitled to the benefits in terms of the contract, nor has he a claim to recover the premiums either personally against the insured or by way of a lien on the policy. However, the third party may be entitled to recover the money from the insured based on the principles of equity which provide a remedy for unjustifiable enrichment: see *Halsbury's* vol 9 par 630 et seq.

156 See *MacGillivray & Parkington* par 1055.

amount so advanced, the transaction is presumed to be a loan. The insured or beneficiary is under a personal obligation to repay the loan.¹⁵⁷

In the decision in *London and Lancashire Life Assurance Co v Flemming*¹⁵⁸ it was held that an agent who is not authorised to give credit for the payment of the premium to the insured, will not effect payment as between the insured and the insurer by debiting himself in his periodical account (with the insurer) with the (unpaid) premium.¹⁵⁹

6.3.6 To Whom the Premium Is to Be Paid

Payment of the premium should be made to the insurer or its agent who has the necessary authority to receive the premium on its behalf.¹⁶⁰ If the contract provides for the payment of the premium to a particular agent, payment to another agent will not be regarded as a valid payment. The insured should exercise reasonable care to find the particular agent to whom payment must be made.¹⁶¹

If no particular agent is named in the contract, payment to any agent of the insurer will constitute effective payment of the premium if that agent has the necessary authority to receive payment on behalf of the insurer. It is not necessary for the agent to have express authority to receive the premium on behalf of the insurer. For example, an agent who is supplied by the insurer with official receipts to be given for premiums, is deemed to have the necessary authority.¹⁶²

The agent must have authority to receive the premium in the manner in which it has been made to him. For example, an agent who is authorised to receive payment of the premiums in cash is not entitled to accept a cheque or a bill of exchange as payment of the premium.¹⁶³

If a broker or other independent intermediary is involved in the conclusion of the insurance contract and similarly involved in the receipt and payment of the premium, the insurer usually looks to the broker or such intermediary for payment of the premium.¹⁶⁴

157 See Pickard 78-79 for examples of when a third party, by paying the premium, will obtain a lien upon the money secured by the policy. See also MacGillivray & Parkington par 1054.

158 [1897] AC 499 (PC).

159 At 506-508.

160 See also par 6.5.4 below.

161 See MacGillivray & Parkington par 911. See also par 6.5.3 and 6.5.4 below as to the receipt of premiums by brokers and other intermediaries.

162 See Baker-Welford & Otter-Barry 192; Ivamy *General* 190-191.

163 See Baker-Welford & Otter-Barry 193-194; Ivamy *General* 191-194.

164 See Clarke 297-298. See further par 6.5 below.

6.3.7 The Amount of the Premium

The amount of the premium is generally a matter for agreement between the parties.¹⁶⁵ However, in many if not the majority of cases there is little negotiation between the parties. Usually the insured who makes the offer to insure to the insurer, makes it on the insurer's usual terms, which include the usual premium levelled by the insurer for that particular type of risk. But negotiation will take place, for example, where the risk is of an unusual nature or extent. If the insurer decides to charge the insured with a higher or lower premium than the usual premium for the particular type of risk and informs him accordingly, it may constitute a counteroffer on the part of the insurer.¹⁶⁶

The adequacy of the premium is the insurer's concern.¹⁶⁷ The premium is usually charged at a rate¹⁶⁸ of so much per £100 of the sum insured, that is, it is charged as a percentage.¹⁶⁹ In the rare case of the premium being expressed in the policy as a currency amount,¹⁷⁰ it is practice for the currency symbol to be indicated in it.¹⁷¹ In the case of non-marine insurance, the insurer usually makes use of actuarial tables to give a reliable guide for the assessment of adequate premiums. From this guide, a fixed minimum for premium rating is derived which is referred to as a tariff.¹⁷² In the case of marine insurance, the insurer does not rely on actuarial tables to fix the premium.¹⁷³ Traditionally, the marine insurer uses its skill, judgment and knowledge to fix the premium.¹⁷⁴ In the case of mutual insurance the premium is usually only finally

¹⁶⁵ See Templeman 10.

¹⁶⁶ See Colinvaux 11 et seq; Henley 88.

¹⁶⁷ See Colinvaux 131. The gross premium (or risk premium as it is also referred to) is determined by and large by the insurer and should include administration expenses, commissions, the net costs of reinsurance, the net costs of any industry or government-administered funds, and the margin for profit and contingency: see Hansell 222-223; Cummins & Derrig 55; Durrant & Wilkens 7/3.

¹⁶⁸ The concept of a "premium tariff" should be distinguished from the concepts of a "premium" and "premium rate". The tariff is a fixed minimum for premium rating and is derived from actuarial tables: see Brown *Principles* vol 1 49-50. Thus, the premium tariff is used to fix the premium rating, which, in turn, determines the amount of the premium.

¹⁶⁹ See Brown *Principles* vol 1 49-50; Ivamy *General* 181-182; Golding 160.

¹⁷⁰ Ie, if the premium is expressed as a decimal monetary amount and not, as is usually the case, as a percentage of the sum insured.

¹⁷¹ See Brown *Principles* vol 2 23 who mentions that where the amount of the premium is expressed, it must be shown to two decimal places only. In practice decimal amounts are not adjusted except where the rate of exchange to sterling is very large.

¹⁷² But the amount or rate of premium does to a large extent depend on the type of risk involved. Some types of insurance are by nature concerned with risks of a more far-reaching nature, eg, fire insurance: see Gamien & Francis 144. A wealth of literature exists on the topic of premium rating or price arrangement in the insurance industry. For a discussion of the principles and economic theories of premium rating, as well as the problems involved in determining premium rates, topics which fall outside the scope of this thesis, see Egerton 5 et seq; Hansell 223-225; McDowell 174 et seq; Carter *Reinsurance* 6/38-6/41; Riley 285-290. As to the fixing of premium rates for life insurance in particular, see Gilchrist 11 et seq; Howe 81 et seq.

¹⁷³ To a large extent this remark applies to indemnity insurance in general, and not to marine insurance only: see Egerton 1; Gamien & Francis 144-145.

¹⁷⁴ This method is also referred to as "judgemental rating", in contrast with "manual rating": see Egerton 1. See also Brown *Principles* vol 1 49.

ascertained when the period of cover has ended.¹⁷⁵ In the case of insurance for profit the amount of the premium is usually fixed on the conclusion of the contract.¹⁷⁶

The main factors which determine the rate for a particular type of insurance depend on the type of insurance at hand. For example, in the case of a life insurance contract concluded by someone on his own life, the state of his health is one of the more important factors which the insurer considers in fixing the rate of the premium, while the amount of debts owed by the insured life to his creditors is usually of minor importance to the insurer. However, in the case of a life insurance contract concluded by the creditor on the life of his debtor, the amount owed by the debtor is an important consideration in fixing the rate of the premium.¹⁷⁷ If the same creditor concludes a (key man) life insurance contract on the life of the debtor who is also an employee of his, the amount of the debt is, as a matter of general principle, irrelevant.¹⁷⁸

Although the parties must reach consensus that a determined or determinable rate of premium will be paid by the insured, it is not necessary that the precise amount of the premium should have been fixed and agreed upon at the time of the conclusion of the contract. However, the parties must reach a definite agreement to postpone the fixing of the amount and to enter into the contract notwithstanding.¹⁷⁹ Where a broker is involved in the conclusion of the contract, the gross premium¹⁸⁰ is expressed in the policy, although the broker pays the premium on a net basis¹⁸¹ to the insurer.¹⁸²

As it is not necessary for the parties to agree on the exact amount of the premium, it is therefore possible for the parties to insure at a premium "to be arranged",¹⁸³ or for the contract to provide for a variation of the amount of the premium during a period of cover, that is, to insure at "an additional premium to be arranged", or for insurance on cargo "to be valued as interest shall appear".¹⁸⁴ If the contract does not provide for the exact amount of the premium, the contract may be void for vagueness unless the parties have provided for an effective mechanism to determine the

175 See Henley 127.

176 See Clarke 293.

177 Other factors which are important in determining the rate of the premium in the case of credit insurance are the quality or extent of the risk, the price of possible reinsurance and the duration of the period for which the insurer will bear the risk: see Briggs & Edwards 119-120; Benjamin 156. As to the fixing of the rate of the premium in the case of reinsurance, see Golding 145-146.

178 See Briggs & Edwards 119.

179 See Ivamy *General* 182n10 and the authorities referred to there which illustrate the concepts of "premium to be arranged" and "reasonable premium".

180 The term "gross premium" connotes the total premium before deduction of brokerage and discounts: see Brown *Dictionary* G14.

181 The term "net premium" connotes the premium after all discounts and brokerage have been taken off, alternatively the premium following the deduction of a return of premium. The latter, if before deduction of discounts, may be called the "gross net premium": see Brown *Dictionary* N11.

182 This is the case because the contract is concluded between the insurer and the insured. The broker is no more than an intermediary in the negotiations: see Brown *Principles* vol 1 52-53.

183 See MacGillivray & Parkington par 892; Chalmers 48n2.

184 See Clarke 293.

amount at a later stage, as happens, for example, in the case of mutual insurance.¹⁸⁵ The contract will not be void for vagueness if the court is able to interpret the contract as meaning that the insured will pay a reasonable premium, the amount of which can be ascertained by reference to the insurance market, as in the case of a "premium to be arranged" clause.¹⁸⁶ In the decision in *Kirby v Cosindit Societa Per Azioni*¹⁸⁷ the insurer agreed to insure the factory of the insured at a specified premium and for a specified period of time. The parties agreed that the cover in terms of the contract would be extended for a further period at "a premium to be arranged".¹⁸⁸ A dispute then arose when the insurer alleged that although no mechanism was expressly agreed upon to establish "the premium to be arranged", a "reasonable premium" was nevertheless payable by the insured. This submission was rejected by the Court since it was not possible for it to fix the amount of the premium with any certainty.¹⁸⁹

In the case of liability insurance in particular, the policy usually provides for an immediate payment of a provisional premium, and for an adjustment of the premium at the end of the year of insurance, which may include an additional premium or a refund.¹⁹⁰ An additional premium is an extra premium which is charged over and above the basic or the loaded rate, should a certain state of affairs exist.¹⁹¹ In practice an additional premium is not paid at the time of the conclusion of the contract, as it is usually in respect of a risk which is anticipated to happen, but which need not necessarily happen.¹⁹²

In marine insurance failure by the parties to agree on the amount of the premium is remedied by statute. Section 31(1) of the Marine Insurance Act provides that when an insurance contract is concluded "at a premium to be arranged", and no arrangement is made, a reasonable premium is payable.¹⁹³ Likewise, where an insurance con-

185 See Henley 127.

186 See Clarke 293-294.

187 *Supra*.

188 At 77-78.

189 See the decision in *Kirby* at 79 where it was held that "the [insured] are right in their submission here that it cannot be said that here is a sum which can be defined and described as being undisputed; and therefore the term ["a reasonable premium"], even if it exists, has not been shown here to exist" (my insertions).

190 See Ivamy *General* 182-183; Henley 127-128.

191 As to the concept of "additional premium", see Brown *Principles* vol 1 54-57.

192 A "loading" is not the equivalent of an additional premium. A "loading" of the basic premium is introduced when some new hazard is introduced into the risk. Eg, if the premium rate is, say one percent and the loading is one quarter percent, then the premium rate for the voyage with the increased risk becomes one and a quarter percent. If the additional hazard is only temporary, the premium rate will return to one percent once the additional hazard ceases to exist: see Brown *Principles* vol 1 54.

193 See also Templeman 4n8 61-62 95; Henley 128; Chalmers 47-48.

tract is concluded on the terms that an "additional premium"¹⁹⁴ is to be arranged in a given event, and that event happens but no arrangement is made, then a reasonable premium is payable.¹⁹⁵ It is a question of fact as to what a reasonable premium or a reasonable additional premium is.¹⁹⁶ Section 31 accords with business understanding, and follows the analogy of the concept of a "reasonable price" which is encountered in the case of contracts of sale.¹⁹⁷ It has been decided that the concept of "arranged" means "agreed to, or in default of arrangement, fixed by an arbitrator or by Court".¹⁹⁸ Likewise, it has been decided that a clause which provides for "a premium to be arranged" does not contemplate any alteration in the terms of the contract other than in respect of the premium.¹⁹⁹ A clause which provides for "a premium to be arranged" has been held to apply only if the insured, on the basis of an accurate declaration of all the facts affecting the risk but excluding knowledge of what was to happen in the event, could in fact have obtained a quotation in the market at a "reasonable commercial premium".²⁰⁰ The concept of an "additional premium" is also acknowledged elsewhere in the sphere of marine insurance.²⁰¹

194 The concept of an "additional premium" is often encountered in insurance policies in terms of which marine war risks are insured. This concept can be described with reference to a marine war risk policy. By nature the concept of an "additional premium" involves two premiums. The first premium is paid for the whole period of insurance, which will be paid for war risk insurance cover to the insured ship throughout the world. The second premium is the additional premium for visits which are made by the insured ship to geographically-defined areas which have a high element of danger, eg, the Suez Canal: see Miller 19-21. "Additional premiums" in terms of a marine war risk policy are sometimes referred to as "breach of warranty premiums". Whether an additional premium is payable does depend therefore to a large extent on the conduct of the insured. But the insurer often reserves the right to designate a new danger area at any time during the period of insurance, which was not among the danger areas that were agreed on at the time of the conclusion of the contract. This patently amounts to a unilateral alteration of the agreed terms of the insurance contract by the insurer: see Miller 19-20. Such unilateral alteration in specified circumstances was, of course, agreed to by the parties. An additional premium is usually added to the basic premium on a cargo insurance when the carrying vessel is older than fifteen years: see *Brown Dictionary A7*.

195 See s 31(1) of the Marine Insurance Act.

196 See s 88 of the Marine Insurance Act. Section 88 of the Marine Insurance Act is similar to s 56 of the Sale of Goods Act 1979 (c 54). See also Chalmers 144. In determining what is a reasonable premium, the courts will take account of market rates as well as the degree of extra risk accepted by the insurer. The Court may refuse to give effect to a "held covered" clause if the insurer can prove that the risk had increased in a manner which was uninsurable on the market: see *Colinvaux* 131-132.

197 See again note 196 above.

198 See Chalmers 48n3 and the authority cited there.

199 See Ivamy *Marine* 109n4 and the authority referred to there.

200 See Ivamy *Marine* 109n5 and the authority referred to there.

201 See in general Chalmers 48n7-11. Generally the main provisions of a marine insurance contract are contained in standard clauses which are attached in a schedule to the policy. The different clauses provide for different types of risk and exclusion. The types of clause attached to the policy depend on the needs of a particular insured. The Institute Clauses are sets of standard clauses drawn up by the Institute of London Underwriters. For a reprint of these clause in a Lloyd's marine insurance policy, see Lloyd's 563-572. The concept of an "additional premium" is acknowledged in the Institute Clauses. The Institute Cargo Clauses provide for an additional premium to be payable where there is a change of voyage: see Chalmers 67 245-246. The Institute Time Clauses concern the payment of an additional premium in case of any breach of warranty as to cargo, trade locality, salvage services or date of sailing: see *Arnould* par 1341-1342; Chalmers 51 168. The Institute Voyage Clauses provide for an additional premium where there is a deviation, a change of voyage or any breach of warranty as to towage or salvage

It has not yet been decided whether section 31 of the Marine Insurance Act applies to non-marine insurance contracts.²⁰² It would appear that although the Marine Insurance Act "codified the Law relating to Marine Insurance",²⁰³ it does not contain any provision which restricts its applicability to policies of marine insurance.²⁰⁴ Thus, it is possible that section 31 will, as a matter of general principle, apply to all types of insurance contract. Furthermore, it is suggested, the concept of a "reasonable premium" accords with business understanding in general, and follows the analogy of "reasonable price" in the case of contracts of sale.²⁰⁵ In the decision in *Martin-Baker Aircraft Co Ltd and another v Canadian Flight Equipment Ltd*²⁰⁶ it was held that

"[t]he common law, in applying the law merchant to commercial transactions, has always proceeded more on the basis of reasonableness in filling up the gaps in a contract which the parties have made on the basis of what is reasonable, so far as that does not conflict with the express terms of the contract, rather on the basis of rigidity. There are abundant illustrations throughout the common law authorities which have subsequently found their place in the great codifying statutes of the Sale of Goods Act, 1893, the Marine Insurance Act, 1906, and the Bills of Exchange Act, 1882, where this view of the law merchant has been adopted and provision has been inserted to the effect that where the contract makes no provision for either fixing price or premium or time at which an act has to be performed, then the law is that a reasonable price and reasonable premium or reasonable time will be imported."²⁰⁷

From this decision it is clear that the concept of a "reasonable price" or "reasonable premium" has its origin in the common law and that section 31 is likely to apply to non-marine insurance contracts too.

A brief explanation of the fixing of the rate of premium at Lloyd's is called for. The rate of the premium in the case of a Lloyd's policy is negotiated by the broker with the underwriter, or leading underwriter in the case of co-insurance. The rate agreed on by the leading underwriter is indicated on the slip. The term "slip" connotes a slip of paper used by brokers for placing insurance on behalf of his client, the insured, with one or more of the underwriters at Lloyd's. The slip contains brief details of the risk on which underwriters write their "lines". Once the rate of premium has been agreed, all the following underwriters accept this rate of the premium automatically by "writing their lines",

services: see Chalmers 196-197.

202 See Cockerell & Shaw 125 where they refer to the decision in *Banque Sabbag SAL v Hope* [1973] 1 Lloyd's Rep 233 (CA) where the Court acknowledged the concepts of "premium to be arranged" and "reasonable premium" but found it unnecessary to decide whether s 31 of the Marine Insurance Act applies to a policy of non-marine insurance.

203 See the subtitle to the Act.

204 Although certain sections of the Act provide expressly that they apply only to policies of marine insurance, eg, s 22, many of the principles contained in the Act are equally applicable to other forms of insurance: see Colinvaux 391.

205 See Chalmers 47.

206 [1955] 2 QB 556.

207 See at 577-578.

that is, underwriting the risk on the slip. The phrase "writing their lines" implies that the different co-underwriters write and initial the proportion of the risk that they are willing to accept or underwrite on one line of a slip.²⁰⁸ Thus, all the underwriters who sign the slip, underwrite their portion of the risk at the same rate of premium.²⁰⁹

6.4 NON-PAYMENT OF THE PREMIUM

6.4.1 Introduction

The non-payment of the premium amounts to non-performance of the basic contractual duty of the insured. The insurer is in principle entitled to sue the insured for the outstanding premium in the event of the non-payment.²¹⁰ In principle the insured will not be excused for non-payment, even if it was caused by force majeure. However, if the premium is unpaid through the fault of the insurer, for example, failure by the insurer to deliver the policy, the insured will be excused.²¹¹ The failure of the insurer to deliver the policy in time may, for example, result in the insured being ignorant of the amount of the premium, or the place or time of payment.

Insurance contracts often provide that, until the premium is paid, there will be no insurance cover. This means that payment of the premium is a condition precedent to the insurer being liable under the contract.²¹² In the case of P and I Clubs the policy often provides for the forfeiture of cover if the member (insured) does not pay the "premium" (call). This forfeiture is sometimes extended to include claims which have arisen prior to the non-payment of the "premium" (call).²¹³ But a provision of this kind will not be implied by the courts, and in the absence of a stipulation which requires the prepayment of the premium, cover commences at the time of the conclusion of the contract and continues until the lateness of payment of the premium becomes of the essence.²¹⁴

208 See Cockerell 148 et seq; *Brown Hazard* 162-163; MacGillivray & Parkington par 1382 et seq.

209 See *Brown Principles* vol 2 92.

210 But the non-payment of the premium is not a ground for the arrest of the debtor's insured ship: see the decision in *Bain Clarkson Ltd v The Owners of the Ship "Sea Friends"* [1991] 2 Lloyd's Rep 322 (CA). In this decision a firm of Lloyd's brokers sued the insured for the outstanding premium in terms of a marine insurance contract. The premium is usually of a small amount and the insurer is often not interested in claiming the outstanding premium through the legal process. But in the present case the premium due was in excess of \$15 000. The question before the Court was whether the broker was allowed to arrest the vessel which was the object of the risk in terms of the insurance contract. The Court decided that, in accordance with public policy, neither an insurer nor a broker should be allowed to arrest a ship to secure the payment of an outstanding premium: see at 323-324. See further Clarke 302n83; Van Niekerk "Marine Insurance Claims" 60n148.

211 See Clarke 302.

212 See Henley 130-131.

213 See Hazelwood 133-136.

214 See Clarke 302.

It has been decided that where the policy was expressed to be treated as a renewal contract²¹⁵ unless notice was given by either party not to renew and no such notice was given, the insured can be held liable to pay the renewal premium.²¹⁶ The insured can therefore, in principle, be compelled to pay the premium.

If the continuance of the cover in terms of an insurance contract is conditional on the punctual payment of the premium on the due date the policy would immediately lapse if the premium was in arrears. The insured will then have to apply for a new insurance contract. In the case of life insurance it is most unlikely that he will be able to obtain cover on the same terms.²¹⁷ In addition the insurer must then prepare a new duly stamped policy in order to comply with the provisions of the Stamp Act 1891.²¹⁸ The non-payment of a single premium could therefore cause great hardship, inconvenience and pecuniary loss to the insured.²¹⁹ To obviate the usual consequences of non-payment of the premium, insurance policies often provide that the cover in terms of the contract is conditional on the payment of the renewal premium, or within so many days after the due date. These days are called the days of grace.²²⁰ The concept of "days of grace" therefore refers to an extra period of time in which the insured is allowed to pay the premium after the original due date for payment of the premium has lapsed.²²¹

215 A renewal contract should be contrasted with an entire contract. The concepts of a "renewal contract" and an "entire contract" involve the length or duration of an insurance contract. There are no rules of law which determine which contracts are renewal contracts and which are entire contracts and the length of the contract is a matter for the policy itself to provide. However, it is safe to state that the life insurance contract is, as a matter of general principle, an entire contract. This implies that it is one contract, existing until the death of the life insured, or a specified date in the case of an endowment or term policy. Thus, provided that the premiums due are properly paid, the insurer cannot refuse to "renew" a life policy. Strictly speaking it is, of course, a misnomer to refer to the "renewal" of a life insurance contract as it is an entire contract. By contrast most other types of policy are of limited duration, normally of one year. Upon the expiry of such policy, the parties may agree to renew the contract and the renewal constitutes a fresh or new contract. One of the consequences of such a renewal is that the duty to disclose material facts to the other party arises again: see *Birds* 79. See further note 235 below.

216 See *Colinvaux* 135.

217 The premiums for a whole-life insurance policy are determined by considering the life insured's life expectancy and the amount of the sum insured. The premiums are levelled so that the amount of the premium for the policy's first period is the same as the amount of the premium for the policy's last period. As the life expectancy of the life insured affects the amount of the premium, the age at which the life insured concludes the contract and starts paying the premiums will co-determine the amount of the premium. Eg, if someone concludes a whole-life insurance contract on his own life for an amount of £100 000 at the age of twenty, the monthly premium will be, eg, £80. But if the contract lapses two years later and the life insured wants to conclude a new contract, the monthly premium will rise to, eg, £90.

218 54 & 55 *Vict* c 39.

219 See *MacGillivray & Parkington* par 953.

220 Although most types of insurance provide for a period of grace, it is not a standard provision in all indemnity insurance contracts. Eg, it is not the practice to give days of grace for the payment of the premium in terms of a motor-vehicle insurance policy: see *Carter Handbook* 1-159.

221 See *Clarke* 301.

There are two situations where the non-payment of the premium will not affect the insured's right to claim an indemnity in the event of a loss. First, where the policy was made under seal and it states that the premium has been paid.²²² Every Lloyd's policy states that the premium has been paid²²³ and it is treated as if the premium were paid upon the conclusion of the contract.²²⁴ Secondly, where no specified time limit for the payment of the premium is fixed, it is taken that the insurer has waived its right to immediate payment of the premium.²²⁵ Waiver by the insurer will be implied where the insurer has given credit for the payment of the premium.²²⁶ In the decision in *Kelly v Solari*²²⁷ the insurer, although it was aware of the fact that the last quarterly premium in terms of the life insurance policy was, by mistake, unpaid at the time of the death of the insured life, it equally mistakenly paid the insured sum to the estate of the insured life. It was decided that the insurer was entitled to claim a return of the sum of money from the estate of the insured which it had paid under a mistake of fact.²²⁸ The conduct of the insurer did not amount to a waiver of the condition of the payment of the premium.

6.4.2 Non-Payment of the Premium in Terms of Indemnity Insurance Contracts

In the case of indemnity insurance, for example, property and fire insurance, the insurer is usually under no obligation to renew the insurance contract. If the contract does not provide for days of grace, the non-payment of the premium will usually cause the lapse of the policy. If the contract provides that the insured will be protected during the days of grace notwithstanding the non-payment of the premium, then the insured is covered during such days for as long as the question of renewal is pending. But if the insurer declines to renew the contract before the days of grace have begun to run, or even during the days of grace, it will not be liable for any loss which occurs during the days of grace.²²⁹

In the case of indemnity insurance contracts, the effect of a days-of-grace clause may be one of two kinds. First, non-payment may result in there being no cover, but only an offer to renew cover, which takes effect if and when the offeree (the insured) accepts the offer and pays the premium. Secondly, there may be interim cover during the days of grace, until the offeree (the insured) decides whether or not to contract for the full renewal period.²³⁰ Which one of these two constructions will apply to a particular contract usually depends on the terms of the contract.

222 For a discussion of the concept "made under seal", see again par 6.2.1 note 15 above.

223 Although policies at Lloyd's are not usually made under seal, a trade usage exists in terms of which the premium under a policy at Lloyd's is deemed to be paid: see further par 6.5.4 below.

224 See *Roberts v Security Co Ltd* supra at 114. See also Baker-Welford & Otter-Barry 197; Henley 131-133.

225 See Clarke 303.

226 See also Henley 133-134.

227 Supra.

228 At 26.

229 See MacGillivray & Parkington par 954n20 and the authority referred to there. But this view should be seen against the principle that the insurer is not allowed to unilaterally revoke the insured's right to pay the premium during the period of grace and to enforce his claim under the policy.

230 See Clarke 301.

If the premium is still unpaid after the days of grace, the policy usually lapses if the contract does not provide for a revival²³¹ of the contract. Indemnity insurance contracts seldom so provide.²³²

In general the courts seem reluctant to acknowledge a waiver by the creditor of a condition in the contract that the time of payment is of the essence.²³³

231 The phrases "revival of the contract" and "renewal of the contract" should be distinguished from each other. If a contract is revived it does not amount to the conclusion of a new or fresh contract, as is the case if it is renewed, but the suspension of the cover in terms of the contract is lifted.

232 See MacGillivray & Parkington par 956. See Peters 119 who is of the opinion that in terms of the Code of Practice for Insurance Intermediaries, the intermediary should inform the insured that the policy has lapsed. See also par 6.5.1 below.

233 In *Nichimen Corporation v Gatoil Overseas Incorporated* [1987] 2 Lloyd's Rep 46 (CA) the plaintiff (seller) concluded a contract of sale with the defendant (buyer) for a quantity of crude oil. Payment was to take place by way of a letter of credit which had to be opened not less than ten days before the lay day range: see at 47-48. (The lay days are the number of days permitted for the loading or unloading of a ship without payment of demurrage. Under a voyage charterparty it is essential that the vessel is not delayed longer than necessary when discharging or loading cargo: see Brown *Dictionary* L6. Demurrage is the extra charge required in addition to the standard dockage in the event of a delay. In marine insurance the term "demurrage" is used to denote any loss of hire period incurred by the shipowner: see Brown *Dictionary* D12. The term "demurrage" is also used to connote the penalty charged when freight cars, or trucks are held up for loading or unloading beyond the accepted time limit, which is usually forty-eight hours: see Terry 81.) The defendant alleged that the plaintiff had waived its right to a prompt payment, because under earlier contracts the letters of credit were opened late. The Court decided (at 52-53) that the plaintiff never waived its right to continue to treat the time for the opening of the letter of credit as of the essence. The fact that the plaintiff gave the defendant a number of fixed extensions of time in the past did not constitute a general waiver of the requirement for prompt payment. In the decision in *Laing v Commercial Union Assurance Co Ltd* (1922) 11 LJ L Rep 54 (Ch) at 54 it was decided that the mere fact that the insurer in terms of the fire insurance contract had accepted late premiums in the past, did not constitute a waiver of the requirement of prompt payment. In the particular year during which the loss had occurred, and while the premium was due but unpaid, the insurer sent the insured a notice that the premium for the particular year was unpaid and that non-payment would result in the lapse of the contract. The insurer was held to be not liable. See also the decision in *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana* [1983] 2 AC 694 (HL) in which it was decided that the mere acceptance of previous late payments in terms of a time charter party were not indicative of a waiver on the part of the owners to enforce their right in terms of a clause which required prompt payment of the premium. The particular clause provided (at 703-704) that "in default of [timeous] payment [the] owners may withdraw the vessel from the service of the charterers" (my insertions). But in *Holliday v Western Australian Insurance Co Ltd* (1936) 54 LJ L Rep 373 (KB) at 376-377 it was decided on the facts of the particular case, that the insurer waived its right to a prompt payment and that it was not allowed to rely on the late (non-)payment of the premium as an automatic cancellation of the policy. The course of business between the parties in the latter case was that the premiums in terms of the fire insurance contract had always been paid by being carried over to the insured's account, and that payment was not effected for up to six months after the account was rendered to the insured.

6.4.3 Non-Payment of the Premium in Terms of Non-Indemnity Insurance Contracts

In terms of a non-indemnity insurance contract,²³⁴ for example, a life insurance contract, the insurer cannot decline to renew or rather continue²³⁵ the policy and the question of whether the insured enjoys cover during the period of grace depends upon the nature of the provisions for continuation.²³⁶

If the cover expires on the day when the continuation premium becomes due and the days of grace are given merely as an opportunity for revival, then the death of the insured life during the days of grace will not be covered. However, in terms of a non-indemnity insurance contract the effect of non-payment is usually that the contract remains in force during the days of grace. In other words, time is not of the essence until the days of grace have expired.²³⁷ If the insured life passes away during the days of grace but before the next premium has been paid, there will be insurance cover.²³⁸ The insurer will be allowed to deduct the amount of the outstanding premium from the amount due under the policy.

Whether or not a non-indemnity insurance contract provides cover during the days of grace is a matter of construction. For example, if the contract is an own-life policy,²³⁹ and it expressly provides that the cover is conditional upon the payment of the premium by the insured, the proper inference will be that payment by someone else (for example, the executor of the insured's estate) will not satisfy the condition.²⁴⁰ In the decision in *Stuart v Freeman*²⁴¹ the life policy provided for insurance cover for a year, the premium of which was payable quarterly. A period of grace of 30 days was allowed for the late payment of the premium. The insured life died after the due date for the payment of the next quarterly premium, but within the period of grace. It was decided that the policy was a continuing one liable to defeasance on the non-payment of the quarterly premium. As a result no question arose as to the revival of the policy

234 Also referred to as "policies written [ie, concluded] on a permanent basis": see MacGillivray & Parkington par 954.

235 As a life insurance contract is, in principle, an entire contract and not a renewal contract, it is, strictly speaking, a misnomer to refer to the "renewal" of a life insurance contract. A life insurance contract is therefore not *renewed* by the proper payment of premiums as they become due, but it is merely *continued* with each payment. For a discussion of the difference between the concepts of a "renewal contract" and an "entire contract", see again note 215 above. For a discussion of the distinction between the terms "renewal" and "revival" of the insurance contract, see again note 231 above.

236 See MacGillivray & Parkington par 954. But see Emanuel 42-43 who is of the opinion that where days of grace are given in terms of a life insurance contract, the policy is kept alive and not merely renewed. The gist of his argument turns on the fact that if the "thing insured" in terms of a life insurance contract, ie, the insured life, has ceased to be capable of insurance during the days of grace, the insurance cannot be "renewed" after the death of the insured.

237 See MacGillivray & Parkington par 954; Clarke 301.

238 See MacGillivray & Parkington par 954n22; Clarke 301.

239 Ie, a life insurance policy in terms of which the insured life and the insured is the same person.

240 See MacGillivray & Parkington par 955.

241 [1903] 1 KB 47 (CA).

within the days of grace, but it was decided that the policy was prevented from lapsing by the payment of the premium within the period of grace.²⁴²

In the case of non-indemnity contracts the policy usually provides for the revival of the contract within a specified time and upon the fulfilment of certain conditions after the non-payment of the premium and expiration of the days of grace. The insurance contract is usually revived upon the payment of a fine by the insured and satisfactory proof that the insured life is in good health.²⁴³

The policy will usually lapse if the insured fails to pay the premium on or before the due date or during the days of grace, and in the case of non-compliance with any further conditions for the revival of the policy. However, the policy sometimes also provides for the appropriation of its surrender value in order to protect the benefits in terms of the policy. Life insurance policies often contain a clause that the insurer will apply any surrender value which the policy may have towards the payment of unpaid premiums until such surrender value has been exhausted.²⁴⁴ If the policy has not yet acquired a surrender value, it will simply lapse for non-payment of the premium.

If the contract provides that it will not lapse for default in payment of the premium unless notice has been given in writing by the broker to the insured, the court will give effect to such a stipulation.²⁴⁵

Finally, the insurer may decide to reinstate²⁴⁶ the policy notwithstanding the non-payment of the premium on or before the due date, or during the days of grace or non-fulfilment of any conditions for revival. The reinstatement usually takes place gratuitously.²⁴⁷

6.5 THE ROLE OF BROKERS AND OTHER INTERMEDIARIES IN THE PAYMENT OF THE PREMIUM

6.5.1 Introduction

If an insurance contract is effected through a broker or other intermediary, the broker or intermediary is usually regarded by the law as the agent of the insured.²⁴⁸

242 At 55.

243 See MacGillivray & Parkington par 956.

244 See MacGillivray & Parkington par 937. Likewise, the insurer may set off any claim which the insured may have against the insurer against premiums due by the insured under the same or other policies: see MacGillivray & Parkington par 938 956n28.

245 See Cockerell & Shaw 145.

246 The "reinstatement" of a life insurance policy should be distinguished from its "continuation" or "revival". As to the meaning of the latter two terms, see again notes 231 and 235 above. "Continuation" of the policy implies that the premium due has to be properly paid in time. "Revival" of the policy entails that the suspension of the cover during the days of grace is lifted by the payment of the premium during the days of grace. "Reinstatement" implies that the policy has lapsed because of the non-payment of the premium during the days of the grace but that the insurer has magnanimously decided to reinstate the policy.

247 See MacGillivray & Parkington par 957.

248 See Cockerell & Shaw 57. Although there are no hard and fast rules in this regard, it is generally

On the face of it a broker who is instructed by the insured to effect insurance cover on his behalf has no authority from the insurer to collect the premium on its behalf. However, insurers frequently insert a term in the insurance contract that the broker or agent is deemed to be the agent of the insurer in respect of the receipt of the premium.²⁴⁹ The fact that a broker or agent is regarded as the agent of the insured in respect of representations made to and negotiations with the insurer, is not in itself an obstacle to regarding the broker or agent as the agent of the insurer in respect of the receipt of the premiums.²⁵⁰ The authority of the broker to collect the premium may also stem from usages between the parties and from customs or trade usages of the insurance market.²⁵¹

In England the role and conduct of all insurance intermediaries, including employees of insurance companies, but excluding registered insurance brokers, are prescribed by the Code of Practice accepted by the members of the Association of British Insurers. This Code provides guidelines on the information which must be recorded by an intermediary when a premium is paid to him by the insured.²⁵²

In the paragraphs that follow, the term "broker" is used, except where the contrary is indicated, to connote all types of insurance intermediary.

6.5.2 The Relationship Between the Insured and the Insurer

Like all contracts, insurance contracts are concluded by one party making an offer to contract which is accepted by the other party. Usually it is the insured who initially approaches the insurer, either directly or through his broker or the insurer's agent.²⁵³ If through his broker, the latter then concludes the contract on behalf of the insured with the insurer.

In the case of marine policies and Lloyd's policies, the broker is personally liable to the insurer for the payment of the premium.²⁵⁴ Section 53(1) of the Marine Insurance Act provides that, unless otherwise agreed, the broker who effects a marine insurance policy on behalf of an insured, and not the insured himself, is directly responsible to the insurer for the premium. However, the insurer is directly responsible to the insured for the amount which may be payable in respect of losses, or in respect of a return of premium.²⁵⁵ Section 82 of the Marine Insurance Act provides that although the broker

taken that an employee of an insurer, eg, a canvassing agent, is regarded as the agent of the insurer in the conclusion of the contract. The extent of his authority will, of course, depend on the circumstances of each case: see MacGillivray & Parkington par 395 et seq.

249 See Cockerell & Shaw 57-58.

250 See MacGillivray & Parkington par 915.

251 See Cockerell & Shaw 99.

252 See Cockerell & Shaw 57 et seq; Peters 93 116-117.

253 See Parks vol II 799-800; Henley 88.

254 See Colinvaux 133. See also par 6.5.4 below.

255 See Colinvaux 406.

is directly responsible to the insurer for the payment of the premium, when the premium is returnable, it is directly repayable by the insurer to the insured.²⁵⁶ However, if the insured in terms of an insurance contract, other than marine insurance policies and policies issued by Lloyd's, pays the premium to the broker who does not pass it on to the insurer, the insurer is not deemed to have received the premium. It is therefore possible that the insured may have to make a double payment in respect of the premium. The insured must then recover the first payment from the broker who has not paid it over to the insurer.

Section 54 of the Marine Insurance Act provides that where a marine insurance policy is effected by a broker on behalf of an insured and the policy acknowledges the receipt of the premium, such acknowledgement is, in the absence of fraud, conclusive proof of payment of the premium as between the insurer and the insured.

In terms of a trade usage at Lloyd's, the insured in terms of a policy which is issued there, is deemed to have allowed the broker to pay the premium on his behalf to the underwriter. The underwriter cannot claim the premium directly from the insured but only from the broker. From the case law it appears that this protection of the insured is derived from trade usage itself, and not from the underwriter's acknowledgement in the policy that the premium has been received.²⁵⁷ The underwriter is consequently not allowed to refuse to pay the insured for a loss on the ground that the broker has not paid the premium to him. The parties are allowed to exclude the operation of this trade usage from their contract.²⁵⁸ In terms of the trade usage it is possible for the insured to claim an indemnity in terms of the policy and even to claim a return of the premium from the insured though the premium was never paid by him to the broker.²⁵⁹

6.5.3 The Relationship Between the Broker and the Insured

Although the broker, in the case of other types of insurance than marine insurance and policies issued by Lloyd's, is generally not authorised to give credit on behalf of the insurer, the broker may pay the premium on the insured's behalf from his own pocket and give the insured credit in respect of the personal debt owed by the insured to him. The broker is, however, not allowed to give the insured credit by giving the insured the benefit of his (the broker's) personal account with the insurer, by merely debiting himself with the premium, and claiming that it was paid by the insured. There must have been an actual payment by the broker to the insurer where the broker gives credit to the insured for a premium which was due immediately.²⁶⁰ If the broker runs a credit account with his client, the insured, he is entitled to set off premiums due against premium returns. But if the broker is responsible for the premium to the insurer, he may

256 See Chalmers 136.

257 See MacGillivray & Parkington par 1381.

258 See MacGillivray & Parkington par 1380.

259 See Cockerell & Shaw 58; MacGillivray & Parkington par 1380n23-24 and the authorities referred to there.

260 See MacGillivray & Parkington par 930.

not set off premiums due against payments in respect of claims instituted by the insured.²⁶¹ The broker therefore gives credit at his own risk.²⁶²

Section 53(2) of the Marine Insurance Act provides that, unless otherwise agreed, the broker has a lien against the insured upon the policy for the amount of the premium and his charges in respect of effecting the policy.²⁶³ As the insured must be in possession of the policy to make a claim under the policy,²⁶⁴ this lien promotes prompt payment of the premium by the insured to the broker.²⁶⁵ However, in practice it is difficult for the broker to exercise his lien. Whilst he may be able to do so with a hull policy,²⁶⁶ most cargo insurance is effected by means of open cover. In terms of an open cover policy the insurer issues, in addition to the policy, certificates to the insured.²⁶⁷ The insured holds the certificates and the certificates are usually what is required for a settlement of the claim.²⁶⁸

Section 54 of the Marine Insurance Act provides that where a marine insurance policy is effected by a broker on behalf of an insured and the policy acknowledges the receipt of the premium, such acknowledgement is not conclusive proof of payment of the premium between the insurer and the broker, but only between the insurer and the insured.²⁶⁹

As the broker in terms of a Lloyd's policy is personally liable to the underwriter for the payment of the premium, he is entitled to sue the insured for the premium. There is, of course, a second reason why the broker is entitled to sue the insured for the

261 This is the case as the broker is not the insured's agent in respect of payments resulting from claims instituted by the insured.

262 See Peters 9.

263 See Chalmers 76n3-4.

264 See Cockerell & Shaw 58.

265 See Brown *Principles* vol 3 28-29.

266 The term "hull insurance" connotes insurance on a ship, its machinery and equipment: see Brown *Dictionary* H10. The term "hull insurance" is also used to refer to the insurance on the hull of an aeroplane and the equipment maintained permanently on board: see *Oxford* 392. The contract of hull insurance is usually embodied in a single policy. It is this policy which is required by s 22 of the Marine Insurance Act 1906 as proof of the contract. Whilst the broker may be in possession of the hull policy and so exercise his lien, it is not possible in the case of certificates which are issued in terms of an open cover policy. Certificates are issued to the insured and not to the broker. As a result the broker does not have possession of the certificates: see Brown *Dictionary* C15.

267 Although the insurer issues a general policy in the case of a marine insurance contract which is concluded by way of open covers, each individual shipment is declared by the insured as and when made and certificates of insurance are issued for declared shipments. The certificate is a document which is issued to the insured certifying that an insurance contract has been concluded between him and the insurer and that a policy has been issued: see Brown *Dictionary* C15; O7-O9.

268 See Brown *Principles* vol 1 51. In order to protect themselves and the brokers from the non-payment of premiums, insurers in terms of open covers and floating policies often require a large deposit premium to be paid by the insured at the inception of the policy. There are, however, mixed views on the desirability of a deposit premium. Some insured may be unwilling or unable to pay a deposit premium: see Brown *Principles* vol 2 52-53.

269 See Chalmers 77-78. See also *Roberts v Security Co Ltd* supra.

premium. As the underwriter may not sue the insured for the premium, the broker is effectively the party designated to sue the insured for payment of the premium.²⁷⁰

If the broker who has not yet received the premium from the insured, debits himself with the premium in his account with the insurer, the question arises as to whether the insurer will be liable for claims outside the days of grace and before the premium has in actual fact been received by the broker. In the case of marine insurance contracts and policies issued by Lloyd's, the premium is owed to the insurer by the broker and not by the insured and the insurer will be liable for such a claim. Outside Lloyd's and in the case of non-marine insurance the matter is more complex. There is no modern English case law on this point and it has been suggested that the position is the same as in the case of a Lloyd's policy or a marine insurance policy.²⁷¹ The only exception appears to be the case of a personal life insurance policy where the broker will not bind the insurer by giving credit to the insured.²⁷²

The liability of the broker for payment of the premium under a reinsurance contract (treaty) has not yet been established by statute or common law. Contrary to the situation which prevails in marine insurance and Lloyd's insurance,²⁷³ the broker acts in principle as agent for the reinsured in the receipt of the premium. Thus, any premium paid by the reinsured to the broker does not constitute a discharge of the reinsured's debt towards the reinsurer until the premium is actually paid over to the reinsurer.²⁷⁴

6.5.4 The Relationship Between the Broker and the Insurer

Generally a broker is entitled to receive the premium on behalf of the insurer. However, the rule that the broker receives the premium on behalf of the insurer applies to marine insurance contracts and policies issued by Lloyd's only.²⁷⁵ It has been decided, in particular, that an agent and by implication also a broker whom the insurer has issued with official receipts, or an agent with authority to grant interim cover on behalf of the insurer or to secure new insurance or the renewal of an existing insurance

270 See MacGillivray & Parkington par 1380.

271 See Cockerell & Shaw 100.

272 See Cockerell & Shaw 101-102 and the decision in *Acey v Fernie* (1840) 7 M & W 151, 151 ER 717 referred to by them.

273 See also 6.5.4 below. Henley 193 mentions the case of a Lloyd's facultative contract of reinsurance as an exception where the broker will be personally liable for the premium.

274 See Henley 191-192.

275 See Colinvaux 133. See again par 6.5.2 above. For an interesting case where the Lloyd's underwriting agent failed to disclose material facts to the reinsurer in terms of a reinsurance contract between the reinsurer and some Lloyd's syndicates, see the decision in *Aiken and others v Steward Wrightson Members' Agency Ltd and others* [1995] 3 All ER 449 (QB). It was decided (at 481-482) that the Lloyd's underwriting agent, who was acting on behalf of the Lloyd's syndicates in their capacity as insured, owed a duty of care to the syndicates, and the failure of the agent to disclose certain material facts to the reinsurer, could be imputed to the syndicates in their capacity as insured, and therefore as principal of the agent concerned.

contract, has authority, implied or apparent, to receive premiums on behalf of the insurer.²⁷⁶

Insurance contracts often provide that premiums received by the broker or other intermediary shall be "at all times the property of, and received for the insurer, and that it can in no way form part of the personal estate of the broker or of any other business involved in by the broker".²⁷⁷ The policy sometimes provides that all premiums are to be held in trust for the insurer.²⁷⁸ This provision has been interpreted by the courts to entail that the broker or other intermediary is the "agent" of the insurer for purposes of the receipt of premiums, even where the particular intermediary is primarily the agent of the insured.²⁷⁹

Section 53(1) of the Marine Insurance Act provides that, unless otherwise agreed, the broker who effects a marine insurance policy on behalf of an insured, is directly responsible to the insurer for the premium. Section 53(1) is a codification of a trade usage which existed in the sphere of marine insurance.²⁸⁰ The operation of this trade usage as well as the operation of section 53(1) can be excluded by an express stipulation in the contract to this effect.²⁸¹ In the decision in *Black King Shipping Corporation v Massie, The Litsion Pride*²⁸² it was held that brokers who are specifically authorised to receive ordinary premiums on behalf of the insurers, are by implication authorised to receive additional premiums on behalf of the insurers.²⁸³ The rule contained in section 53(1) is unique to marine insurance policies and policies of Lloyd's. As a result, the insurer is the broker's creditor for the amount of the premium.²⁸⁴

²⁷⁶ See Clarke 296 and the authorities referred to there.

²⁷⁷ For an example of such a clause, see the decision in *Vehicle & General Insurance Co Ltd v Elmbridge Insurances* [1973] 1 Lloyd's Rep 325 (Mayor's & City of London Court) at 327.

²⁷⁸ See Cockerell & Shaw 99 102; MacGillivray & Parkington par 916.

²⁷⁹ See the decision in *Vehicle & General Insurance Co Ltd v Elmbridge Insurances* supra at 327-328. See also Clarke 298.

²⁸⁰ See the decision in *Universo Insurance Co of Milan v Merchants Marine Insurance Co Ltd* [1897] 2 QB 93 (CA) at 97 where the Court decided that "[i]t is impossible for the [insurer] to deny the existence of this custom, applicable as it is to the business of marine insurance in general in this country" (my insertion).

²⁸¹ Section 53(1) expressly provides that "[u]nless otherwise agreed ..." (my italics). See MacGillivray & Parkington par 1381. See the decision in *Universo Insurance Co of Milan v Merchants Marine Insurance Co Ltd* supra at 97.

²⁸² [1985] 1 Lloyd's Rep 437 QB.

²⁸³ At 512. See also Chalmers 77n1.

²⁸⁴ See Brown *Principles* vol 1 50-51; Colinvaux 406. According to Colinvaux (at 406) this rule is based on the fiction that the broker has passed the premium paid by the insured to the underwriter, and the underwriter has loaned it back to the broker. As a result the underwriter is the broker's creditor.

In terms of a long established trade usage at Lloyd's,²⁸⁵ the underwriter does not claim the premium from the insured but directly from the Lloyd's broker.²⁸⁶ The broker in turn recoups the premium from the insured. Between the Lloyd's broker and the underwriter, the premium is treated as a debt due from the broker only. The broker is therefore the principal debtor to the underwriter for it in addition to being an agent of the insured to negotiate the insurance cover.²⁸⁷ The broker and the underwriter have a running account showing premiums due from the broker and losses payable on contracts for which the underwriter is liable to the insured. Although the underwriter is directly responsible to the insured for any amount due in terms of a claim by the insured,²⁸⁸ the practice is that the underwriter pays the claims to the broker, by way of the account system, who then pays the insured. The account between the broker and the underwriter is settled under the Lloyd's central accounting procedure, and payment is usually made at quarterly intervals.²⁸⁹ The principle underlying this usage is the provision of security for the underwriter by allowing him to look for payment to the broker who is known to him, instead of the insured whose reputation is often unknown to the underwriter.²⁹⁰

Apart from marine insurance and Lloyd's policies, the broker cannot, in the absence of an agreement to the contrary, be held responsible to the insurer for the payment of a premium which he is unable to collect.²⁹¹ The broker may, however, incur a general liability by not informing the insurer immediately when he (the broker) becomes aware of difficulties in collecting the premium from the insured. If he fails to inform the insurer and the latter suffers damage as a result of the broker's negligence to inform it, for example, where it is unable to recover the premium from the insured, the insurer may sue the broker for damages for breach of a duty to take care.²⁹²

285 See again par 6.5.1 above.

286 The existence of this trade usage was acknowledged in the decision in *Universo Insurance Co of Milan v Merchants Marine Insurance Co Ltd* supra. The Court at 96 stated that "[i]t cannot be denied that for about a century, at any rate, 'according to the ordinary course of trade between the assured, the broker, and the underwriter, the assured do not in the first instance pay the premium to the broker, nor does the latter pay it to the underwriter. But as between the assured and the underwriter the premiums are considered as paid. The underwriter, to whom in most instances the assured are unknown, looks to the broker for payment, and he to the assured. The latter pay the premiums to the broker only, and he is a middleman between the assured and the underwriter. But he is not solely agent; he is a principal to receive the money from the assured and to pay it to the underwriters'".

287 Large brokerage firms are often not prepared to be personally responsible for the payment of the premium and refuse to sign an agreement with the insurer to this effect: see Peters 3.

288 See s 53(1) of the Marine Insurance Act.

289 See MacGillivray & Parkington par 1378; Peters 3. As to the operation of this central accounting bureau as well as the system of flow of documentation in operation at Lloyd's in general, see Oakes 195 et seq. See also Golding 162 et seq as to the system of accounts in respect of reinsurance policies which are in operation at Lloyd's.

290 See Ivamy *General* 184; MacGillivray & Parkington par 1379.

291 However, such an "agreement to the contrary" is almost invariably included in the business agreement between the insurer and the broker: see Peters 8.

292 See Clews 33.

As to the liability of the broker for any unpaid premiums towards the insurer, the following summary seems apt:

- In the case of a Lloyd's policy as well as a marine insurance policy, the premium is considered to be paid upon the issue of the policy, regardless of whether or not the broker has received it, and the broker is always liable to the underwriter for the premium.
- In the case of an individual life insurance policy the insurer will be able to rely on the decision in *Acey v Fernie*²⁹³ to deny its liability for a claim outside the days of grace where the premium had been merely credited by the broker but not in actual fact been received.²⁹⁴
- In the case of other types of insurance the following usage apparently applies. If the broker has a normal practice of debiting himself with the premium in the course of his running account with the insurers, and he has a similar practice between himself and his client of crediting the client in his books, the insurer is unlikely to successfully dispute its lack of knowledge of the latter usage which is prevalent in the modern commercial insurance world.²⁹⁵

The broker may prefer to pay claims to the insured before he, the broker, himself has been paid by the insurer, or to pay premiums to the insurer before the broker has received it from the insured. This is known as "funding".²⁹⁶ The question arises of whether the voluntary payment of the premium to the insurer can be reversed.²⁹⁷ A payment of the premium by the broker out of his own pocket cannot be recovered from the insurer unless made under a mistake of fact, for example, if there was an overpayment or if the contract is avoided and the premium is wrongly²⁹⁸ returned by the insurer to the insured.²⁹⁹

The liability of the broker for the payment of the premium in the case of a marine insurance policy or a Lloyd's policy does not apply to the broker for payment of the premium to the reinsurer under a reinsurance contract or treaty. In the absence of an agreement to the contrary, the broker in terms of a reinsurance contract is therefore not personally liable for the premium.³⁰⁰

293 Supra.

294 See again par 6.5.3 above.

295 See Cockerell & Shaw 104-105.

296 Funding is usually done for commercial reasons. Apparently prompt settlement of claims and premiums will raise the insured's and the insurer's perceptions of the broker's ability: see Henley 176.

297 The broker is liable to the insurer for the premium under s 53 of the Marine Insurance Act, and by custom at Lloyd's for all insurance. The insured is liable to the broker under s 53(2) of the Marine Insurance Act and the broker's implied right to an indemnity from the insured: see Henley 177.

298 In terms of s 53(1) the insurer must return the premium to the insured, even though the broker may himself have paid the premium to the insurer, without receipt of the premium from the insured. Thus, although the insurer must in principle return the premium to the insured, there are circumstances in which the insured is not entitled to keep the returned premium.

299 See Henley 177.

300 See Henley 190-191.

The legal effect of computerised accounting systems upon the question of credit, running accounts and the liability of the respective parties for premiums has yet to emerge.³⁰¹

6.6 THE RETURN OF THE PREMIUM

6.6.1 Introduction

The return of the premium is governed by the principles of restitution, which, in turn, are closely linked with the doctrine of consideration.³⁰² The law of restitution is concerned with cases where a person is liable to pay for benefits obtained even if there is nothing that could remotely be called an implied promise. For example, the insured pays a premium to the insurer by mistake. The insured is entitled to recover it even though the insurer gave no express or implied promise to repay it. The reason for the insured's right of recovery of the premium is basically that the insurer would be unjustly enriched if were not compelled to repay the premium. The insurer would, in other words, receive a benefit from the insured which it has no right to retain -- there would be no reason or "consideration" why it should retain the premium.³⁰³

In principle the insured does not have a right to a return of the premium except if the insurer wrongfully repudiates the contract or induced the contract by misrepresentation or non-disclosure.³⁰⁴

Three rules are of importance in respect of the question as to the return of the premium. In the celebrated decision in *Tyrie v Fletcher*³⁰⁵ Lord Mansfield decided that

"if the risk ... has once commenced, there shall be no apportionment or return of premium afterwards. [I]f it has commenced, though it be only for twenty-four hours or less, the risk is run; the contract is for the whole entire risk, and no part of the consideration shall be returned."³⁰⁶

This is the first rule and it rests upon the principle that consideration by the insurer, although disproportionately low in relation to the premium paid by the insured, has been received and has not totally failed.³⁰⁷ If a loss arises from an excepted peril the premium cannot be recovered as the risk has attached. Likewise, where no loss

301 See Cockerell & Shaw 105.

302 As to the general rules which underlie the doctrine of consideration, see again par 6.2.1 above.

303 See Atiyah 119.

304 See Clarke 312.

305 (1777) 2 Cowp 666, 98 ER 1297.

306 At 1298.

307 See Clarke 313. In *Tyrie v Fletcher* supra Lord Mansfield had to rely on the general principles applicable to insurance contracts in solving the problem as to the return of the premium. He formulated the answer as consisting of two rules. First, where no risk is run the premium must be returned because an insurance contract is an indemnity contract. Secondly, if the risk has once commenced, there shall be no apportionment or return of the premium afterwards. The exception to the second rule was mentioned in passing in *Tyrie v Fletcher*, but it was only formulated in later decisions in the form in which it is known today.

arises the premium cannot be recovered if the risk has attached.³⁰⁸ The practical consideration for the existence of this rule is simple. The degree of risk cannot be calculated by duration. The risk may be as great in a day as in a month.³⁰⁹

An important exception to the rule laid down in *Tyrie v Fletcher*³¹⁰ is the case where the risk is divisible. This exception constitutes the second rule. In terms of this exception, the rule as laid down in *Tyrie v Fletcher*³¹¹ applies to entire risks only³¹² and provides that a portion of the premium must be returned where a single insurance contract covers separately identifiable risks.³¹³ For example, an insurance contract which is concluded for a year, the premium of which is stipulated as £20 per month and payable in monthly instalments, is divisible into monthly parts. However, an insurance contract which is concluded for a year, requiring a premium of £240 per year, albeit payable in twelve equal monthly instalments, is indivisible for purposes of the return of the premium.³¹⁴

The third important rule in respect of the return of the premium is that the insured will in principle not be entitled to claim a return of the premium where he has acted fraudulently.³¹⁵ This rule is entrenched in the Marine Insurance Act³¹⁶ and it has

308 The consequence of this rule is that the insurance cover ends with the destruction of the insured property. Put differently, if the risk materialises no premium is recoverable for the unexpired period of cover: see the decision in *Bermon v Woodbridge* (1781) 2 Doug KB 781, 99 ER 497 at 502. In *Darrell v Tibbitts* (1880) 5 QB 560 (CA) it was decided that the insured landlord was not entitled to indemnification by the tenant for damage caused to the lease property, nor to claim an indemnity from the insurer for the same damage. The Court further decided (at 562) that the insured was not entitled to a return of the premium because the insurer had provided consideration nonetheless by being at risk. See also MacGillivray & Parkington par 1008.

309 See Arnould par 1334; Parks vol II 782.

310 Supra.

311 Supra.

312 The rule in terms of this exception has been formulated as follows: "[If the] risk ... has once commenced, there shall be no apportionment or return of premium afterwards (at 1298). [But] all the judges ... lay the stress upon the contract comprising two distinct conditions, and considering the voyage as being in fact two voyages [ie, a divisible risk]. There was a usage also found by the jury in that case, that it was customary to return a proportionate part of the premium. [This] plainly shewed the general sense of merchants, as to the propriety of returning a part of the premium in such cases: and there can be no doubt of the reasonableness of the thing" (my insertions) (at 1299). See also MacGillivray & Parkington par 1002.

313 See MacGillivray & Parkington par 944 1002.

314 See Emanuel 45; Parks vol II 782-783; MacGillivray & Parkington par 949 1002; Clarke 313-314. For examples of divisible and indivisible risks from the case law in respect of marine insurance, see Arnould par 1326-1328. For a discussion of s 84 of the Marine Insurance Act which turns on the distinction between the right to a return of the whole of the premium, and the right to a return of part of the premium only, see Ivamy *General* 194 et seq.

315 See Pickard 71; MacGillivray & Parkington par 1032; Clarke 315.

316 See s 84(1) of the Marine Insurance Act which provides that "[w]here the consideration for the payment of the premium totally fails, and there has been no fraud or illegality on the part of the assured or his agents, the premium is thereupon returnable to the assured". See also Arnould par 1329. French law has gone a step further and provides that in the case of fraud by the insured he not only forfeits all benefits in terms of the policy as well as all premiums paid, but in addition he has to pay the insurer an amount amounting to double the premium as a penalty: see Parks vol II 775.

been suggested that this rule is probably equally applicable to all classes of insurance.³¹⁷ The concept of "fraud" entails a willful intention to deceive by the insured or his agent, and not mere innocent or negligent conduct made without actual fraud.³¹⁸ The law relating to the return of the premium in the case of fraud by the insured is as follows. If an action is brought by the insured to claim the benefits in terms of the contract, the insurer may defend the action on the grounds of fraud, and is then not bound to tender a return of the premium.³¹⁹ However, if an insurer seeks relief which is purely equitable,³²⁰ it must offer to return the premium in respect of which it has never been at risk despite the insured's fraud.³²¹ The insurer is therefore not allowed to institute an action for rescission without offering to return the premiums which it has received.³²² It is uncertain whether the insurer would be able to keep the premiums in the latter scenario in terms of a forfeiture clause.³²³

This exposition of the third rule is based on the decision in *London Assurance v Mansel*.³²⁴ This decision is regarded in English law³²⁵ as the primary authority on the rule under discussion.³²⁶ From the heads of argument of counsel for the insured it appears that the insurer, upon the discovery of the (apparently fraudulent) misrepresentation by the insured, informed the insured of its intention to cancel the insurance contract and sent him a notice to that effect which was accompanied by a cheque for the amount of the premium already paid by him. However, apart from the order made by the Court (which in any event merely repeated the intentions of the

317 See MacGillivray & Parkington par 1028.

318 See Arnould par 1333.

319 Emanuel 65 formulates this rule as follows: "[E]ven without any special provision the insured cannot recover premiums under a contract avoided by his own fraud." This rule is based on the principle that a person may not set up his own unlawful act to found a claim for relief or a benefit: see MacGillivray & Parkington par 1028n88 and the authorities cited there.

320 The concept of "equitable relief" connotes relief which could in former days have been obtained only in a court of equity. Eg, in earlier times it was not possible in terms of the common law for a party to resile from an insurance contract due to the innocent misrepresentation by the other party. The equity courts, in contrast, were prepared to grant such relief to the aggrieved party: see MacGillivray & Parkington par 577 et seq. See further note 321 below.

321 Colinvaux (at 138) explains this particular rule as follows: "[B]ut where ... it is the insurer who comes to the court to claim rescission of the policy on the ground of the assured's fraud, a different principle applies. Since such rescission is a purely equitable remedy, the court will apply the maxim that "he who seeks equity must do equity" and may, therefore, in its discretion, refuse the insurer relief unless he is willing to repay premiums already paid".

322 See MacGillivray & Parkington par 1028. See also Pickard 73 who explains the return of the premium in the case of fraud by the insured as follows: "[I]f an action is brought at law to recover the insurance moneys the insurers may defend on the ground of fraud and need not tender the premiums paid. The assured cannot bring a separate action or counterclaim for the return of the premiums, because to prove that the policy was avoided he would have to allege his own fraud. If, however, the insurers seek equitable relief (eg, delivery up and cancellation of the policy), ie, relief which could in former days be obtained only in Courts of equity, then they must offer to return the premiums paid."

323 See MacGillivray & Parkington par 1028n90.

324 (1897) 11 Ch D 363.

325 As well as in other jurisdictions, see, eg, ch 7 par 7.6.4 below for the position in Australian law and ch 8 par 8.6.4 below for the position in South African law.

326 See MacGillivray & Parkington par 1028n89; Colinvaux 138n73.

insurer as explained in its notice to cancel the contract which was sent to the insured), no other mention was made in the reported judgment of the *obligation* of the insurer to return the premium in the case of cancellation of the contract by it due to the fraud of the insured. Moreover, the Court did not once discuss or refer to, let alone lay down any principle concerning the obligation of the insurer to return the premium if it cancels the contract as a result of the insured's fraud. For the sake of completeness the order made by the Court is repeated here and it reads as follows:

"The order will be -- [the insurer] being *willing and hereby offering to return the premium*, declare that the acceptance by the [insurer] of the [insured's] life was void and of no effect, that [the insurer was] not bound to deliver the policy, and that the contract be delivered up to be canceled."³²⁷

An insured who wishes to claim a return of the premium must take cognisance of the provisions of the Limitation Act 1980 (c 58). In terms of section 5 of this Act the return of the premium may be barred if no action is brought within six years after the cause of action arose.³²⁸

An important point which must be made at this stage is the fact that a ground for a return of the premium is simultaneously a valid ground for a defence by the insured against a claim to pay the premium. This reality is confirmed in section 82 of the Marine Insurance Act which provides that if a premium or a proportionate part of it is declared to be returnable, it may be recovered by the insured from the insurer, or if it is (still) unpaid, it may be retained by the insurer or his agent.³²⁹ The fact that a ground for a return of the premium is simultaneously a valid ground for a defence by the insured against a claim to pay the premium, is closely linked with the role and function of the concept of consideration in the English law of contract in general.³³⁰

327 (My insertions and italics). See at 372. See also in this regard the decision in *Lodge v National Union Co* [1907] 1 Ch 300. It is significant that Colinvaux (at 138) remarks that "[t]he premium is sometimes ordered in such a case to be applied towards payment of the costs, however gross the fraud of the assured". This remark flies in the face of the explanation and approval given by Colinvaux and the other English writers of the rule under discussion. The mere fact that the premium is not actually returned to the insured who has acted fraudulently but is applied towards the payment of the costs, clearly illustrates that the courts indirectly penalise the insured for his fraud.

328 Section 32 of the Limitation Act provides that where the contract is illegal, or where there is no contract at all for want of agreement or mutual mistake, or in the case of misrepresentation by the insurer, the cause of action arises when each premium is paid. Premiums which were paid more than six years before the action is brought cannot be recovered, except in cases where there has been fraud on the part of the insurer or its agent, in which case the prescription does not begin to run until the discovery of the fraud: see also MacGillivray & Parkington par 1038.

329 See Chalmers 136 who mentions that although the broker is directly responsible to the insurer for the payment of the premium, when the premium is returnable, it is directly repayable to the insured.

330 Atiyah (at 123) gives the following example of a conditional promise, ie, the consideration given by the insurer, which may sometimes present the paradox of a valid promise which never binds. "An insurance company promises to pay the value of a house if it is destroyed by fire during a certain year. The house is not destroyed so the insurance company never has to pay. But clearly this is a valid contract and if the insured has not paid the premium he can clearly be sued for it. The reason is that the insurance company's promise has value when made, and it is 'on risk' during the year". As to the role of the doctrine of consideration in the English law of contract, see

6.6.2 In the Case Where the Contract Did Not Come into Operation

In terms of the general rule laid down in *Tyrie v Fletcher*,³³¹ if the insurer does not run the risk as contemplated at the time of the conclusion of the contract, it must return the premium as its (the insurer's) consideration has failed.³³²

Section 84(1) of the Marine Insurance Act provides that if the consideration for the payment of the premium totally fails, and there has been no fraud or illegality on the part of the insured or his agent, the premium must be returned to the insured. Section 84(2) provides for a proportionate return of the premium in appropriate circumstances.³³³

Section 84(3)(b) of the Marine Insurance Act provides for the return of the premium or a part of it where the object of the risk has never been imperiled. However, where the object of the risk has been insured "lost or not lost" and it has in fact arrived safely at the time when the contract is concluded, the premium will not be returned, unless the insurer knew of the safe arrival at the time of the conclusion of the contract.³³⁴

Section 76 of the Insurance Companies Act 1982 (c 50) provides for a special case of the return of the premium in terms of a long-term insurance contract. In terms of section 76(1), the insured may decide that he does not wish to continue with the contract of insurance during the statutory period for "cooling off".³³⁵ In terms of section 76(5)(a) the insured is entitled to a return of any premiums paid in terms of the contract. The premium is claimed from the insurer irrespective of whether it has been paid to the insurer or to its agent. In this case the operation of the contract which has already commenced, is nullified with retrospective effect.³³⁶

again par 6.2.1 above.

331 Supra.

332 Supra at 1298. See also Parks vol II 785-790 for a discussion of the decision in *Tyrie v Fletcher*. This rule was confirmed in *Stevenson v Snow* (1761) 3 Burr 1237, 97 ER 808. The facts were that the insured insured a ship "at and from London to Halifax". The insured warranted that the ship would depart with convoy from Portsmouth. When the ship arrived in Portsmouth, the convoy had already left. The Court decided (at 810) that the risk was divisible and that a portion of the premium had to be returned. But Clarke at 314n195 is of the opinion that this decision hinges on an express term in the contract, ie, that if the ship did not reach Portsmouth in time to join the convoy, the insurance would cease, rather than on the divisibility of the risk.

333 See also Arnould par 1325-1327; Parks vol II 782.

334 See Tempelman 445-446; Chalmers 138n4 139n17.

335 The insured must cancel the contract within ten days after he has received the notice from the insurer which informs him of his right to cancel the contract: see s 76(1)(a) of the Insurance Companies Act. Section 75 provides for guidelines as to the form and content of the statutory notice which every insurer to a long-term insurance contract has to send to the insured, to inform him of his right to cancel the contract in certain circumstances.

336 See also Henley 141.

6.6.3 In the Case Where the Contract Is Void

The insured is entitled to a return of the premium if the contract is void, for example, if the parties did not reach consensus on the essentials of the contract, or if the contract is void for mistake,³³⁷ or where the insured withdrew his proposal before acceptance, or it is void because the transaction was beyond the scope of the insurer's business.³³⁸

If the contract is void for illegality, the insured is not entitled to a return of the premium.³³⁹ For example, the conclusion of an insurance contract in terms of which no insurable interest exists is forbidden by the common law³⁴⁰ as well as by statute.³⁴¹ Ignorance of the law, in contrast with ignorance of the facts,³⁴² will not be regarded as excusing the insured and he will not be able to recover the benefits in terms of the contract or claim a return of the premiums.³⁴³ However, if the insured has been misled by the insurer or its agent as to the legality of the contract, English law acknowledges an exception and the insured will be allowed to recover the premium.³⁴⁴ The onus is on the insured to prove that he was ignorant of the misleading conduct of the other party.³⁴⁵ If the innocent party decides to cancel the illegal contract while it is still wholly executory, that is, when nothing has been done to carry out the (illegal) purpose of the contract, he may cancel the contract and claim a return of any consideration paid by him.³⁴⁶ If the insurance contract is legal at the time of the conclusion of the contract but subsequently becomes illegal, the insurer is not liable to return any portion of the premium because the risk has commenced.³⁴⁷

337 See MacGillivray & Parkington par 1035; Henley 138.

338 See MacGillivray & Parkington par 1006 for further examples from the case law of when an insurance contract will be void. See also MacGillivray & Parkington par 1003 where the reason for the return of the premium in these circumstances is formulated as follows: "[T]he cause of action in most cases is ... for money paid in return for a consideration which has wholly failed." See also Clarke 315.

339 See MacGillivray & Parkington par 1007. In a case of equal wrong by both parties the defendant is in the stronger position. As the parties are in *pari delicto*, the court will not assist any of them to recover what has been transferred to the other: see Emanuel 62-63; MacGillivray & Parkington par 1012 and the authority referred to there.

340 See MacGillivray & Parkington par 14-15.

341 Eg, s 4(2)(a) of the Marine Insurance Act, s 1 of the Life Assurance Act 1774 (14 Geo III c 48) and the Gaming Act 1845 (8 & 9 Vict c 109): see MacGillivray & Parkington par 16-32.

342 See MacGillivray & Parkington par 1021 where it is stated that if the insured concluded an insurance contract in ignorance of the facts which made the contract illegal, he is entitled to a return of the premium if the insurer repudiates the contract on the ground of the illegality. Eg, where the insured believed that he was the owner of the property insured, whereas in fact he had no title to it.

343 See MacGillivray & Parkington par 1010. But see Arnould par 1331 for exceptions to this rule.

344 See MacGillivray & Parkington par 1015-1019 for examples from the case law of the different fraudulent devices employed by agents to persuade insured to conclude insurance contracts in terms of which no insurable interest existed.

345 See MacGillivray & Parkington par 1014. It is not clear whether the insured will be able to claim a return of the premium if the insurer or its agent has innocently or negligently misled him as to the legality of the contract.

346 See Arnould par 1330; MacGillivray & Parkington par 1022.

347 See MacGillivray & Parkington par 1024.

A distinction must be drawn between policies which are illegal in the sense that they are prohibited and penalised, and those which are merely declared to be void. Section 4(1) of the Marine Insurance Act provides that "[e]very contract of marine insurance by way of gaming or wagering is void". Section 4 of the Marine Insurance Act is supplemented by s 1(1) of the Marine Insurance (Gambling Policies Act) 1909³⁴⁸ which penalises contracts of marine insurance in cases where there is no interest or no bona fide expectation of an interest either in the safe arrival of a ship or in the safety of the subject-matter insured. Contracts such as those described in the Marine Insurance (Gambling Policies Act) are illegal.³⁴⁹ But not all policies "without interest" are necessarily wager policies. For example, when the insured bona fide expects to have an interest, but the expectation is not realised, the policy is not a wager policy.³⁵⁰ Premiums which are paid in terms of contracts which are merely void may be recovered. However, premiums which are paid in terms of contracts which are illegal³⁵¹ may not be recovered.³⁵²

Section 84(3)(a) of the Marine Insurance Act provides for a return of the premium as from the commencement of the risk where the policy is void ab initio, or from the time it is avoided by the insurer, provided that there has been no fraud or illegality on the part of the insured.³⁵³ However, if the risk is not apportionable³⁵⁴ and it has once attached, the premium is not returnable.³⁵⁵

6.6.4 In the Case Where the Contract Is Voidable for Misrepresentation

A misrepresentation or non-disclosure by one of the parties does not make the insurance contract void but merely voidable at the option of the other party.³⁵⁶ If the contract is rescinded by the insurer for an innocent or negligent misrepresentation or non-disclosure committed by the insured,³⁵⁷ the insured is in principle entitled to a return of the premium.³⁵⁸ However, the insured will not be allowed to set up his own misrepresentation to rescind the contract and claim a return of the premium.³⁵⁹

348 9 Edw VI c 12.

349 See *Colinvaux* 392.

350 See *Chalmers* 9.

351 For a discussion on the topic of illegal marine insurance contracts, see *Arnould* par 1331.

352 See *MacGillivray & Parkington* par 1011 for examples where the insured will be allowed to recover the premiums in terms of an illegal contract.

353 See *Arnould* par 1338; *Parks* vol II 780-781.

354 As to the effect of the distinction between a divisible and an indivisible risk on the return of the premium, see again par 6.6.1 above.

355 See *Chalmers* 138n3 139n16 and the authority referred to there.

356 See *MacGillivray & Parkington* par 1034.

357 On the effect of an innocent or negligent misrepresentation in general, see *MacGillivray & Parkington* par 576-577.

358 See *MacGillivray & Parkington* par 1004; *Henley* 137-138; *Clarke* 314-315.

359 See *Clarke* 316.

Where the insured has committed a fraudulent misrepresentation, the insurer is entitled to rescind the contract.³⁶⁰ MacGillivray and Parkington are of the opinion that the principle upon which premiums are returnable in the case of fraud,³⁶¹ is probably equally applicable to all classes of insurance. They explain it as follows. If the insured brings an action at law to recover the insurance moneys, the insurer is allowed to defend the action on the ground of fraud, and is not bound to tender a return of the premiums. The insured is not entitled to bring a separate action or counter-claim for a return of the premiums because in order to do so he would have to allege his own fraud. But if the insurer seeks relief which is purely equitable, that is, if it cancels the contract for fraudulent misrepresentation by the insured, it must offer to return the premiums in respect of which it has never been at risk. Thus, an insurer cannot, even on the basis of fraud, bring an action for rescission without offering to return the premiums which it has received.³⁶² This exposition of the rule is based on the decision in *London Assurance v Mansel*³⁶³ which is regarded as the primary authority on the point under discussion. But it has been indicated that this decision does not support the weight attached to it by English writers.³⁶⁴

Although it has been said that the innocent party's right to rescind the contract cannot be exercised if the guilty party cannot be restored to his previous position, this does not necessarily entail that the premium has to be returned to the insured. In the context of insurance it has been suggested that restitution of the premium is impossible (or rather not justified) where the insurer has been at risk.³⁶⁵

In the case where the contract is cancelled due to a fraudulent misrepresentation by the insurer or its agent, the insured is entitled to a return of the premium, even if the insurer has been at risk.³⁶⁶ In the decision in *Kettlewell v Refuge Assurance Co*³⁶⁷ the insured was induced by the agent of the insurer to continue paying the premiums on a life policy on the misrepresentation by the agent that she would become entitled to a paid-up policy after five years. After paying the premiums for four years, she discovered the fraud and sued the insurer for a return of the premium. Two of the three judges decided that she was entitled to rescind the contract and have the premiums returned notwithstanding the fact that the insurer had been at risk.³⁶⁸

360 See MacGillivray & Parkington par 571.

361 See again the discussion in par 6.6.1 above.

362 See MacGillivray & Parkington par 571-572, 1004 and 1028n89 and the authorities referred to there.

363 Supra.

364 See again the discussion of this decision in par 6.6.1 above.

365 See MacGillivray & Parkington par 572 and the authority referred to there.

366 See MacGillivray & Parkington par 1029; Clarke 315n202.

367 [1908] 1 KB 545 (CA).

368 The decision was confirmed by the House of Lords, reported as *Refuge Assurance Co Ltd v Kettlewell* [1909] AC 243 (HL). See also MacGillivray & Parkington par 1031.

In the case of an innocent or negligent misrepresentation by the insurer or its agent, it would appear that the insured can recover the premium from the insurer.³⁶⁹

6.6.5 In the Case of Breach of Contract

The insurer is entitled to repudiate its liability in terms of the contract for breach of contract by the insured. The contract is voidable from the time of the breach. If the breach by the insured occurred in respect of a condition precedent³⁷⁰ to the inception of the risk, the risk never attached, and in the absence of fraud on his part the insured may recover the premium paid.³⁷¹ However, if the condition or term in respect of which the breach occurred was by nature a condition subsequent,³⁷² for example, a continuing promissory warranty, and the breach occurred after the commencement of the risk, then the insurer was at risk and the premium is not recoverable.³⁷³ But where the risk is divisible into periods corresponding to the dates when the premium is payable, premiums paid after the breach of contract has occurred may be recovered by the insured.³⁷⁴ This is in accordance with the exception to the rule in *Tyrie v Fletcher*,³⁷⁵ because no part of the risk for the future periods has ever been run by the insurer.

In the case of breach of contract by the insurer,³⁷⁶ the insured is released from his obligation to pay the premium. This rule would mean that the insured is entitled to a return of a premium already paid in the case of a breach of contract by the insurer.³⁷⁷

6.6.6 In the Case Where No Insurable Interest Exists

In terms of English law, an insured must have an insurable interest in the object of the risk in order to conclude a valid insurance contract. This requirement applies to indemnity insurance contracts as well as non-indemnity insurance contracts. But a distinction must be drawn between these two types of insurance contract. First, the position under an indemnity insurance contract. An insurable interest is required to distinguish insurance contracts from gaming contracts. The rules in respect of the requirement of an insurable interest are to be found in a combination of statutory and common-law rules. The essence of these rules is the requirement of a specific financial interest under the contract.³⁷⁸ The Marine Insurance Act defines the concept of "insurable interest" as follows:

369 See MacGillivray & Parkington par 1031n96-97 and the conflicting authorities referred to there. However, MacGillivray & Parkington are of the opinion that the better view is to allow the insured to recover the premium in the case of an innocent or negligent misrepresentation by the insurer or its agent.

370 I.e., a suspensive condition.

371 See MacGillivray & Parkington par 1005.

372 I.e., a resolutive condition.

373 See Henley 138.

374 See MacGillivray & Parkington par 1005.

375 Supra. As to the rule and the exception to it, see again par 6.6.1 above.

376 Eg., if the insurer wrongfully repudiates the validity of the contract.

377 See Arnould par 1339; MacGillivray & Parkington par 1036; Clarke 302-303.

378 See MacGillivray & Parkington par 8 et seq; Merkin 87-88.

"[A] person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or may incur liability in respect thereof."³⁷⁹

A marine insurance contract by way of gaming or wagering is deemed to be void. A marine insurance contract is deemed to be a gaming or wagering contract where the insured has no insurable interest and the contract is concluded with no expectation of acquiring an interest.³⁸⁰

An insurance contract in terms of which the insured has no insurable interest will be void and provided that the contract is not illegal, the insured will be entitled to recover the premium.³⁸¹

These principles are reiterated by the Marine Insurance Act. Section 84(3)(c) provides that where the insured has no interest throughout the duration of the contract, the premium is returnable, except where the contract has been concluded by way of gaming or wagering.³⁸² Where the insured has a defeasible interest³⁸³ which is terminated during the currency of the risk, the premium is not returnable.³⁸⁴

The rule which applies to indemnity insurance contracts can therefore be summarised as follows. If, through mistake, misrepresentation (which includes non-disclosure), or any other innocent or negligent cause, an insurance contract is concluded in terms of which the insured does not have an insurable interest, he is entitled to a return of the whole premium.³⁸⁵ If the insured fraudulently concludes an insurance contract in terms of which he does not have an insurable interest, he will not be entitled to claim a return of the premium.³⁸⁶

Secondly, non-indemnity insurance contracts. In terms of English law an insurable interest is required for the conclusion of a valid life insurance contract. A life

379 See s 5 of the Marine Insurance Act. See also Chalmers 11-13.

380 Section 4 of the Marine Insurance Act. See also Chalmers 8-10.

381 See MacGillivray & Parkington par 11 who state that the contract is not void but merely unenforceable by the insured. If the insurer does not deny the insured's interest or rather, the lack of interest, the insured will be able to recover on the policy.

382 Section 1 of the Marine Insurance (Gambling Policies) Act 1909 (9 Edw VI c 12) places a prohibition on marine insurance contracts in terms of which the insured has no interest in the safe arrival of the ship or other subject-matter, or without the expectation of acquiring such interest. In the absence of the required interest the contract will be deemed to be a gambling contract. The insured is not entitled to receive any moneys in terms of such a contract. See also Chalmers 138n5 139n18.

383 See Arnould par 1335 who states that an insured who has had no interest during the duration of the policy must claim a return of the premium before the risk terminates.

384 Section 84(3)(d) of the Marine Insurance Act. See Chalmers 138n6 139n19.

385 See Arnould par 1334.

386 See again par 6.6.1 above.

insurance contract which is concluded without the required insurable interest is void and illegal.³⁸⁷ The main difference between indemnity insurance and non-indemnity insurance as far as the absence of an insurable interest is concerned, is therefore that a non-indemnity insurance contract which is concluded without the necessary interest is not only void but also illegal. This has an important bearing on the recoverability of the premium by the insured. The fact that the contract is illegal results in the maxim *ex turpi causa non oritur actio* applying. Two important consequences flow from this maxim. First, the court will not assist any of the parties to claim a performance from the other party in terms of the contract. Secondly, if a party has performed in terms of an illegal contract, he is not entitled to recover that which he has given the other party. This rule is embodied in the maxim *in pari delicto potior est conditio defendentis*. An important exception in this regard is that where the party bringing the action is less blameworthy than the defendant, the former will usually succeed in his claim.³⁸⁸ From the English case law it appears that the insured cannot recover the premium where he has concluded a life insurance contract without the necessary insurable interest.³⁸⁹ However, if the insured can prove that he and the insurer are not *in pari delicto* since the insurer or its agent fraudulently misrepresented to him that an insurable interest existed and that the contract was therefore legal, the insured will be entitled to a return of the premium.³⁹⁰

6.6.7 In the Case Where There Has Been Over-Insurance

If the insured has mistakenly paid an excessive premium in terms of a non-marine insurance contract, whether by reason of over-insurance or by other mistake, it would appear that he will in principle be entitled to a return of the excessive premium.³⁹¹

387 Section 1 of the Life Assurance Act 1774 provides that "no insurance shall be made ... wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering; and every assurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever". See also *Havenga Life Insurance* 88-89.

388 See *Birds* 150-151; *Havenga Life Insurance* 89; *Atiyah* 345 et seq.

389 See *Howard v Refuge Friendly Society* (1886) 54 LT 644 at 646; *Harse v Pearl Life Assurance Co* [1903] 2 KB 92 at 96; on appeal [1904] 1 KB 558 at 563; and *Hughes v Liverpool Victoria Legal Friendly Society* [1916] 2 KB 482 at 492. See further *Havenga Life Insurance* 92-95 where these cases are discussed.

390 See *Howard v Refuge Friendly Society* supra at 645; *The British Workman's and General Assurance Co (Ltd) v Cunliffe* (1902) 18 TLR 502 at 503; *Harse v Pearl Life Assurance Co* [1904] 1 KB 558 at 563; and *Hughes v Liverpool Victoria Legal Friendly Society* supra at 493. See further *Havenga Life Insurance* 94.

391 See *Henley* 140; *Clarke* 316n217. But see *MacGillivray & Parkington* par 1037 who are of the opinion that the express terms of the contract will usually prevent any claim for the return of the premium on the grounds of over-insurance. They conclude that even in the absence of such an express term, the rule applicable to marine insurance would probably not be extended to other types of insurance contract, in the absence of any custom or practice of returning a proportion of the premium in cases of over-insurance. They are of the opinion that there is in any event no authority for the existence of an enforceable insurance practice or custom in this regard. But this opinion should not be construed to mean that principles of marine-insurance are in general not applicable to non-marine insurance contracts, and vice versa. Their argument involves but one particular rule of marine insurance.

It would appear that in practice insurers sometimes encourage the insured to over-insure rather than be under-insured, to assure them of a full indemnity in the event of a claim. Insured who are encouraged to intentionally over-insure, are usually protected against the payment of an unnecessary excess premium through over-insurance by the incorporation of a return of premium clause.³⁹²

In the case of marine insurance the insurer is bound to return a pro rata portion of the premium when, due to an accidental over-valuation, short interest,³⁹³ or double insurance, there has been over-insurance by the insured. The reason for the return in this case is the fact that the insurer has never been at risk for the full amount insured.³⁹⁴ The reason for the return of the premium in these cases appears to hinge on the fact that the consideration of the insurer (that is, the bearing of the risk of the materialisation of the uncertain event) in return for the payment of the premium is apportionable.³⁹⁵ Thus, it is not as much a case that the risk is divisible but rather a case that the consideration of the insurer is "divisible".³⁹⁶

Section 84(3)(e) of the Marine Insurance Act provides for a return of a proportionate part of the premium if the insured has over-insured under an unvalued policy.³⁹⁷ If the over-insurance is the result of double insurance, a proportionate part of

392 See Riley 243 who provides the following example of a return of premium clause. "The premium paid hereon may be adjusted on receipt by the Insurer of a declaration of Gross Profit earned during the financial year most nearly concurrent with the period of insurance. If [the] declaration is less than the sum insured on Gross Profit for the relative period of insurance the Insurer will allow a pro rata return of premium not exceeding 50 percent of the premium paid." It is important to note that the 50 percent which is mentioned as the limit on the return of the premium, does not mean that half of the premium on the amount of the over-insurance will be repaid. Usually a full pro rata return of the premium will be made on the amount of the over-insurance to a limit of 50 percent of the sum insured. Eg, on a sum insured of £1 million a full return of the premium would be made on the difference between that figure and the certified amount of gross profit earned, subject to the limit of 50 percent of the former, ie, a full return on any over-insurance not exceeding £500 000: see Riley 243-244. For an exposition of the practicalities and technicalities involved in the claim of a return premium, see Riley 246-249. Such technicalities include the furnishing of certificates by the auditors of the insured, in terms of which the gross profit derived from the insured's business and premises is confirmed. These certificates usually concern business interruption insurance policies.

393 The term "short interest" is used in floating policies to denote the outstanding balance on the amount insured by the policy when the last declaration was made by the insured. A return of part of the deposit premium may be payable on the short interest. But this term is apparently seldom encountered nowadays as floating policies are not used as frequently as in the past: see *Brown Dictionary* S25.

394 See MacGillivray & Parkington par 1037. Templeman 446 correctly remarks that the insured's right to a return of a portion of the premium is restricted to over-insurance under an unvalued policy.

395 See s 84(2) of the Marine Insurance Act.

396 See Chalmers 138 where it is argued that the return of the premium in the case of s 84 of the Marine Insurance Act seems to rest on the doctrine of (partial) failure of consideration by the insurer.

397 See Parks vol II 767; Chalmers 138n7. It would appear that a return of the premium is, as a matter of general principle, not necessary in the case of a valued policy: see Templeman 446.

the several premiums is returnable.³⁹⁸ But where the double insurance has been effected knowingly by the insured or if a claim has been paid on the policy in respect of the full sum insured, no premium will be returned.³⁹⁹

The principle underlying the rule regarding over-insurance can be summarised as follows. If the insurer could never in any event have been called on to pay the whole sum but only a part of the sum on which he has received a premium, it is not entitled to the full premium. The insured is therefore entitled, in the absence of fraud on his part, to a return of the premium for that part for which the insurer was never at risk.⁴⁰⁰

6.6.8 In the Case Where the Policy Expressly Provides for the Return of the Premium

The policy may expressly provide for the return of the premium or a proportionate part of the premium in specific circumstances. It is in principle immaterial whether or not the risk has commenced.⁴⁰¹ The circumstances usually specified in the policy are the following.⁴⁰² First, when the insurer has elected to terminate the insurance contract.⁴⁰³ Secondly, where the insurer has bound itself to return part of the premium on the performance of a condition subsequent.⁴⁰⁴ The amount of premium to be returned is usually fixed by the stipulation.⁴⁰⁵

Section 83 of the Marine Insurance Act acknowledges the practice that the policy may provide for the return of the premium on the happening of a particular event.⁴⁰⁶ For example, express clauses may provide for a proportionate part of the premium to be returned in the case of the vessel being transferred to new management⁴⁰⁷ or the cancellation of the policy.⁴⁰⁸

398 See Tempelman 446.

399 See Arnould par 1336-1337 for examples of how over-insurance may come about. See also Raynes 36; Henley 140; Chalmers 138n8-9.

400 See Pickard 67; Arnould par 1336.

401 See Baker-Welford & Otter-Barry 203-204.

402 See Henley 139.

403 See Ivamy *General* 200; Clarke 314. In the decision in *CT Bowring Reinsurance Ltd v MR Baxter* [1987] 2 QB 416 at 420 the policy provided for a pro rata return of the premium in the event of a total loss or total constructive loss of any of the insured vessels.

404 I.e., a resolutive condition.

405 Eg, the contract may provide that ten percent of the premium is to be returned on the expiration of the contract, provided that the insured has made no claim under the contract during its currency: see Ivamy *General* 200.

406 Eg, if the ship "sails with convoy and arrives". The practice of providing for a return of a part of the premium appears to have arisen in connection with sailings in convoy during the eighteenth century. As this practice served as source of safety, insurers felt compelled to encourage the practice by entering into such agreements: see Arnould par 1340. The practice of sailing in convey is apparently no longer employed today.

407 See Chalmers 137n5 who refers to the decision in *North Shipping Co Ltd v Union Marine Insurance Co Ltd* (1918) 24 Com Cas 83 where the insured ship was captured and condemned for carrying contraband. It was decided that this did not constitute "transfer to new management" and that the premium was not returnable.

408 See Chalmers 137.

In the decision in *CT Bowring Reinsurance Ltd v MR Baxter*⁴⁰⁹ the Court was concerned with the question of the return of the premium where the insurance contract provided for such return in certain circumstances.⁴¹⁰ Two super-tankers, *M Vatan* and *M Ceyhan*, were insured under a hull war-risk policy for the purpose of their operating a shuttle service between islands in the Persian Gulf. During the currency of the policy both vessels were struck and seriously damaged in an air-fired missile attack.⁴¹¹ One of the clauses of the insurance contract provided that the insured was entitled to a return of a pro-rata portion of the premium should any of the insured vessels perish during a specific period.⁴¹² The insured mistakenly paid over a premium to the insurer after the vessels had already been damaged and notice of cancellation of the insurance cover given to the insurer. The insurer contended that as the risk had commenced it was entitled to the full premium for the duration of the contract.⁴¹³ In this regard it relied on the rule as formulated in *Tyrie v Fletcher*.⁴¹⁴ The Court referred to section 83 of the Marine Insurance Act which provides that "[w]here the policy contains a stipulation for the return of the premium, or a proportionate part thereof ... the premium or, as the case may be, the proportionate part thereof, is thereupon returnable to the assured". The Court concluded that the clause in question constituted such a stipulation as envisaged in section 83 and that the insured was entitled to a return of a portion of the premium.⁴¹⁵

A clause which provides for a "no-claim discount" or a "no-claim bonus" is frequently encountered in indemnity insurance contracts. In terms of this type of clause the insurer undertakes to return a certain portion of the premium if the insured does not submit any claims during a particular year. However, strictly speaking a "no-claim bonus" is not an example of a return of the premium as such but merely entails a discount on the next year's premium.⁴¹⁶ Thus, if the insured decides not to renew the policy for the next year, he will usually forfeit his "no-claim bonus".⁴¹⁷

409 Supra at 420.

410 Although the decision in *CT Bowring Reinsurance Ltd v MR Baxter* supra concerned a reinsurance contract between the original insurer, being the insured in terms of the reinsurance contract, and the reinsurer, the parties will be referred to as the insured and the insurer for purposes of the present discussion.

411 See at 417.

412 In the decision in *CT Bowring Reinsurance Ltd v MR Baxter* supra at 420 the relevant clause provided that "in the event vessel herein being sold or unchartered other than by reason of Total or Constructive loss of vessel this insurance is automatically canceled. In such event the underwriters agree to return pro rata net monthly premium".

413 See at 422. The insurer further argued that the clause which entitled the insured to a return of the premium or a portion of it, was not covered by the circumstances of the present case: see at 422-423. For purposes of the present discussion this argument may be ignored.

414 See at 422. For a discussion of this rule, see again the first rule discussed in par 6.6.1 above.

415 See at 425.

416 See Hansell 229.

417 Although the insurer may, in a fit of magnanimity, decide to pay the monetary value of the "no-claim bonus" to the insured if the latter decides not to renew the contract for the next period, it is very unlikely to happen.

6.7 FORFEITURE OF THE PREMIUM

Apart from the circumstances in which the law provides that the premium will not be returned,⁴¹⁸ the contract frequently provides for the forfeiture of the premium in certain circumstances.⁴¹⁹ The insured who forfeits the premium may appeal on the grounds of the principles of equity against such forfeiture.⁴²⁰ In the decision in *Shiloh Spinners Ltd v Harding*⁴²¹ it was held that the Court had to consider certain facts before granting relief to the insured for the forfeiture of premiums or other benefits in terms of an insurance contract. First, the Court must consider the conduct of the parties. For example, forfeiture for non-payment of the premium will not be allowed if the non-payment was induced by the insurer. Secondly, the Court must take into account any disparity between the value of the property, that is, the amount of the premium, forfeited and the extent of the damage which was caused to the person (insurer) who is relying on the forfeiture clause.⁴²² The insured may also appeal on the grounds of waiver by the insurer to rely on the forfeiture of the premium,⁴²³ or on the ground of appropriation.⁴²⁴ Of late it has been confirmed by the courts that they have a general authority to grant relief against forfeiture in other interests than just an interest in land.⁴²⁵ But the courts do not have an unlimited authority to grant relief against forfeiture clauses. For example, it was decided that this authority of the courts does not extend to the forfeiture of a commercial licence because it would undermine the principle of certainty which is of importance to commercial transactions.⁴²⁶ It was decided that it is necessary for both parties to a commercial transaction "to know where they

418 See again par 6.6.1 above. See also Baker-Welford & Otter-Barry 204-206.

419 Forfeiture may take place irrespective of whether the insurer was bona fide or mala fide: Emanuel 64. See also Baker-Welford & Otter-Barry 206.

420 See Ivamy *General* 204-205. See again par 6.1 above.

421 [1973] AC 691 (HL).

422 *Shiloh Spinners Ltd v Harding* supra at 723-724. See also Clarke 308-309. The dictum in *Shiloh Spinners Ltd* was considered and applied in *Jobson v Johnson* [1989] 1 All ER 621 (CA) at 635.

423 See Clarke 303-305.

424 These guidelines were approved in *Starside Properties Ltd v Mustapha* [1974] All ER 567 (CA) at 571. See Clarke 306-308.

425 Previously it was taken that the courts' authority to grant relief against forfeiture was limited to cases which involved issues of land. The oldest example of rules against forfeiture comes from the law of mortgages. Originally a mortgage commonly provided that, if the borrower failed to pay the loan and interest off on the due date, the property should be forfeited to the mortgagee, even though it might be worth much more than the amount due to the mortgagee. On the basis of the principles of equity the courts began, centuries ago, to override these forfeiture provisions, and permit borrowers to pay off mortgage debts long after the due date: see Atiyah 298 et seq 438-439. This authority of the courts to override forfeiture provisions in contracts has in recent times been extended to the protection of other types of interest than an interest in land. See the decision in *BICC plc v Burndy Corp and another* [1985] 1 All ER 417 (CA) at 427 where the Court referred with approval to the guidelines which were laid down in the decisions in *Shiloh Spinners* supra and *Starside Properties* supra. The Court concluded (at 427-428) that "[it is] difficult to see why the jurisdiction of equity to grant relief against forfeiture should only be available where what is liable to forfeiture is an interest in land and not an interest in personal property. [There is] no reason in principle for drawing a distinction as to the type of property in which the right subsists".

426 See the decision in *Sport International Bussum BV and others v Inter-Footwear Ltd* [1984] 1 All ER 376 (CA) at 380-382.

stand without the delays involved in investigations about whether the court will grant relief".⁴²⁷

It is not necessary for the insurer to give notice to the insured that the premium is due and that the non-payment of the premium will result in the forfeiture of benefits and premiums already paid in terms of the policy.⁴²⁸ However, if the practice of giving notice has become part of the usual dealings between the insurer and the insured, or if the insurer has expressly undertaken to give notice, the insurer will not be allowed to rely on non-payment of the premium when it failed to give such notice.⁴²⁹

If the contract provides for the forfeiture of the premium in certain circumstances, the Court will give effect to the forfeiture clause notwithstanding that the insured would normally be entitled to a return of the premium in those circumstances.⁴³⁰ For example, it is not uncommon for an insurer to provide for the forfeiture of premiums in the case of breach of contract, irrespective of the presence or absence of fault on the part of the insured.⁴³¹

Although it is open to parties to stipulate that the premium is non-returnable in circumstances where there would otherwise be a return of the premium, such stipulation is not usually found in a marine insurance contract. However, should the parties stipulate for the forfeiture in a marine insurance contract, the Court will, as a matter of general principle, give effect to it.⁴³²

It is possible for the insurer to waive its rights to rely on a forfeiture clause contained in the insurance contract. In *Hemmings v Sceptre Life Association Ltd*⁴³³ the insured's answers in the proposal form were made the basis of the life insurance contract. The insured declared that the answers given in the proposal form were correct to the best of her knowledge, and that if it appeared that any of the statements made by her was untrue, the policy would be void and all premiums forfeited. The insured made an innocent mistake by stating her age as three years younger than she actually was. After the discovery of her mistake, the insurer nevertheless accepted two (further) annual premiums from the insured.⁴³⁴ The Court decided that by accepting the two

427 See the decision in the House of Lords where the decision in the Court of Appeal was confirmed: *Sport International Bussum BV and others v Inter-Footwear Ltd* [1984] 2 All ER 321 (HL) at 325.

428 See MacGillivray & Parkington par 922-970.

429 See MacGillivray & Parkington par 970-971.

430 See Arnould par 1324; MacGillivray & Parkington par 1005.

431 See Birds 149n21 and the authority cited there.

432 However, Arnould is of the opinion that the right of the insurer as regards stipulations in respect of the forfeiture of premiums is not unlimited. Eg, if the contract provides for the forfeiture of the premium in the case of an innocent misrepresentation by the insured, the stipulation will be regarded as null and void as it will be in conflict with s 11(1) of the Unfair Contract Terms Act 1977 (c 50). In terms of s 11(1) a forfeiture clause in respect of an innocent misrepresentation committed by the insured will not be regarded as reasonable: see Arnould par 1343.

433 [1905] 1 Ch 365.

434 At 369-370.

annual premiums the insurer had waived its right to cancel the contract and keep the premiums paid earlier by the insured. The contract was held to be in full force.⁴³⁵

6.8 FUNCTION AND INSURANCE OF THE PREMIUM

6.8.1 Function of the Premium

The amount of the premium is calculated in relation to the likelihood⁴³⁶ that performance by the insurer will be required.⁴³⁷ Thus, the premium represents the probability of the materialisation of the uncertain event. This probability is expressed in monetary terms. It has been said that "the premium is the mathematical end product of the application of a rate to a sum insured".⁴³⁸ In short, the function of the premium is to serve as counter-performance by the insured, in return for the undertaking by the insurer to bear the risk of the materialisation of the uncertain event.⁴³⁹

6.8.2 Insurance of the Premium

The practice of insuring the premium has been in force in English insurance law from early on. In terms of a policy issued in London and subscribed by twenty-two underwriters, dated 5 August 1555, the premium was added to the sum insured as being an insurance expense.⁴⁴⁰

In terms of English law, an insured must have an insurable interest in the object of the risk in order to conclude a valid insurance contract.⁴⁴¹ An insurance contract by way of gaming or wagering is deemed to be void. A marine insurance contract is deemed to be a gaming or wagering contract where the insured has no insurable interest and the contract is concluded with no expectation of acquiring an interest.⁴⁴²

The Marine Insurance Act confirms the practice of insurance of the premium. Section 13 provides that "the assured has an insurable interest in the charges of any

435 At 370. See also the decision in *Ayrey v British Legal and United Provident Assurance Co Ltd* [1918] 1 KB 137 where the insured stated his occupation as a fisherman. The fact that he was also a member of the Royal Naval Reserve, and therefore exposed to additional risks, was not stated in the proposal form for life insurance. But this fact was verbally communicated to the district manager of the insurance company. The premiums due were subsequently paid to and accepted by the district manager. The correctness of the insured's answers in the proposal form was made the basis of the contract. The Court at 140 decided that the district manager's knowledge of the true facts were the knowledge of the insurance company and that the latter waived the breach of contract which occurred in the proposal form.

436 Ie, the possibility that the risk may materialise: see again ch 2 par 2.1 above for a discussion of the meaning of the term "risk".

437 See *MacGillivray & Parkington* par 2.

438 See *Riley* 283.

439 See again par 6.2.2 above.

440 See *Raynes* 28-29.

441 See again par 6.6.6. for a discussion of the requirement of an insurable interest in the object of the risk.

442 Section 4 of the Marine Insurance Act. See also *Chalmers* 8-10.

insurance which he may effect". The charges of insurance usually consist of the premium and the brokerage, if the latter is paid by the insured. In practice, though, the commission of the broker is usually paid, or rather allowed in account, by the insurer.⁴⁴³

The insurance of the premium is of particular importance in those cases where the premium amounts to a considerable sum, for example, in terms of the insurance of the hull of a ship. It is practice for the owner to insure this premium separately on "total loss only" conditions. In order to prevent the shipowner from receiving more than a full indemnity, the customary wording in these types of policy provides that the premium is insured on a monthly reducing basis. This entails that, for example, if the ship is lost say four months after the inception of a twelve months' policy, the shipowner will receive eight months' premium only from the insurer.⁴⁴⁴ Likewise, the owner of cargo may include in the value of his goods the amount of the premium.⁴⁴⁵ If goods are sold on "cif" (cost, *insurance*, freight) terms, it is customary for the goods to be valued for insurance purposes at the "cif" value plus a certain percentage. The "*insurance*" element in the "cif" value refers, of course, to the insurance premium.⁴⁴⁶

The practice of insuring the premium is acknowledged in other types of insurance too.⁴⁴⁷ In the case of some types of insurance it is, from an economic point of view, not expedient to insure the full premium. For example, in the case of marine freight insurance, air freight insurance, parcel insurance, and export credit guarantee insurance, for which the premium usually varies with the value of the goods dispatched, it will cost the insured too much to insure these premiums for full value. The same principle applies to employers' liability insurance premiums, in particular those insured in industries where the accident risk and consequently the employers' liability premium rates are high.⁴⁴⁸

Although there is legislative acknowledgement for the practice of insuring the premium, the legal tenability of this practice has not yet come under scrutiny from either the English writers or the English courts. One must therefore assume that the insurance of the premium is not seen by English writers as militating against the general principles underlying the idea of insurance.⁴⁴⁹

6.9 CONCLUSION

The English insurance law was influential in the development of the insurance law of a number of jurisdictions, including South Africa.⁴⁵⁰ English insurance law is fur-

443 See Chalmers 19.

444 See Tempelman 69.

445 See Reed 417.

446 See Tempelman 69.

447 See Riley 154.

448 See Riley 153-154.

449 For a critique of the practice of insuring the premium in some other legal systems, see, eg, ch 4 par 4.8.2 above, as well as ch 8 par 8.8.2 below.

450 See again ch 1 par 1.2.2.6 above.

ther characterised by a history of more than three hundred and fifty years, and is therefore to a large extent a well elaborated and accessible system consisting of tested and proven principles.⁴⁵¹ A random selection of these principles regarding the premium merit a mention.

First, as a result of the general requirement of a (valuable) consideration in return for a promise which is part of English law of contract, there can be no such thing as "premiumless" or "free" insurance in English law of insurance.⁴⁵²

Secondly, English law is characterised by the peculiar bifurcation between, on the one hand, marine insurance policies and policies issued at Lloyd's, and, on the other hand, other types of insurance policy. Although trade usages have developed so that most of the rules applicable to marine insurance policies and policies issued at Lloyd's also apply to other types of policy, there are still some areas to which this division applies. For example, in the case of marine insurance policies and policies issued at Lloyd's, the broker is generally personally liable for the payment of the premium. In the case of other types of policy this rule only applies if the parties have included it in their agreement.⁴⁵³

Thirdly, the fact that the premium may take the form of something other than money is expressly acknowledged in English law. Whereas in some other legal systems⁴⁵⁴ this matter is discussed by the commentators only, English insurance law boasts legislation as well as judicial decision to support this proposition.⁴⁵⁵

Fourthly, English insurance legislation expressly acknowledges the concepts of "a reasonable premium" and "premium to be arranged". Although these concepts are also acknowledged in the insurance practice of the other legal systems which were investigated,⁴⁵⁶ English law is unique in that it embodied it in legislation.⁴⁵⁷

Fifthly, the return of the premium is based on the rules as set out in the decision in *Tyrie v Fletcher*,⁴⁵⁸ and expounded on in later decisions. One aspect in particular merits a mention. In the case where the insurance contract is voidable for fraudulent misrepresentation by the insured, English law draws a distinction between, on the one hand, the situation where the insurer rescinds the contract, and, on the other hand, the situation where the insured claims a return of the premium. If the insurer rescinds the contract, it must tender the return of the premium. But it has been suggested that in

451 See again par 6.1 above.

452 See again par 6.2.2 above.

453 See again par 6.5.2 above.

454 See, eg, ch 4 par 4.2 above, ch 5 par 5.2 above, and ch 8 par 8.2 below.

455 See again par 6.2.2 above.

456 See, eg, ch 4 par 4.3.7 above, ch 5 par 5.3.7 above, and ch 8 par 8.3.7 below.

457 See again par 6.3.7 above. See also ch 7 par 7.3.7 below for a discussion of the Australian law on this point. In terms of Australian law (which has re-enacted the English Marine Insurance Act) the concept of "a reasonable premium" has, of course, also been recognised by the legislature there.

458 *Supra*.

accordance with the decision in *Tyrie v Fletcher*, the restitution of the premium by the insurer is unnecessary as it has been at risk. If the contract is cancelled by the insured by reason of his misrepresentation, he is not entitled to a return of the premium.⁴⁵⁹

Finally, the practice of insuring the premium is acknowledged and regulated by legislation. However, the legal tenability of this practice has up till now, not received the attention of the English legal commentators.⁴⁶⁰

459 See again par 6.6.4 above.

460 See again par 6.8.2 above.

CHAPTER 7 AUSTRALIAN LAW¹

7.1 INTRODUCTION

The law in force in Australia today is to a large extent based on English law. Australia, which is part of the Commonwealth, was colonised by Great Britain during the eighteenth century.² The application of British law to new colonies depended on whether the colony was regarded as a ceded colony or a settled colony. Where a colony was conquered or ceded, it was recognised that a legal system was already in existence and the laws of the conquered people survived until expressly displaced by statute. However, in the case of a settled colony, that is, where the new territory was regarded for practical purposes as being unoccupied, English settlers took with them the law of England as it existed at the date of settlement. As a matter of law, Australia was regarded as a settled colony.³

English law was officially made the common law of Australia. The Act⁴ passed in 1828 enacted that

"all laws and statutes in force within the realm of England at the time of the passing of this Act [25 July 1828] ... shall be applied in the administration of justice in the courts of New South Wales and Van Diemen's Land [Tasmania] respectively".⁵

The question remains as to what law of England was received into the colonies of New South Wales and Van Diemen's Land (as Tasmania was then called) by virtue of the Act of 1828. These colonies acquired, inasmuch as it was appropriate to the circumstances of the colonies and was capable of local enforcement, the body of statutes and common law in force in England in 1828. This included the common law relating to

1 In writing this chapter the following general works on Australian insurance law were consulted: Wickens 10-13 52-69 90-95; Sutton 419-453; Tarr, Liew & Holligan; and Kelly & Ball *Principles*.

2 The legal history of Australia following British settlement is that of progression from the original penal colony to the emergence of substantially independent, self-governing colonies, which in 1900 formed themselves into a federal system of government. All of these attained independence from the United Kingdom on 3 March 1986. The continent of Australia was acquired by Great Britain in two stages. New South Wales was entrusted to Governor Phillip in 1787. It then comprised the land stretching from Cape York to Van Diemen's Land, as Tasmania was referred to until 1856, and included about one-half of the continent. The Western portion of Australia was annexed by Captain Fremantle in 1829: see Vermeesch & Lindgren 34; Turner 6-7.

3 See Vermeesch & Lindgren 34-35; Turner 25.

4 9 Geo IV c 83.

5 My insertions. See also Vermeesch & Lindgren 36.

contracts, torts, property, status and crime. As a result, Australia, as it is known today,⁶ acquired a system of courts and a body of law substantially similar to the English model on which it was based.⁷

There is consequently still a large degree of overlapping between the current legal systems of England and Australia. This correspondence also holds true for the law of contract in general⁸ and the law of insurance in particular. A number of statutes from England were re-enacted by the Australian legislature. One of them, of considerable interest to insurance law, is the Australian Marine Insurance Act 1909 which is based on the English Marine Insurance Act 1906.⁹ English decisions and the works of English writers on the English Marine Insurance Act 1906 are therefore regarded as authoritative in the interpretation of the Australian Marine Insurance Act 1909.¹⁰

The decisions of English courts are an important (secondary) source of Australian law in general and of its insurance law in particular. Although the decisions of English courts are referred to as authoritative by Australian courts and legal writers alike, they are not strictly binding on Australian courts.¹¹ For example, the decisions of the House of Lords, the highest appellate body for the United Kingdom, are not binding on Australian Courts, although they will generally be followed unless there is a good reason not to do so.¹² Many of the landmark decisions on insurance law which were handed down in English courts are followed by Australian courts and form part of Australian insurance law.¹³

However, despite the many similarities between English insurance law and Australian insurance law, recent legislative reform in the sphere of Australian insurance law necessitates a separate chapter on this part of Australian law. Insurance law has undergone major legislative reform in Australia with the coming into force of the

6 Today, Australia consists of several States which together form a federation. A feature of a federal legal system is that there is usually a written constitution, ie, a document setting out the legal system and powers of the central or federal government and its legal relationship with the different States. In Australia this is found in the Commonwealth of Australia Constitution Act 1900 (63 & 64 Vict c 12), an Act of the United Kingdom Parliament, which contains the Commonwealth Constitution. In addition to the Commonwealth Constitution, each of the States making up the federation, namely, New South Wales, Victoria, Queensland, South Australia, Western Australia, and Tasmania, has its own constitution which determines the system of government for that State: see Vermeesch & Lindgren 43 et seq; Turner 5.

7 See Vermeesch & Lindgren 36-37; Turner 25 et seq.

8 See Carter & Harland 4n3 and the English law sources referred to there, being the sources of reference for the historical development of Australian law of contract.

9 See Turner 655-656. The number of the corresponding section of the English Marine Insurance Act 1906 is determined by subtracting six from the number of the section of the Australian Marine Insurance Act 1909.

10 See Tarr, Liew & Holligan 15-16 372 et seq; Turner 655-656.

11 See Carter & Harland 14 where they state that "Australian contract law ... is derived from principles stated in English decisions, mainly those of the nineteenth century".

12 See Turner 30 et seq for an exposition of the doctrine of precedent and the hierarchy of Australian courts.

13 For a summary of the history and development of insurance law in Australia, see Tarr, Liew & Holligan 1 et seq.

Insurance (Agents and Brokers) Act of 1984 (Cwith) and the Insurance Contracts Act 80 of 1984 (Cwlth).¹⁴

The reform measures pertaining to the Australian law of insurance contract are contained in the Insurance Contracts Act 1984.¹⁵ It consists of ten parts. Part I consists of administrative measures;¹⁶ part II deals with the duty of the utmost good faith;¹⁷ part III concerns the requirement of an insurable interest;¹⁸ part IV deals with disclosures and misrepresentations;¹⁹ part V treats the insurance contract in general;²⁰ part VI provides for claims;²¹ part VII regulates aspects relating to the expiration, renewal and cancellation of the contract;²² part VIII treats the topic of subrogation;²³ and parts IX and X deal with miscellaneous matters.²⁴ The Act applies to all types of insurance contract except those of reinsurance, health insurance, marine insurance, workers' compensation insurance or insurance contracts entered into by a friendly society or the Australian Trade Commission.²⁵ The Act does not apply to contracts entered into before its commencement, that is, 1 January 1986, but it does apply to contracts renewed after that date.²⁶ Some of the States in Australia still have general legislation relating to insurance contracts. Although uniformity of legislation was one of the main concerns of the Australian Law Reform Commission, one cannot necessarily assume that the provisions of the Acts of the different States are, as a matter of general principle, in harmony with the Insurance Contracts Act 1984.²⁷

The reform measures in respect of insurance intermediaries are contained in the Insurance (Agents and Brokers) Act 1984. It consists of five parts. Part I deals with administrative matters such as the commencement and application of the Act.²⁸ Part II contains some general provisions pertaining to the liability of agents to insurers and insured, as well as the receipt of premiums by insurance intermediaries;²⁹ part III deals with the registration of insurance brokers;³⁰ part IIIA deals with the registration of for-

14 See ALRC *Agents & Brokers* par 2; ALRC *Contracts* par 1; Tarr, Liew & Holligan 17-18; Kelly & Ball *Legislation* vii; Vermeesch & Lindgren 1014 et seq; Turner 614 et seq. The Insurance Contracts Act 1984 is not a code of insurance law, and, except in so far as the Act "either expressly or by necessary intendment, otherwise provides", existing rules of law are preserved: see s 7 of the Insurance Contracts Act 1984.

15 The Act was assented to on 25 June 1984 and came into operation on 1 January 1986.

16 See ss 1-11.

17 See ss 12-15.

18 See ss 16-20.

19 See ss 21-33.

20 See ss 34-55.

21 See ss 56-57.

22 See ss 58-64.

23 See ss 65-68.

24 See ss 69-78.

25 See s 9. See also Kelly & Ball *Legislation* 56-57.

26 See s 4 and 11(9).

27 See ALRC *Contracts* xxi, 8, and 236 et seq.

28 See ss 1-9A.

29 See ss 10-17.

30 See ss 18-31.

eign insurance agents;³¹ while part IV provides for certain miscellaneous matters, mainly regarding the conduct of brokers.³²

Section 7 of the Insurance (Agents and Brokers) Act 1984 provides that the provisions of the Act do not apply to reinsurance contracts and health insurance contracts. Kelly and Ball are of the opinion that section 7 of the Insurance (Agents and Brokers) Act must be compared with section 9(1) of the Insurance Contracts Act 1984, which excludes workers' compensation, compulsory third party and marine insurance from the operation of the latter Act. The lack of a similar exclusion of marine insurance from the operation of the Insurance (Agents and Brokers) Act 1984 means that the rules governing responsibility for insurance intermediaries, that is, sections 11, 12, 14, and 15 of the Insurance (Agents and Brokers) Act 1984, extend to workers' compensation, compulsory third party and marine insurance as well. This extension is likely to be of most significance in the case of marine insurance.³³

The changes effected by these two Acts will be discussed in their appropriate context throughout this chapter.³⁴ In addition to these two Acts a considerable body of both Commonwealth and State Legislation has been enacted regulating particular types of insurance contract and modifying to a greater or lesser extent earlier common-law principles.³⁵ The fact that Australian insurance law boasts a considerable collection of legislation dealing with general insurance and insurance contract law means that the Australian Marine Insurance Act 1909 is rather insignificant in the interpretation and supplement of general principles of Australian insurance law when compared with, for example, the slightly more important role of the Marine Insurance Act 1906 in English insurance law in general.³⁶

Thus, the law of non-marine insurance in Australia is primarily to be found in the general principles of law and equity,³⁷ some State and Territory Acts and Ordinances, the Insurance (Agents and Brokers) Act 1984, and the Insurance Contracts Act 1984.³⁸

Because the common-law rules of English and Australian law have to a large extent developed parallel to each other, an exposition of the Australian principles would largely amount to a repetition of the common-law principles of English law. These were explained in chapter six. In this chapter the emphasis will, therefore, rather be on the different Australian (Federal) Acts which have amended the relevant common-law rules.

31 See ss 31A-31K.

32 See ss 32-48.

33 See Kelly & Ball *Legislation* 4.

34 See par 7.2-7.7 below.

35 See Turner 617.

36 The English Marine Insurance Act 1906 sought, of course, to codify the pre-existing common law of marine insurance. There is a natural overlap between most of the principles contained in the Marine Insurance Acts of England and Australia on the one hand, and the common-law principles of the law of insurance contracts in general of these two jurisdictions respectively: see again ch 6 par 6.1 above.

37 As to the meaning of the concept of "equity", see again ch 6 par 6.1 above.

38 See Vermeesch & Lindgren 968.

Where applicable, cross-references to chapter six have been made to the relevant common-law principles of English law.

Finally, it should be reiterated that an insurance contract is simply a type of contract. This is also the position in Australian law. The general principles of the law of contract therefore apply with equal force to insurance contracts.³⁹ The common-law principles of English law of contract which were received in Australia by the Act of 1828, and which were developed over the years to form an "Australian law of contract",⁴⁰ are therefore, as a matter of general principle, applicable to the insurance contract.⁴¹

7.2 THE PREMIUM AS THE CONSIDERATION IN TERMS OF THE CONTRACT OF INSURANCE

7.2.1 Introduction

As in English law, Australian law of contract requires some consideration for a promise to be binding as a contract.⁴²

The rules which expound and explain the concept of consideration in Australian law of contract are based on, and are to a large extent similar to, the corresponding rules of English law regarding consideration. The same applies to the concept of equity.⁴³

7.2.2 The Premium as the Consideration in Terms of the Insurance Contract

Although section 11 of the Insurance Contracts Act 1984 provides for a number of definitions of particular types of insurance,⁴⁴ the Act does not define the concept of an "insurance contract". Because certain Acts, for example, the Insurance Contracts Act 1984, apply to insurance contracts only and not to other types of contract, the dis-

39 See Tarr, Liew & Holligan 6 et seq, 135 et seq, 337 where this fact is expressly acknowledged.

40 This does not mean that "Australian law of contract" is wholly different from "English law of contract". "Australian law of contract" merely has a "special flavour" by nature of the type of cases in which the principles of "Australian law of contract" have been expounded and developed. By far the most common type of contract to come before the Australian courts has been the sale of land. This must be seen against the fact of the traditionally rural basis of the Australian economy and the importance attached by Australians to home ownership. This contrasts with the position in England, where commercial contracts of charterparty or sale of goods are more common. For purposes of commercial law in particular, which includes insurance law, reference is often made to English case law: see Carter & Harland 14.

41 See Vermeesch & Lindgren 966 for examples of the application of the general principles of contract to the insurance contract.

42 See Carter & Harland 82.

43 See Carter & Harland 86 et seq. See again ch 6 par 6.1 and 6.2.1 above for a discussion of the concept of consideration.

44 Eg, life insurance, superannuation insurance, continuous disability insurance, and liability insurance.

inction between insurance contracts and other types of contract is important.⁴⁵ A definition of the concept of an "insurance contract"⁴⁶ which appears to be accepted in Australian law as a point of departure, is the one offered by section 4 of the Insurance Act 1960 (Qld), where insurance, in a legal sense, is defined as

"[t]he undertaking by one person to indemnify another person against loss or liability for loss in respect of a certain risk or peril to which the object of the insurance may be exposed, or to pay a sum of money or other thing of value upon the happening of a certain event".⁴⁷

Section 7 of the Marine Insurance Act 1909 defines a marine insurance contract as follows:

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

It is generally taken that the premium is the counter-performance or consideration by the insured in return for the undertaking by the insurer to bear the risk of the materialisation of an uncertain event.⁴⁸ The actual payment of the premium is not

45 This distinction is also important for a number of other reasons. Eg, the Insurance Contracts Act 1984 has changed the position in terms of insurance contracts in relation to misrepresentations and warranties: see par 7.6.4 and 7.6.5 below; unlike other contracts, insurance contracts are contracts *uberrimae fidei*, ie, a contract in relation to which each party must act in the utmost good faith to the other: see Kelly & Ball *Principles* 1-2.

46 Although some Australian writers urge that the archaic distinction between the concepts of "insurance" and "assurance" (and all their derivatives) should be retained, it is, as in many other jurisdictions, ignored not only in every day speech but also in legislation. Eg, while the term "assurance" was used in the title of the Life Assurance Act 1774, "insurance" is used in the title of the Life Insurance Act 1945.

47 See Tarr, Liew & Holligan 6 who refer to this definition of insurance. In New Zealand the concept of "insurance business" was recently considered judicially, and the problems in formulating a water-tight and all-inclusive definition of the concept of "insurance" were once again highlighted by this decision. In *The Motorcycle Specialists Ltd v The Attorney-General* (1988) 5 ANZ Ins Cas 60-882 (CA) the Court had to decide whether or not a licensed dealer in motorcycles was carrying on "insurance business". The dealer offered its hire purchase customers an option in terms of which, for an extra charge, ie, a "premium", it would agree to forego hire-purchase payments for six months if the customer became unable to work through illness or retrenchment. If the presence of this clause meant that the dealer was carrying on "insurance business", then it was required to make compulsory deposits in terms of the Insurance Companies Deposit Act 1953. It was decided that the clause in question did not amount to insurance as it was essentially a vendor/purchaser situation "far removed from the traditional concept of a contract for insurance". The fact that the dealer's obligations could be met with no expenditure and only forgiveness, was an important consideration which militated against a finding that insurance business was conducted. See Rishworth 152 for a discussion of the facts and the decision of the Court in this case.

48 See Tarr, Liew & Holligan 7 154. Vermeesch & Lindgren at 966 describe the premium as the consideration given by the insured in return for the promise by the insurer to indemnify the insured in the event of the materialisation of the uncertain event. It has been said that in insurance contracts, like gambling contracts, the purchaser (insured) pays a (usually) small premium in return for a contingent interest: see Kercher & Thomas 183.

necessary for the insurance contract to take effect. Even where the policy provides that "[i]n consideration of the *payment* ... of the premium ... the insurer will indemnify", it has been held that such provision does not necessarily entail the prior payment of the premium. A policy may therefore take effect before the actual payment of the premium has been made.⁴⁹ There is therefore no general principle that a contract of insurance will not take effect until the premium has been paid.⁵⁰ However, insurance contracts often provide that they are not to be regarded as complete until payment of the premium or the issue of the policy.⁵¹

Insurers sometimes issue policies in terms of which the prepayment of the premium is made a condition precedent for the issuance of the policy or for the cover in terms of the contract to commence, although the premium is in fact still unpaid. The question arises whether such conduct by the insurer can be interpreted as a waiver by it of the condition of prepayment of the premium. In the case of marine insurance, section 60 of the Marine Insurance Act 1909 provides that

[w]here a marine policy effected on behalf of the insured by a broker acknowledges the receipt of the premium, such acknowledgment is, in the absence of fraud, conclusive as between the insurer and the assured, but not as between the insurer and the broker".

Thus, in the case of marine insurance where the policy is effected on behalf of the insured by a broker, the premium is deemed to be paid if the policy recites that the premium is paid. If there was no broker involved in the conclusion of the contract, it would appear that the premium is not necessarily deemed to be paid by the insured to the insurer.⁵² In the case of non-marine insurance the position is more complex. If the insurance is arranged with Lloyd's, the mere issue of the policy is sufficient, since Lloyd's syndicates look solely to the broker for the payment of the premium. Where the insurance is arranged elsewhere than at Lloyd's, the position is less clear. The mere fact that a broker was involved in the conclusion of the contract is apparently irrelevant, as insurers other than those doing business at Lloyd's do not look exclusively to the

49 See the decision in *Mandalinic v Government Insurance Office of New South Wales; Georgoulis v Mandalinic and another* (1984) 3 ANZ Ins Cas 60-572 (NSW) at 78,437.

50 See Tarr, Liew & Holligan 155-156 and their discussion of the New Zealand decision in *Tapa v Attorney-General* (1977) 2 NZLR 435 (HC). This principle has also been confirmed by the decision in *Mandalinic v Government Insurance Office of New South Wales; Georgoulis v Mandalinic and another* supra at 78,437. But if the policy expressly provides that the payment of the premium is a condition precedent for it to take effect, the court will give effect to such condition (term). See the decision in *Williamson v Standard Insurance Co Ltd* (1935) NZLR 224 (SC) at 229-230 where it was decided that the insurer waived its right to prepayment of the premium.

51 See Kelly & Ball *Principles* 395; Turner 618. If a term of the policy provides that the cover does not commence until the premium is paid it clearly refers to the formal contract of insurance and not to interim cover. It has been decided that such a term is inconsistent with the nature of interim cover: see Kelly & Ball *Principles* 232 and the authority referred to there.

52 See Kelly & Ball *Principles* 397.

broker for payment of the premium.⁵³ Even if a plea of waiver or estoppel is not available to the insured merely on the basis of a recital concerning the payment of the premium, other factors may well found such plea, for example, if the insurer specifically gave credit to the insured for the payment of the premium.⁵⁴

The parties must agree before or upon the conclusion of the contract that a premium will be paid, but it is not necessary for them to agree on the amount of the premium.⁵⁵ For example, an agreement to insure "at a reasonable premium" is binding on the insurer.⁵⁶

The insurance contract is a reciprocal contract and the duty of the insured or his agent to pay the premium and the duty of the insurer to issue the policy, and, by implication, also to provide cover in terms of the policy are concurrent conditions. The insurer is therefore not bound to issue the policy until payment or tender of payment of the premium has taken place.⁵⁷ Although the issuance of the policy is not usually a requirement for the contract to take effect, it will be extremely difficult if not impossible for the insured to prove the terms of the insurance contract in the absence of such issuance. It would therefore appear that the payment or tender of payment of the premium, which is usually a condition precedent, that is, a suspensive condition for the issuance of the policy, is a requirement for the insured to enforce his rights in terms of the contract.

Usually the premium takes the form of a monetary payment but it can also take the form of something other than money. For example, the premium could be the liability which a member of a mutual insurance society assumes to contribute to the funds of that society.⁵⁸ This contribution may, of course, consist of something other than money, for example, the liability of shipowners who are members of the same mutual society to assist each other in the case of an emergency at sea.⁵⁹

53 See Kelly & Ball *Principles* 397-398. In English law it was decided in *Roberts v Security Co Ltd* [1897] 1 QB 111 (CA) that an acknowledgement in the policy of receipt of the premium constituted a waiver of the condition precedent relating to the payment of the premium: see again ch 6 par 6.2.2 above. But Kelly & Ball *Principles* 398 are of the opinion that the decision in *Roberts* dealt with estoppel by deed, where different considerations apply, and not with waiver.

54 See Kelly & Ball *Principles* 398-399 for other examples as well as for the authorities which substantiate these examples.

55 See Sutton 419.

56 For a discussion of the concept of "a reasonable premium", an aspect which concerns the amount of the premium, see further par 7.3.7 below.

57 See s 58 of the Marine Insurance Act 1909. Section 58 corresponds with s 52 of the English Marine Insurance Act 1906: see again ch 6 par 6.2.2 above. As to the aspect of the time of the payment of the premium, see par 7.3.2 below.

58 See Tarr, Liew & Holligan 154.

59 The mere fact that the premium consists of something other than money does not mean that the arrangement between the members of the society may not qualify as an insurance contract. Such arrangement may be compared with the concept of a "consortium". A consortium in the context of insurance is a group of companies or individuals who agree to share with each other risks written by any individual member of the consortium and applies particularly to insurance on the hull of a ship: see Brown *Dictionary* C41.

In terms of a mutual insurance contract the insured, that is, the members of the mutual society, do not pay what would otherwise be described as the conventional premium, as they are simultaneously the insurer of the other members.⁶⁰ This fact is acknowledged by section 91(2) of the Marine Insurance Act 1909 which provides that the provisions of the Act relating to the premium do not apply to mutual insurance, "but a guarantee, or such other arrangement as may be agreed upon, may be substituted for the premium".⁶¹

In the case of mutual insurance the premium or contribution is usually levelled by the insurer without any intention of making a profit. For example, mutual life insurance companies have no paid share capital and after deducting business expenses, their profits are usually divided among the policy-holders in the form of bonuses.⁶²

Although mutual insurance schemes are not restricted to marine insurance, it is the most common form of mutual insurance. Mutual insurance organisations are more commonly known as "Clubs".⁶³ The practice of the Clubs is to levy "calls" (premiums) upon members. The calls usually fall into three categories, namely advance calls,⁶⁴ supplementary calls⁶⁵ and reserve calls.⁶⁶ The call is the equivalent of the premium and is, in effect, the consideration which moves from the member to the Club for the cover provided.⁶⁷

The relationship between calls and claims, especially where a member has entered more than one vessel in different classes with the Club, also gives rise to the question of set-off. For example, there may be claims by a member for losses in one class of vessel, which are matched by calls owing by the same member to the Club in respect of another class of vessel.⁶⁸ The particular rules of the Club will in most

60 It has been said that "[i]n mutual insurance each member is the insurer of the other members but the member may also be a claimant": see Tarr, Liew & Holligan 414.

61 Section 91(2) corresponds with s 85(2) of the English Marine Insurance Act 1906: see again ch 6 par 6.2.2 above.

62 See Vermeesch & Lindgren 1007.

63 It has been estimated that 90 percent of the world's merchant fleet is entered with the international group of protection and indemnity clubs (P & I Clubs): see Tarr, Liew & Holligan 411-412.

64 Ie, a sum charged to a member and which is usually payable over a period of months. The Club retains the right to specify the currency in which the advance call is to be paid. It is calculated by reference to a particular year: see Tarr, Liew & Holligan 421. The advance call can be compared with an "initial premium".

65 As the Club cannot foretell the exact number of claims, as well as the extent of the claims to be submitted, it will often have to levy a supplementary call calculated by reference to the claims submitted to it for the particular year: see Tarr, Liew & Holligan 422. A supplementary call can be compared to an "additional premium": see par 7.3.7 below.

66 Ie, the imposition of catastrophe calls in the event of a particularly extreme maritime disaster: see Tarr, Liew & Holligan 422.

67 See Tarr, Liew & Holligan 421.

68 See Tarr, Liew & Holligan 422-423.

instances be decisive in answering this question. The rules of most Clubs now provide that the member's obligation to pay calls is unaffected by any claim he may have.⁶⁹

Strictly speaking, and especially if seen against the requirement that each promise must be supported by some consideration, Australian law should not acknowledge the concept of enforceable "free" insurance.⁷⁰ However, an interesting statutory example of "premiumless" or "free" insurance occurs in Australian law. Section 58(2) of the Insurance Contracts Act 1984 provides for the statutory renewal of an insurance contract where the insurer failed to give the insured notice in writing of the expiry of "renewable insurance cover". Section 58(3)(b) provides that if the insurer failed to comply with section 58(2), and if the insured had not obtained insurance cover from another insurer to replace that provided by the original contract, then the original contract is deemed to be renewed by operation of the law.⁷¹ Kelly and Ball describe the effect of sections 58(2) to (3) as follows:

"It requires the insurer to send the insured a renewal notice. If the insurer fails to do so [and the contract has lapsed] it is at risk of a [new] contract being brought into existence by s 58."⁷²

Section 58(4)(a) provides that if no claim is made in terms of this statutorily renewed insurance contract, no premium will be payable. In the event of a claim being made under this contract, the insured must then pay a premium which is to be ascertained by reference to a formula prescribed in the Act.⁷³ Although it may appear at first glance that this example of "free" insurance is of little value to the insured as a premium has to be paid when he claims in terms of the policy, section 58(4)(a) nevertheless illustrates an important principle. The undertaking by the insured to pay a premium is not given in return for the actual indemnification by the insurer. The premium, or in this case, the lack of it, serves as counter-performance or consideration⁷⁴ for the undertaking by the insurer to bear the risk of the materialisation of the uncertain event. Finally, it is important to mention that it is, of course, possible for legislation to provide that one or more of the essentials of an insurance contract will not apply in a particular case. Such an omission of an essential of the insurance contract by the legislature will not disqualify the contract from being one of insurance.⁷⁵

69 See Tarr, Liew & Holligan 423-424 for a discussion of a number of decisions which illustrate the problems experienced in this regard. See again ch 6 par 6.2.2 for a similar approach in English law.

70 See again par 7.2.1 above. See also again ch 6 par 6.2.2 above.

71 As to the effect of s 58(3)(b) regarding the non-payment of the premium, see further par 7.4.2 below.

72 My insertions. See Kelly & Ball *Legislation* 112. See also ALRC *Contracts* par 264.

73 See s 58(4)(b). See also par 7.4.2 below.

74 See again par 7.2.1 above.

75 It is uncertain whether *the parties* to an insurance contract (in contrast with *the legislature*, as is the case in s 58) may agree that one or more of the essentials of an insurance contract will not apply to their contract, but that it will nevertheless be regarded as insurance. A distinction should be drawn between the situation, on the one hand, where the undertaking to pay a premium is an essential of the insurance contract, and the situation, on the other hand, where it is regarded as a requirement for the validity of the insurance contract. If seen against the fact that the requirement of consideration is regarded, at least in English and Australian law, as a requirement for the contract or promise to be binding and enforceable, it would appear that the parties are not allowed to waive one or more of the general requirements for the validity of the insurance

7.3 THE PAYMENT OF THE PREMIUM

7.3.1 Introduction

The duty of the insured or his agent to pay the premium is regarded as his primary duty.⁷⁶ The general principles regarding the payment of debts, such as the principles which provide for the place of payment, by whom the debt is to be paid, and to whom the debt is to be paid, are also applicable to the payment of the premium under an insurance contract.

7.3.2 The Time of Payment of the Premium

Generally, the time of performance under a contract is determined by reference to the intention of the parties. The parties may expressly provide for the time at which their contractual obligations are to be performed. Where the contract does not specify the time of performance, that is, the time of payment of the premium, the obligation must be performed within a "reasonable time".⁷⁷ What constitutes a reasonable time is a question of fact to be determined at the time when performance (the premium) is alleged to be due rather than at the moment of the conclusion of the contract.⁷⁸ It is common practice for insurers to stipulate that the contract is not to take effect until the premium has been paid.⁷⁹

The insurer may by agreement or course of dealing allow credit to the insured for payment of the premium and treat the policy as being in force although the premium has not been paid on the due date.⁸⁰

contract. If the parties agree that no premium will be payable, no contract will come into being and the purported "insurance contract" will be invalid and unenforceable because of a lack of consideration. However, if the legislature provides that one of the general requirements for the validity of a particular type of contract will not apply to that contract, the absence of such undertaking will not effect the validity and enforceability of the contract. But in a legal system where the undertaking to pay a premium or consideration is an essential and not a general requirement for the validity of the insurance contract, it is possible for the parties to waive the essential of the payment of the premium and for the contract to be regarded as a valid and enforceable contract. However, as the essential of an undertaking to pay a premium is a requirement by law for a contract to be regarded as an insurance contract, their contract will not be classified by the law as one of insurance, but another type of contract, eg, a contract of gratuitous indemnity. Thus, in the case where the undertaking to pay a premium is an essential of the contract, the parties may agree to exclude such essential from their contract but it will not be without effect: see further ch 8 par 8.2 below for an analysis of the present discussion in the context of the South African law where the undertaking to pay a premium is merely an essential of the insurance contract and not a general requirement for its validity.

76 See s 58 of the Marine Insurance Act 1909. Section 58 corresponds with s 52 of the English Marine Insurance Act 1906: see again ch 6 par 6.3.1 above.

77 If the premium is not payable in advance, ie, upon the conclusion of the contract, it is usually regarded as being payable in arrears.

78 See Carter & Harland 555; Vermeesch & Lindgren 302.

79 See Sutton 429 and the variety of wording of clauses by which this may be effected.

80 See Sutton 422; Tarr, Liew & Holligan 160.

If payment of the premium is overdue and a loss occurs while the premium remains unpaid and the insured tenders the amount of the premium at a later stage, the insurer is not bound to accept the premium and indemnify the insured. If it is accepted, the insurer is no longer entitled to rely on the fact that the policy had lapsed for non-payment of the premium and it will be liable to indemnify the insured. But if the insurer rejects the late payment of the premium, the insurer is not liable to meet the claim.⁸¹

The late payment of the premium after the policy has already lapsed does not, as a matter of general principle, revive the policy. In the decision in *Mobili Pty Ltd v FAI Insurances Ltd*⁸² the insurer sent a renewal certificate of notice to the insured close to the expiry date of a fire policy. The insured property was damaged by a fire after the expiry of the policy. The cheque for the renewal of the premium was handed to the clerk of the insurer only the day after the fire had occurred. The insurer rejected the insured's claim and returned the premium to him. The insured argued that the renewal certificate operated as an offer to renew which was capable of acceptance within a reasonable time, and that such reasonable time had not expired when the cheque for the premium was handed over to the clerk. The Court decided that the receipt of the cheque by the clerk did not bind the insurer to an acceptance of the premium. The portion of the renewal certificate which operated as an offer to renew was no more than an offer to renew the policy before its expiration. There was therefore no contractual right to any reasonable period of time for the renewal of the policy.

Under common law, the payment of the premium after the due date and the issue of an interim receipt by the insurer's agent did not bind the insurer to an acceptance of the premium.⁸³ Sutton is of the opinion that this position was altered by the provisions of section 11 of the Insurance Contracts Act 1984 under which the insurer is held liable for the conduct of its agent,⁸⁴ notwithstanding the fact that the latter did not act within the scope of his authority.⁸⁵ Thus, if an agent accepts an overdue premium and represents by words or conduct that the insurance contract has thereby come into effect or has been renewed, the insurer will probably be liable under the contract.

7.3.3 The Mode of Payment

Generally the payment of a debt (premium) must be in cash. In the case of a tender of money, the tender must be a legal tender, that is, notes or coins issued by the Reserve Bank.⁸⁶ Where a contract provides for payment in cash, the promisee (creditor

81 See Vermeesch & Lindgren 988.

82 (1986) 4 ANZ Ins Cas 60-718 (NSW).

83 See Tarr, Liew & Holligan 154 who, without giving reasons, are apparently of the opinion that this will also be the case notwithstanding the provisions of s 11 of the Insurance Contracts Act 1984.

84 See also par 7.5.4 below.

85 See Sutton 424.

86 See Carter & Harland 562n54. Australian decimal currency notes for any amount are legal tender. Coins of the denominations of five cents, ten cents, 20 cents or 50 cents are legal tender for payment of an amount not exceeding five dollars and one or two dollar coins are legal tender for payment of an amount not exceeding ten times their face value: see s 16(1)(a)-(c) of the Currency Act 1965 (Cwth). See also Vermeesch & Lindgren 297; Turner 180n1.

or insurer) is not bound to accept a negotiable instrument, such as a cheque, since it is not payment in cash.⁸⁷ However, it is extremely common for a creditor (insurer) to accept a cheque or other bill of exchange as payment. The consequences of such acceptance depend on the intention of the parties.⁸⁸

Payment by cheque is, in the absence of a clear intention to the contrary, conditional payment only.⁸⁹ In the case of the cheque being a conditional payment, the rule is that the premium will be paid only if the cheque is honoured on presentation.⁹⁰ Even if the insurer's agent gave an unconditional receipt in respect of a payment of the premium by cheque, the insurer is not estopped from denying that payment has been made where the cheque is dishonoured.⁹¹ However, if seen against Sutton's interpretation of the effect of section 11 of the Insurance Contracts Act 1984 by which the insurer is held liable for the conduct of its agent⁹² notwithstanding the fact that the latter did not act within the scope of his authority, this rule may perhaps be interpreted differently.⁹³ Thus, if an agent gave an unconditional receipt in respect of a payment by cheque or other type of instrument of payment apart from cash, the insurer can probably be held liable under the contract.

Where the premium is paid by a method other than a cheque, payment is also usually made conditionally. For example, if a contract provides for payment by "banker's confirmed credit", the fact that a credit has been opened in favour of the insurer as creditor does not necessarily mean that the insured as debtor has discharged the obligation to pay the premium. Usually the credit is regarded as a conditional discharge only.⁹⁴

7.3.4 The Place of Payment of the Premium

The place at which payment of the premium must take place is sometimes specified in the policy.⁹⁵ In the absence of a contractual term or a provision in terms of legislation regarding the place of payment of the premium, reference will have to be made to the position under the common law.⁹⁶

In the case of life insurance policies, the Life Insurance Act 1945 provides that unless the parties have agreed otherwise, all moneys payable in terms of a life

87 See Wickens 67.

88 See Carter & Harland 562.

89 See Vermeesch & Lindgren 180-181.

90 See Wickens 67; Carter & Harland 562-563.

91 See Tarr, Liew & Holligan 154n106 and the authorities cited there.

92 See also par 7.5.4 below.

93 See Sutton 424. See again par 7.3.2 above.

94 See Carter & Harland 563 and the authority referred to there.

95 See Wickens 59.

96 As to the common-law rules regarding the place of payment of debts (premiums), see again ch 6 par 6.3.4 above.

insurance policy, including the premiums, are payable at the registered office of the insurer.⁹⁷

7.3.5 By Whom the Premium Is to Be Paid

Generally the premium must be paid by the insured as debtor personally. But there is authority for the view that it is irrelevant who pays the premium, as long as it is received by the insurer as consideration under an insurance contract which it acknowledges to be in the name of a particular insured.⁹⁸

The question whether a third party can validly perform on behalf of the insured as promisor or debtor depends on three factors. First, it must be ascertained whether the insured as promisor obtained the consent of the insurer as promisee to allow a third party to pay the premium on behalf of the insured. The insurer may agree to accept payment of the premium by a third party, or it may subsequently ratify such payment.⁹⁹ Secondly, the nature of the performance in terms of the contract may have a bearing on the question of whether a third party can validly perform on behalf of the insured. The nature of the performance is important as the performance of the insured as promisor may be personal to the insured. For example, the performance may call for the exercise of skill or expertise or involve an element of personal confidence. As the performance of the insured under an insurance contract usually consists of money,¹⁰⁰ the nature of the performance in terms of the contract is usually not of any importance in the case of the insurance contract. If, however, an element of personal confidence does exist between the parties,¹⁰¹ vicarious performance will not be permitted.¹⁰² Thirdly, the terms of the contract may provide, expressly or impliedly, that vicarious performance is not to take place. If the contract is silent on the question of whether performance by a third party will discharge the debt, the first two factors will settle the issue.¹⁰³

7.3.6 To Whom the Premium Is to Be Paid

Neither the Australian legislature nor the legal writers deal with the question as to whom the premium can validly be paid to. It must therefore be taken that the common-law principles will determine the matter.¹⁰⁴ These principles coincide, of course, with the corresponding principles of English common law.¹⁰⁵

97 See s 118(3). See also Wickens 59.

98 See Sutton 420-421 and the authorities referred to there.

99 See Carter & Harland 563-564.

100 See again par 7.2.2 above.

101 Eg, as is sometimes the case in mutual insurance: see again par 6.2.2 above.

102 See Carter & Hartland 564.

103 See Carter & Harland 564.

104 See again ch 6 par 6.3.6 above as to the question to whom the performance, ie, the premium in terms of an insurance contract, may be validly performed.

105 See again ch 6 par 6.3.6 above.

Section 14 of the Insurance (Agents and Brokers) Act 1984 determines the legal consequences of payment of the premium by the insured to the broker (or other intermediary).¹⁰⁶

7.3.7 The Amount of the Premium

Generally the amount of the premium is determined by the insurer and consented to by the insured.¹⁰⁷ The insurer determines the amount of the premium, or rather its rate, with due consideration of a number of factors. One of these factors is the material facts known to the insurer through its own knowledge, as well as the material facts disclosed to it by the insured.¹⁰⁸ The amount or rate of the premium will vary according to the type of risk covered, for example, the premium rating for a fire policy on a weatherboard house is greater than for a brick house.¹⁰⁹

In the case of motor-vehicle insurance, or as it is more commonly known, compulsory third-party insurance, the amount of the premium is not fixed by consent between the parties but by legislation. The premiums in this type of insurance vary according to the type and the classification of the use of the vehicle insured, and are reviewed from time to time by the authorities.¹¹⁰

Section 42 of the Insurance Contracts Act 1984 provides special protection to the insured in respect of the practice by insurers of levying a "minimum premium". The background to the legislature's decision to protect the insured as contained in section 42 is as follows. It was reported by the Law Reform Commission that some people, when considering, for example, their house-contents insurance, placed a valuation on their goods which was years out of date and consequently they were under-insured. Several insured had complained that on checking with their insurance companies, they found that for the same premium they could have enjoyed a much higher cover. This was a result of the fact that the insurers had established "a minimum premium", for example, \$100 per month, irrespective of the valuation of the insured goods. This led to a situation where, for example, an insured who had maintained a contents cover of say \$20 000 for years because he thought he could not afford a higher premium, could in

¹⁰⁶ See par 7.5.2-7.5.4 below.

¹⁰⁷ The fact that the amount of the premium or rather its rate is an aspect of the insurance contract which should generally be determined by the parties themselves, and not by prescribed rates by the legislature, was confirmed by the the Australian Law Reform Commission. It recommended that legislative controls on the setting of premium rates should, as a matter of general principle, not be introduced: see ALRC *Contracts* par 360. This recommendation was accepted by the legislature.

¹⁰⁸ Section 26(2) of the Marine Insurance Act 1909 provides that "[a] representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk". Section 26(2) corresponds with s 20(2) of the English Marine Insurance Act 1906: see again ch 6 par 6.3.7 above.

¹⁰⁹ See Vermeesch & Lindgren 988. For further examples of different factors which may have an influence on the rate of the premium in terms of different types of insurance, see Vermeesch & Lindgren 999 et seq.

¹¹⁰ See Vermeesch & Lindgren 1009.

actual fact have enjoyed cover, of say, \$30 000 for the same minimum premium.¹¹¹ Section 42 requires the insurer to give the maximum cover for the premium which the insured pays, notwithstanding that the insured may have elected some lesser amount as the sum insured under the contract. For example, if the insurer charges a "minimum premium" of \$100 per month in terms of its policies of house-contents insurance, and the cover to which an insured is entitled when paying a premium of \$100 is \$30 000, the insured will enjoy cover for \$30 000, even where he has placed a valuation of, say, \$25 000 on his house contents. Thus, section 42 ensures that the insured receives the maximum cover for the premium which he pays. The insured is nonetheless not allowed to recover an amount from the insurer in excess of his actual loss.

An agreement to insure at a "reasonable premium" is binding on the parties.¹¹² In terms of the general principles of the law of contract an agreement to contract at a reasonable price or rent is regarded as a valid and binding agreement.¹¹³ This principle of the law of contract is also acknowledged and confirmed by the legislature.¹¹⁴ The Marine Insurance Act 1909, too, acknowledges the concept of a "reasonable premium".¹¹⁵ The question as to what is reasonable is one of fact¹¹⁶ and is determined in the light of the particular circumstances of each case.¹¹⁷

In the case of marine insurance, the premium may be arranged upon the conclusion of the contract and it may be altered in the event of a change of the voyage or alteration in the risk. If an insurance contract is concluded "at a premium to be arranged", and no arrangement is made, section 37(1) of the Marine Insurance Act 1909 provides that a reasonable premium is payable. If an insurance contract is concluded on the basis that an additional premium is to be arranged in a given event, and that event happens but no arrangement is made, then a reasonable additional premium is payable.¹¹⁸

The concept of "loading of the premium" is often encountered in the case of life insurance contracts. It refers to an additional premium which is chargeable for the duration of the policy. For example, a premium may be "loaded" owing to the fact that the insured suffers from poor health or carries on a hazardous occupation. Thus, a "health loading" is something added to the basic premium in the case of a substandard life and

111 The protection provided in terms of s 42 resulted from the recommendations of the Australian Law Reform Commission: see *ALRC Contracts* par 275. See also Kelly & Ball *Legislation* 92.

112 See s 37(1) of the Marine Insurance Act 1909. Section 37(1) corresponds with s 31(1) of the English Marine Insurance Act 1906: see again ch 6 par 6.3.7 above.

113 See Carter & Harland 789 797-798.

114 See Carter & Harland 798n95 and the different statutes regarding sale referred to there, which acknowledge the enforceability of an agreement to sell at a reasonable price.

115 See s 37(1) of the Marine Insurance Act 1909. Section 37(1) corresponds with s 31(1) of the English Marine Insurance Act 1906: see again ch 6 par 6.3.7 above.

116 See s 94 of the Marine Insurance Act 1909. Section 94 corresponds with s 88 of the English Marine Insurance Act 1906: see again ch 6 par 6.3.7 above.

117 See Tarr, Liew & Holligan 154.

118 See s 37(2) of the Marine Insurance Act 1909. Section 37(2) corresponds with s 31(2) of the English Marine Insurance Act 1906: see again ch 6 par 6.3.7 above.

it is related not to the basic premium, but to the insurer's assessment of the degree of extra mortality of the substandard life.¹¹⁹ This increase or "loading" should, however, not be understood to entail a unilateral increase in the amount of the premium by the insurer as the parties usually agree, upon the conclusion of the contract, that the premium will be subject to "loading" in accordance with a predetermined scale.¹²⁰

In the case of mutual insurance, the final amount of the premium (or "the call" as it is sometimes referred to in the case of mutual insurance) is usually not fixed upon the conclusion of the contract but only at the end of the particular period of insurance. The initial premium or advance call is then later supplemented by further premiums or supplementary calls if and when necessary.¹²¹ Likewise, in the case of some insurance for profit contracts, the initial premium is sometimes supplemented by an additional premium. For example, in the case of the insurance of cash in transit, which is a type of property insurance, the amount of the premium is usually based on the amount of cover required in conjunction with the amount of money to be carried during the period of insurance. The amount of the premium is then adjustable at the end of the period of insurance according to the amount of cash actually carried during that period.¹²²

Finally, section 13(1)(a) of the Insurance (Agents and Brokers) Act 1984 penalises intentional false or misleading statements by an insurance intermediary as to the amount of the premium or any amount which is payable in respect of a proposed contract of insurance.¹²³ Section 13 applies to all insurance intermediaries¹²⁴ as well as to agents and employees of insurance intermediaries and of insurers.¹²⁵

7.4 NON-PAYMENT OF THE PREMIUM

7.4.1 Introduction

Although the insured usually becomes liable to pay the premium upon the conclusion of the contract of insurance, the mere failure to pay the premium will not absolve the insurer from liability. However, it is usual for the insurer to stipulate that the contract will not come into operation (that is, if the insured fails to pay the first premium) or continue to provide cover (that is, if the insured fails to pay any of the subsequent premiums) until the premium is paid.¹²⁶

119 See Vermeesch & Lindgren 1007.

120 See Turner 654.

121 See again par 7.2.2 above.

122 See Vermeesch & Lindgren 1011.

123 Section 13(1A) provides that the provisions contained in s 13(1)(a) include a reference to the non-disclosure of a matter which is material to a statement. See also Kelly & Ball *Legislation* 11-12.

124 As to the meaning of the concept of "insurance intermediary", see par 7.5.1 below.

125 See s 13(5)(a)-(b). Section 13(5) provides that the penalty for the contravention of the provisions contained in s 13(1)-(2) is a fine of \$2 000 or imprisonment for one year in the case of a natural person, or, in the case of a corporation, a fine of \$10 000.

126 See Tarr, Liew & Holligan 156.

The general rule is that a policy will lapse or be forfeited on the non-payment of the premium. The policy usually provides for such consequence. However, two Acts made significant inroads into this general rule.¹²⁷ First, the Insurance Contracts Act 1984 provides for an automatic extension of cover in the absence of notice of expiry by the insurer or payment of an additional premium by the insured.¹²⁸ Secondly, the Life Insurance Act 1945 provides for non-forfeiture on the non-payment of the premium in certain circumstances.¹²⁹

It must also be borne in mind that the insurer itself may relax any legislative provision as to the timeous payment of the premium, or may be estopped from insisting on timeous payment.¹³⁰

7.4.2 Non-Payment of the Premium in Terms of Indemnity Insurance Contracts

Generally the mere non-payment of the premium will not result in the lapse of the indemnity insurance contract. In terms of the common law, the election by the insurer to *rescind* from the contract, in contrast with the mere lapse of the policy,¹³¹ as a result of the non-payment of the premium, has to be communicated to the insured.¹³²

In cases where the premium is payable in instalments, or where the policy is renewable by the payment of a further premium, it is standard practice for insurers to send a notice of reminder to the insured. Before the enactment of the Insurance Contracts Act 1984, a failure by the insurer to send out such a notice did not have any legal consequences for the insurer as it was under no legal duty to do so.¹³³

127 See Tarr, Liew & Holligan 159.

128 See par 7.4.2 below for a discussion of the relevant provisions of the Insurance Contracts Act 1984.

129 See par 7.4.3 below for a discussion of the relevant provisions of the Life Insurance Act 1945.

130 See Tarr, Liew & Holligan 159 and the authority referred to there.

131 Rescission from a contract is a remedy at the disposal of both parties to a contract. If a party elects to rescind from the contract, he in actual fact refuses to be bound by it, eg, as a result of the innocent or fraudulent misrepresentation by the other party. The decision to rescind may include a claim against the guilty party to return any payment or other benefit given to him by the innocent party. The effect of rescission is to cancel the contract on the basis that the parties are substantially returned to their positions prior to the conclusion of the contract: see Vermeesch & Lindgren 240. In the case where the contract lapses, by contrast, the contract between the parties is terminated but they are not returned to their positions prior to the conclusion of the contract.

132 See the decision in *Trevor George Turner v Metropolitan Life Assurance Co of New Zealand Ltd* (1988) 5 ANZ Ins Cas 60-861 (HC) at 75,403.

133 The Australian Law Reform Commission expressed its concern about the possibility that an insurance policy could be cancelled by the insurer without prior notification to the insured for the non-payment of a single premium. A payment may be missed for a number of valid or excusable reasons. Eg, the insured may fall ill or he may have another valid excuse why the premium was not paid in time. The Commission recommended that an insurer should not be entitled to rely on a contractual provision permitting cancellation of an (instalment) insurance contract (ie, a contract in terms of which the premium is payable in instalments) without the proper notice to the insured: see ALRC *Contracts* par 253 254. These recommendations resulted in the inclusion of s 58 in the Insurance Contracts Act 1984.

Section 39 of the Insurance Contracts Act 1984 provides for a statutory period of grace for general insurance contracts.¹³⁴ Where an instalment has fallen due but it is not paid by the insured within the period of grace of fourteen days, the insurer is entitled to cancel the contract. Section 39 provides that

"[w]here a provision included in an instalment contract of general insurance has the effect of limiting the liability of the insurer by reference to non-payment of an instalment of the premium, the insurer may not refuse to pay a claim in whole or in part, by reason only of that provision unless - (a) at least one instalment of the premium has remained unpaid for a period of at least 14 days: and (b) before the contract was entered into, the insurer clearly informed the insured, in writing, of the effect of the provision".

An instalment contract of general insurance is defined in section 11(8) of the Insurance Contracts Act 1984 as

"[a] contract of general insurance the premium for which is, by virtue of a provision of the contract, payable by seven or more instalments in a year".

Section 62 of the Insurance Contracts Act further restricts the insurer's right to cancel an instalment contract of general insurance¹³⁵ for non-payment of an instalment of the premium.¹³⁶ In terms of section 39, an insurer may refuse to pay a claim in whole or in part when an instalment is *unpaid for more than fourteen days*. Section 62 permits cancellation only if an instalment is *unpaid for more than a month*. It is suggested by Australian writers that the time difference between the two sections (that is, fourteen days in terms of section 39 and a month in terms of section 62) is a result of an oversight when section 39 was amended.¹³⁷ It is submitted that the period of one month which is provided for in section 62, should in the application of the latter section enjoy preference to the period of fourteen days provided for in section 39.¹³⁸

In terms of section 58(2) of the Insurance Contracts Act 1984, an insurer must give the insured at least fourteen days' notice in writing of the day on which and the time at which the cover under an existing insurance contract will expire.¹³⁹ This notice

134 Section 11(6) of the Insurance Contracts Act provides that "[f]or the purposes of this Act, a contract of general insurance is a contract of insurance that is not a contract of life insurance". Thus, for purposes of the Act, s 39 applies to all types of insurance except life insurance.

135 ie, all types of insurance except life insurance: see s 11(6) of the Insurance Contracts Act.

136 See Kelly & Ball *Principles* 406.

137 See Kelly & Ball *Legislation* 116.

138 Although no direct authority could be found to substantiate this submission, it would be in accordance with the general aim and scope of the Act to give the insured the maximum time and opportunity to rectify his neglect to pay the premium timeously: see ALRC *Contracts* par 254.

139 The Australian Law Reform Commission recommended that the insurer should give the insured at least one month's notice: see ALRC *Contracts* par 254 264. It was argued by the Commission that "[w]hen an insurer is in breach of its duty to send an expiry notice, the insured's cover should continue for a period of time equal to the period of time for which the original contract remained in effect or until substitute insurance has been arranged by the insured".

must further indicate whether the insurer is prepared to negotiate, renew or extend the cover. Section 58(3) provides for the consequences flowing from non-compliance with section 58(2). Section 58(3)(b) provides that if the insurer fails to comply with section 58(2) and if the insured has not obtained insurance cover from another insurer to replace that provided by the original contract, then the original contract will be deemed to be renewed by operation of the law.¹⁴⁰ Section 58(4)(b) provides that in the event of a claim being made under this statutory renewal of the contract, the insured must then pay a premium which is to be ascertained by reference to a formula prescribed in the Act. If no claim is made, no premium is payable.¹⁴¹

Section 91(2) of the Marine Insurance Act 1909 provides that the provisions of the Act relating to premiums do not apply to mutual insurance. The question remains therefore as to what the situation is where the insured or a member in terms of a marine mutual insurance contract fails to pay the call or premium. The question is thus whether the Club is entitled to cancel the cover afforded to the member in the case of the non-payment of the call. It would appear that it is entitled to do so with retrospective effect. A number of reasons are relied upon to substantiate this proposition. First, the Club is entitled to rely upon the income derived from calls.¹⁴² Secondly, cancellation of the cover will not amount to a penalty but is more akin to a right of forfeiture.¹⁴³ Thirdly, this proposition emphasises the essence of the principle of mutuality;¹⁴⁴ it is the members who bear the consequence of a fellow member's default.¹⁴⁵

Finally, the non-payment of the call or premium in the case of marine mutual insurance¹⁴⁶ is regulated by statute. The combination of sections 4(2)(s) and 16 of the Admiralty Act 1988 (Cwth) allows for a permit arrestment of a ship for unpaid calls.¹⁴⁷

7.4.3 Non-Payment of the Premium in Terms of Non-Indemnity Insurance Contracts

Generally, the mere non-payment of the premium will not result in the lapse of a

140 See Kelly & Ball *Legislation* 112.

141 See s 58(4)(a). See again par 7.2.2 above as to the concept of "premiumless" insurance.

142 See Tarr, Liew & Holligan 424.

143 See Tarr, Liew & Holligan 424-425 and the authorities referred to there.

144 See again par 7.2.2 above for a discussion of the principle that the insurance contract is a reciprocal contract.

145 See Tarr, Liew & Holligan 425.

146 Sometimes referred to as P & I Clubs. See again par 7.2.2 above.

147 See also Tarr, Liew & Holligan 425. The concept of "arrestment of a ship" entails that it may be detained because of some infringement of regulations. When a maritime lien is to be exercised the ship may also be "arrested". Such a lien may, eg, arise when the ship is the subject of a salvage award, or, as in the example given by Tarr, Liew & Holligan (at 425), if there are any outstanding premiums (calls): see Brown *Dictionary* A20-21. For a discussion of the broker's right to a lien on a ship in respect of premiums which have been advanced by the broker on behalf of the insured, see Menefee 563 et seq.

non-indemnity insurance policy.¹⁴⁸ Non-payment of the premium will, furthermore, not result in the policy's becoming void but merely in its becoming voidable at the option of the insurer.¹⁴⁹ But in Australian law the cancellation of a life insurance policy, which is the stock example of non-indemnity insurance, is not simply a matter of contract between the insurer and the insured. Cancellation of a life insurance policy is subject to the provisions of the Life Insurance Act 1945.¹⁵⁰

In the case of life insurance policies, special protection is afforded against forfeiture for the non-payment of premiums. Provision is also made for the discontinuance of payments and conversions of policies into paid-up policies.¹⁵¹ This protection is contained in Division IV of the Life Insurance Act 1945, and applies to whole-life and endowment policies. Section 95(1) of the Life Insurance Act 1945 provides that the protection afforded by the Act does not apply to annuity policies.¹⁵²

Section 96 of the Act provides that the owner of a life insurance policy who wishes to discontinue the further payment of premiums on a life policy on which not less than three years' premiums have been paid, may make an application to the insurer for a paid-up policy. The nature and extent of the protection of the premiums paid under the policy depend on how long the policy has been in force. For example, where less than one year's premiums have been paid, the policy cannot be forfeited for

148 In the New Zealand decision in *Aetna Life of Australia & New Zealand Ltd v ANZ Banking Group Ltd* (1984) 2 NZLR 718 (CA) at 719-721 the Court of Appeal considered the effect of a forfeiture clause in a life insurance policy. The clause in question provided that "[t]hirty days' grace is allowed for payment of a premium. If a premium is not paid within this period, this Policy will be forfeited". After the insured fell in arrears with the payment of the premium, the insurer sent him a first notice which stated that the insured's benefits were terminated as the 30 days' grace for payment of the premium had expired, but that they would be revived if the amount owing was paid within fourteen days. One or two days later the insurer sent the insured a second memorandum which noted that earlier problems with payment of premiums still existed and which suggested that the insured should complete a "new bank order to have all these payments made on it". No further premiums were paid before the insured died a few days later. The Court decided that the words "will be forfeited" in the clause in question suggested that something would be done to bring about forfeiture. The clause rendered the policy liable to forfeiture for non-payment of the premiums at the election of the insurer. An election had to be communicated to the insured and had to be unambiguous. Here the evidence indicated that the communications from the insurer could not and did not convey to the insured a clear intention that the policy would be forfeited. The ambiguity created by the two documents which were sent to the insured, meant that there had been no election by the insurer to cause the insured to forfeit the policy. The policy had consequently not been forfeited: see at 725. The decision in *Aetna Life of Australia & New Zealand Ltd v ANZ Banking Group Ltd* was applied and followed in *Trevor George Turner v Metropolitan Life Assurance Co of New Zealand Ltd* supra at 75,400.

149 This principle was confirmed in the New Zealand decision in *Boynton v Monarch Life Insurance Co of New Zealand Ltd* (1973) 1 NZLR 606 (SC). In this decision the policy provided that it would become "null and void" on non-payment of the premium. The Court (at 611) referred with approval to previous decisions where it was held that even where there is an express term that the policy shall be void when a premium is unpaid, the policy becomes not void but voidable at the election of the insurer.

150 See ALRC *Contracts* par 255.

151 See Tarr, Liew & Holligan 157-158.

152 See Tarr, Liew & Holligan 158n130.

non-payment of the premium until it is four weeks overdue. Where at least one but less than two years' premiums have been paid, the premium must be at least eight weeks overdue. Where the premiums have been paid for a period of two to three years, forfeiture is only permissible for non-payment of the premium if it is more than twelve weeks overdue. If the insurer causes the insured to forfeit a policy after a period of three years, it must in lieu of the original policy grant a paid-up policy for an amount not less than that calculated with regard to the rules prescribed by the Act.¹⁵³

Section 97 deals with the situation where a policy-owner who wishes to discontinue premium payments does not wish to apply for a paid-up policy. In terms of section 97(1), the owner of a policy which has been in force for at least six years is entitled to surrender the policy¹⁵⁴ and to receive the surrender value of the policy less the amount of any debt owing to the insurer under or secured by the policy. Surrender values, like paid-up policy values, are determined in accordance with the rules set out in a schedule to the Act.¹⁵⁵

Under a life insurance contract the insurer does not usually possess the right to sue the insured for any unpaid premiums. Accordingly, when a life insurance policy has lapsed for the non-payment of the premium, a court will not order its reinstatement upon the policy-owner's subsequently proffering the premium. The policy itself may, of course, prescribe the conditions of reinstatement.¹⁵⁶

The protection against forfeiture of benefits as the result of the non-payment of premiums is contained in section 100 of the Act. Under section 100, an ordinary life insurance policy¹⁵⁷ on which at least three years' premiums have been paid, is not forfeited because of non-payment of a premium if the surrender value of the policy is more than any debt owed by the insured to the insurer in respect of the policy.¹⁵⁸

The procedure for cancelling a life insurance contract other than an "ordinary life insurance policy" as referred to in section 100, is set out in section 59 of the Insurance Contracts Act 1984. It is similar to the procedure that must be followed in respect of a contract of general insurance.¹⁵⁹

In terms of section 101 of the Act, an industrial policy on which at least one year's premium has been paid is not forfeited because of non-payment of the premium

153 See Tarr, Liew & Holligan 159.

154 The surrender value of a policy is defined as "the amount payable to an assured for a surrender of all claims in respect of a policy. Under most [life insurance] contracts the policy does not acquire a surrender value until it has been in force for at least two years": see Vermeesch & Lindgren 1007.

155 See ALRC *Contracts* par 256 where it is stated that most insurers pay surrender values after only two or three years rather than the prescribed period of six years.

156 See Wickens 67.

157 For the purposes of s 100 the concept of "ordinary life insurance policy" excludes a "term policy": see Kelly & Ball *Principles* 415n135 and the authority referred to there.

158 See also Kelly & Ball *Principles* 415.

159 See again par 7.4.2 above. See also Kelly & Ball *Principles* 416.

unless it has remained unpaid for at least four weeks. The period is increased proportionally for each subsequent year, until three years' premiums have been paid. After three years the insurer must issue a paid-up policy with a value calculated in accordance with the rules prescribed by the Act.¹⁶⁰

7.5 THE ROLE OF BROKERS AND OTHER INTERMEDIARIES IN THE PAYMENT OF THE PREMIUM

7.5.1 Introduction

The law relating to the role and the liability of the insurance intermediary in the conclusion of the insurance contract has to a large extent been codified by the Insurance (Agents and Brokers) Act 1984.¹⁶¹ The Act is designed to regulate the activities of life and general insurance brokers, and to some extent the activities of marine insurance brokers and life and insurance agents. Its aim is to protect the insuring public against the negligence and misconduct of agents or brokers, and to maintain standards of conduct and the quality of the advice offered by them.¹⁶²

A salient feature of the Act is the apparent indiscriminate use of the concepts of "broker", "agent" and "intermediary". For example, the heading to part III of the Act reads "Registration of *Insurance Brokers*", while the heading to part IIIA of the Act reads "Registration of *Foreign Insurance Agents*". However, each of these different concepts referred to by the Act has a specific meaning for purposes of the operation of the Act. Section 9 of the Act provides that the concept of "insurance intermediary" means a person who arrange contracts of insurance in Australia and elsewhere for reward and as an agent for one or more insurers, or as an agent for intending insureds. The concept of "insurance intermediary" includes an insurance broker. An "insurance broker" is defined as "a person who carries on the business of arranging contracts of insurance, whether in Australia or elsewhere, as agent for intending insureds." Section 9 also provides for definitions of the concepts of "life insurance broker", "registered foreign insurance agent" and "registered insurance broker".

The different definitions of "insurance broker", "general insurance broker", "life insurance broker" and "insurance intermediary" are vital to the structure of the Act.¹⁶³ The Act determines the responsibility of insurers for the acts of insurance inter-

¹⁶⁰ See Kelly & Ball *Principles* 416.

¹⁶¹ The Act was assented to on 25 June 1984. Some parts and individual sections only came into effect at later dates: see Kelly & Ball *Legislation* 2-3. For an exposition of the structure of the Act, see again par 7.1 above.

¹⁶² As to the scope of the recommendations of the Australian Law Reform Commission which formed the basis of the Insurance (Agents and Brokers) Act 1984, see ALRC *Agents & Brokers* par 1. See also Turner 642.

¹⁶³ Eg, s 39 of the Insurance (Agents and Brokers) Act 1984 provides that an insurance intermediary must not describe himself or herself in such a way that would lead a person to believe that the intermediary is a broker, where he or she is not a registered broker, or an insurer. See also Kelly & Ball *Legislation* 45; Turner 646.

mediaries, including brokers and agents, and imposes various obligations on different categories of intermediary. Some of these obligations are placed on all types of insurance intermediary.¹⁶⁴ Others are placed on certain groups of intermediary only. In some cases, the group is registered insurance brokers.¹⁶⁵ In other cases, it is insurance brokers, whether they are registered or not.¹⁶⁶ In two other cases, the group aimed at is insurance intermediaries other than insurance brokers.¹⁶⁷ Finally, in a particular case the obligation is imposed on persons acting as agents for an insurer with life insurance brokers and general insurance brokers are excluded.¹⁶⁸

7.5.2 The Relationship Between the Insured and the Insurer

Because of the important function which brokers and other insurance intermediaries fulfill in the conclusion of the insurance contract between the insured and the insurer, and also because of their role in the receipt of the premium, the relationship between the insurer and the insured is rather insignificant. Generally, whenever a broker or other insurance intermediary is involved in the conclusion of the contract, the premium is not paid directly by the insured to the insurer, but to the broker or intermediary. Where there is no broker or intermediary involved in the conclusion of the contract between the insured and the insurer, the general rule is that the premium is paid personally by the insured to the insurer and that the insured remains liable for it to the insurer until it is paid.

7.5.3 The Relationship Between the Broker and the Insured

The relationship between the broker and the insured, at least as far as the payment of the premium is concerned, is to a large extent regulated by the Insurance (Agents and Brokers) Act 1984.

Section 14 is central to the operation of the Insurance (Agents and Brokers) Act 1984.¹⁶⁹ Sections 14(1) and 14(2) settle the troublesome question of whether as between the insured and the insurer, payment of a premium to the broker constitutes payment to the insurer. The answer to this question, in terms of the common law, was considered by the Australian High Court in the decision in *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd*.¹⁷⁰ The insured (Con-

164 See s 13, 14, 34, and 39 of the Act.

165 See ss 26-31 of the Act.

166 See s 19, 32, 35, 36, and 38 of the Act.

167 See s 10 and 33 of the Act.

168 See s 37 of the Act. See also Kelly & Ball *Legislation* 7.

169 See Kelly & Ball *Legislation* 13. Section 14 deals with, amongst other things, the problem which arose in the past where the premiums which had been paid by the insured to the broker, were lost, eg, due to the insolvency or the disappearance of the broker. In such an event insurers claimed the right to require the insured concerned to pay the premium a second time. This unfortunate rule was acknowledged and applied in a number of decisions. The Australian Law Reform Commission recommended legislation to the effect that a broker should be deemed to receive the premium on behalf of the insurer, and not the insured: see ALRC *Contracts* par 2.

170 (1986) 64 ALR 481 (HC). See also Turner 643.

Stan) instructed his broker to obtain insurance cover on his behalf. Norwich was selected as the insurer and the proposal for insurance was accepted by Norwich. Con-Stan paid the premiums to the broker who failed to pay them to the insurer. The broker was subsequently liquidated and the insurer sued the insured for the premiums.¹⁷¹ The Court decided that in the absence of proof of a contrary custom in the insurance industry, payment to the broker does not discharge the insured's liability to the insurer. In this case the insured failed to prove the existence of an implied term in the insurance contract which arose from custom or usage in the industry, namely that the broker alone is liable to an insurer for the payment of the premium, or, alternatively, he failed to prove that there is an implied term that payment of the premium to a broker discharges the insured's obligation to the insurer.¹⁷²

Although the decision in *Con-Stan* was handed down only after the Insurance (Agents and Brokers) Act 1984 had come into operation, the facts giving rise to the dispute arose before the enactment of the Act, and consequently also the coming into operation of section 14.¹⁷³ The scope of section 14 was therefore not considered in the decision in *Con-Stan* as section 14 was not put into operation retrospectively. The importance of the decision in *Con-Stan* appears to be the fact that in the case of insurance contracts concluded before the commencement of the Insurance (Agents and Brokers) Act 1984, payment of the premium by the insured to the broker will, in the absence of proof of a contrary custom from the insurance industry, not discharge the insured's liability to the insurer.¹⁷⁴ This rule from the decision in *Con-Stan* applies to non-marine insurance contracts which were concluded before 1984 only, as section 59 of the Marine Insurance Act 1909 will apply to marine insurance contracts concluded before the commencement of the Insurance (Agents and Brokers) Act 1984.¹⁷⁵

Section 14(1) of the Insurance (Agents and Brokers) Act 1984 provides as follows:

"Where a contract of insurance is arranged or effected by an insurance intermediary, payment to the insurance intermediary of moneys payable by the insured to the insurer under or in relation to

¹⁷¹ See at 483.

¹⁷² See at 487-488. But see ALRC *Agents & Brokers* par 48 where it is argued that payment of the premium by the insured to the broker should have been regarded, even before the enactment of s 14 of the Insurance (Agents and Brokers) Act 1984, as tantamount to payment to the insurer. The Law Reform Commission based its argument on the following reasons. First, such argument is in accordance with general accounting customs. Secondly, it is a truism that the insured is not commonly known to the insurer and it is furthermore commonplace that the credit which an insurer gives for the payment of the premium is to the broker and not to the insured.

¹⁷³ The term "enactment" connotes, of course, the process of making the Act, while the phrase "come into operation" entails that the Act which has been made, has been put into effect. It is obvious that due to practical and technical considerations the "enactment" of an act and "its coming into operation" seldom if ever take place simultaneously.

¹⁷⁴ See also Kelly & Ball *Legislation* 14 for other authorities which confirm this principle.

¹⁷⁵ Section 14 of the Insurance (Agents and Brokers) Act 1984 applies to both non-marine and marine insurance contracts concluded after the commencement of the Act: see again par 7.5.1 above.

the contract, whether in respect of a premium or otherwise, is a discharge, as between the insured and the insurer, of the liability of the insured to the insurer in respect of those moneys."¹⁷⁶

Section 14(2) of the Insurance (Agents and Brokers) Act 1984 provides as follows:

"Payment to an insurance intermediary by or on behalf of an intending insured of moneys in respect of a contract of insurance to be arranged or effected by the intermediary, whether the payment is in respect of a premium or otherwise, is a discharge, as between the insured and the insurer, of any liability of the insured under or in respect of the contract, to the extent of the amount of the payment."¹⁷⁷

While section 14(1) covers the payment of moneys by *insured*, section 14(2) provides for payments by *applicants for insurance*. The rule contained in sections 14(1) and 14(2) which provides that payment of the premium to the broker is tantamount to payment to the insurer, applies in respect of all the components of the premium, for example, stamp duty and the compulsory fire levy.¹⁷⁸

The operation of section 14(2) was considered in the recent decision in *Manufacturers' Mutual Insurance Co v John H Boardman Insurance Brokers Pty Ltd and another*.¹⁷⁹ The insured owned certain premises which it wished to insure. It gave a mandate to the broker to procure insurance on behalf of it, the insured. The original policy was for the period 28 June 1987 to 27 May 1988. There was a renewal for the period 27 May 1988 to 27 May 1989. Before the expiry of the renewed policy, the insurer sent the broker a renewal notice for the policy. On 22 May 1989 the insured instructed the broker to arrange for the renewal of the policy and forwarded a cheque to the broker which was presented by the broker to the drawee bank and paid. It was assumed by the Court that the broker neither communicated the insured's decision to renew the policy to the insurer, nor forwarded a cheque in payment of the premium. On

¹⁷⁶ Although there is no clear authority, the Australian Law Reform Commission was apparently of the opinion that in the vast majority of marine insurance cases and Lloyd's policies, payment of the premium by the insured to the broker discharges the insured's obligation to the insurer. The Commission hinted that although this rule originated in respect of Lloyd's policies, it is likely that, as a result of mercantile custom, it became applicable to *all insurance policies generally* in England and Australia: see ALRC *Agents & Brokers* par 46 47. It was the existence of this very mercantile custom which was found unproven in the decision in *Con-Stan* supra.

¹⁷⁷ The provisions contained in s 14 are based on the recommendations made and sentiments expressed by the Australian Law Reform Commission as regards the role of brokers and other insurance intermediaries in the conclusion of the contract, and the receipt of premiums from insured. The Commission made two important points. First, the fact that it is the insurer, and not the insured, which agrees with the broker on credit terms and acquiesces in a broker's temporary treatment of premium money as his own. Secondly, it is the insurer and not the insured which is in the better position to know the overall payment performance of a broker, and to become aware of the possibility of an impending insolvency of the broker: see ALRC *Agents & Brokers* par 50-51.

¹⁷⁸ See Kelly & Ball *Legislation* 14.

¹⁷⁹ (1994) 120 ALR 401 (HC). See also Turner 644.

28 December 1989 the insured building was damaged in an earthquake. The insurer rejected the claim on the basis that the insurance policy had lapsed on 27 May 1989 for non-payment of the premium. It was common cause that the notice of renewal by the insurer operated as an offer to renew the cover in terms of the policy.¹⁸⁰

The question to be answered by the Court was whether the payment of the renewal premium by the insured to the broker effected a renewal of the contract of insurance by virtue of section 14(2) of the Insurance (Agents and Brokers) Act 1984. In a majority decision it was held that the effect of section 14(2) was to regard the payment of the premium to the broker as the discharge of the liability under the contract between the insurer and the insured. If the insured wants to renew the contract it must make an offer of renewal to the insurer. Thus, there rests a liability on the insured to make an offer of renewal to the insurer should he wish to renew the insurance cover. However, it was decided that payment of the premium did not result in the discharge of the liability *and simultaneously making it the acceptance of the offer*. The Court further decided that the scheme of section 14 of the Insurance (Agents and Brokers) Act 1984 is to leave the relationship between the broker and the insurer to be determined by reference to the common law except in two situations: first, where a binder is in existence and, secondly, in relation to the receipt of moneys for premiums. This supports the notion that payment of moneys to a broker before any contract is arranged, will not bring a contract between the insurer and the insured into existence. The appeal was accordingly allowed.¹⁸¹

Section 14 was also considered and applied in the decision in *International Specialist Underwriters Ltd v Heiman*.¹⁸² The insured instructed his broker to arrange insurance cover on his behalf in respect of a truck. The broker complied by insuring the truck with an underwriting agent acting on behalf of an insurance company and certain Lloyd's underwriters. The policy was to expire on 13 September and the underwriting agent sent a renewal notice to the broker. The broker accordingly informed the insured who sent a cheque for the premium to it on 30 August. The same day a provisional liquidator was appointed to the broker. The liquidator banked the cheque. The insured then paid the premium to the underwriting agent as well, apparently to ensure that the policy did not lapse as a result of the imminent liquidation of the broker.¹⁸³ The Court decided that in terms of section 14, payment of the premium by the insured to the broker discharged the insured's liability to the insurer.¹⁸⁴ The insured was accordingly allowed to recover the subsequent, second payment of the premium from the underwriting agent.¹⁸⁵

180 At 402-403.

181 At 409. In New Zealand it has been decided that the district agent of an insurer who has the authority to bind the insurer by the acceptance of new risks, also has the authority to bind it by the acceptance of a renewal premium on a policy after its due date: see the decision in *Scott v Accident Association of New Zealand* (1888) 6 NZLR 263 (SC) at 270-271.

182 (1987) 73 ALR 391 (NSW).

183 At 392.

184 At 394.

185 See also Kelly & Ball *Legislation* 14 where this case is discussed.

The effect of section 14 is less clear where the intermediary receives a payment from an applicant for insurance, that is, the situation envisaged by section 14(2), and where the intermediary fails to arrange the insurance. In the decision in *Metrot Pty Ltd v Manufacturers' Mutual Insurance Ltd*¹⁸⁶ the insurer sent a renewal notice to the insured's broker. The insured instructed his broker to renew the policy and paid the premium to the broker. The insurer denied that the broker had renewed the policy. The question which the Court had to consider was whether the insured's payment of the premium to the broker had the effect of a renewal of the policy. It held that it had. The Court pointed out that if the insurer's argument was to be rejected, the broker's receipt of the premium had to have the following two effects. First, it had to operate as an acceptance of the offer made by the insured and secondly, it had to discharge the liability by the insured to the insurer.

Kelly and Ball are of the opinion that section 14 had the second effect only. They further submit that there is nothing in the Insurance (Agents and Brokers) Act 1984 which suggests that the broker is the agent of the insurer for purposes of entering into the contract. This fact creates a difficult and anomalous position. The only way an insured could be certain that his policy is renewed, would be to deal directly with the insurer. The Court suggested an amendment of section 14

"which equates in all respects, including the making of the contract, payment to the broker with payment to the insurer direct. Were it otherwise, the work of the Act would be but half done".¹⁸⁷

Section 14(3) of the Insurance (Agents and Brokers) Act 1984 provides as follows:

"Payment by an insurer to an insurance intermediary of moneys payable to an insured, whether in respect of a claim, return of premiums or otherwise, under or in relation to a contract of insurance, does not discharge any liability of the insurer to the insured in respect of those moneys."

Section 14(3) deals therefore with the converse situation to the one envisaged by sections 14(1) and 14(2), namely where a payment which is destined for the insured is made by the insurer to the broker. Such payment might be in respect of a claim or the return of the premium. In the case of such payment the insurer remains directly liable to the insured.¹⁸⁸

Section 14(4) of the Insurance (Agents and Brokers) Act 1984 provides that any term of an insurance contract which purports to alter or restrict the operation of sections 14(1) to (3) will be regarded as void. Thus, the operation of sections 14(1) to 14(3)

186 (1991) 6 ANZ Ins Cas 61-005 (NSW).

187 See Kelly & Ball *Principles* 206 et seq; Kelly & Ball *Legislation* 15 where this recommendation of the Court is referred to with apparent approval.

188 See Kelly & Ball *Legislation* 14.

cannot be excluded by agreement between the insurer and the insured, the insurer and the intermediary, or between the intermediary and the insured.¹⁸⁹

Section 14(5) of the Insurance (Agents and Brokers) Act 1984 provides that an insurance intermediary is allowed to contract with the insured that the intermediary will be allowed to set off moneys payable by the insured to the intermediary in respect of premiums, against moneys payable to the insured. Section 14(5) further provides that such an agreement between an insured and an insurance intermediary will not be in conflict with the provisions of section 14(4).

In the case of marine insurance the position was, before the enactment of section 14 of the Insurance Contracts Act 1984, different from the position under general insurance. There payment of the premium by the insured to the broker was tantamount to payment to the insurer. Section 59 of the Marine Insurance Act 1909 provides that

"[u]nless otherwise agreed, where a marine policy is effected on behalf of the assured by a broker, the broker is directly responsible to the insurer for the premium, and the insurer is directly responsible to the assured for the amount which may be payable in respect of losses, or in respect of returnable premium".¹⁹⁰

A necessary corollary of section 59 is that an insurer has no recourse against the insured if the broker fails to pay the premium to the insurer.¹⁹¹ But the payment of the premium by the insured to the broker in terms of a marine insurance contract is now also governed by the provisions contained in section 14 of the Insurance (Agents and Brokers) Act 1984.¹⁹² Thus, as far as marine insurance contracts are concerned, the position stays the same, because section 14 of the Insurance (Agents and Brokers) Act 1984 confirms and expands on the protection provided to the insured in section 59 of the Marine Insurance Act 1909.

Although section 59(1) of the Marine Insurance Act 1909 provides that the broker in terms of a marine insurance contract is directly responsible for the payment of the premium to the insurer, it also provides that the insurer is directly responsible to the insured for the amount which may be payable in respect of losses, or in respect of a returnable premium.

There is some doubt as to the applicability of section 59(1) to mutual insurance.¹⁹³ Section 59 represents the practice at Lloyd's but the practice of the indi-

189 See Kelly & Ball *Legislation* 14.

190 Section 59 corresponds with s 53(1) of the English Marine Insurance Act 1906: see again ch 6 par 6.5.4 above.

191 See the decision in *Con-Stan* supra at 483 489.

192 See again par 7.5.1 above. See also Tarr, Liew & Holligan 155; Kelly & Ball *Legislation* 4 14.

193 As to the concept of "Clubs" in mutual marine insurance, see again par 7.2.2 above.

vidual Clubs is different, even more so if the entry is arranged from Australia.¹⁹⁴ Generally, the rules of a P and I Club make it clear that it is contracting with the owner as a member rather than with the broker or intermediary. There may be special circumstances requiring an inquiry as to the identity of the person with whom the Club contracted.¹⁹⁵

In terms of section 59(2) of the Marine Insurance Act 1909, the broker has, as against the insured, a lien upon the policy for the amount of the premium and his expenses in respect of concluding the contract on behalf of the insured.¹⁹⁶

It is submitted that although section 14 of the Insurance (Agents and Brokers) Act 1984 also applies to marine insurance contracts, it should still be read with the relevant provisions of the Marine Insurance Act 1909. Although the Insurance (Agents and Brokers) Act 1984 does not provide for a similar lien upon the policy in favour of the broker, it is suggested that a broker under a marine insurance contract will still be entitled to the protection in terms of section 59(2).

7.5.4 The Relationship Between the Broker and the Insurer

As is the case in most tripartite relationships, the different rights and obligations involved in the relationships between the insurer, the insured and the broker are to a large extent intertwined. The provisions of section 14 of the Insurance (Agents and Brokers) Act 1984 which were discussed in the previous paragraph in the context of the relationship between the broker and the insured, apply also, with the necessary changes, to the relationship between the broker and the insurer.

During the early 1980s, before the enactment of the Insurance (Agents and Brokers) Act 1984, several Australian cases involving insurance brokers came before the courts. A number of principles concerning the relationship between the broker and the insurer were laid down in those decisions. They are, of course, still relevant to those insurance contracts which were concluded before the Insurance Contracts Act 1984 came into operation. Some of these principles are in conflict with the provisions of the Insurance (Agents and Brokers) Act 1984. For example, the position as explained in the decision in *Con-Stan*¹⁹⁷ has been reversed by section 14.¹⁹⁸ The principles laid down

194 See Tarr, Liew & Holligan 422. Although these writers do not expand on why the practice as embodied in s 59 is not applicable in the case of mutual insurance if the entry is arranged from Australia, one has to assume that it has something to do with the fact that Australia, in spite of modern communication and transport technology, is quite distant from the other continents and hubs of trade and industry. It is consequently inconvenient, if not difficult, for a mutual insurer which has its principal place of business say in England, to have a running account with and accept entries through a broker who is doing business from Australia.

195 See Tarr, Liew & Holligan 422 and the decisions referred to there as being examples of the difficulties which may be experienced in establishing which party is liable for the call or premium in the case of Club insurance.

196 Section 59(2) corresponds with s 53(2) of the English Marine Insurance Act 1906. See again ch 6 par 6.5.3 above.

197 *Supra*. For a discussion of this decision, see again par 7.5.3 above.

198 See Kelly & Ball *Principles* 205.

in some of the other decisions were included, albeit in an indirect way, in the Insurance (Agents and Brokers) Act 1984. For example, it has been decided that there is no general liability *on a broker* in favour of an insurer to pay premiums to the insurer, whether or not the broker has received payment from the insured.¹⁹⁹

In terms of section 11(1) of the Insurance (Agents and Brokers) Act 1984, an insurer is liable to the insured or an intending insured for the conduct of its (the insurer's) agent or employee. The conduct for which the insurer will be liable must be of the nature upon which a person in the circumstances of the insured or intending insured could reasonable be expected to rely.²⁰⁰ This would entail, for example, that if an agent falsely represented that he has the necessary authority to receive premiums on behalf of the insurer, the insurer will be held to this representation by the agent.²⁰¹ This could mean that payment of the premium to an unauthorised agent may qualify as payment to the insurer if the requirements of section 11 have been met.²⁰²

Section 12 of the Insurance (Agents and Brokers) Act 1984 deems every *insurance intermediary*, except a *general insurance broker* in respect of general insurance business and a *life insurance broker* in respect of life insurance business, to be the agent of the insurer and not of the insured.²⁰³ In short, an intermediary who is not registered under the Act in respect of the relevant class of business, is deemed to be the agent of the insurer in any matter relating to insurance.²⁰⁴

The Insurance (Agents and Brokers) Act 1984 does not contain for general insurance contracts, a provision of the same tenor as that contained in section 59(1) of the Marine Insurance Act 1909.

Section 60 of the Marine Insurance Act 1909 provides that

199 See Vermeesch & Lindgren 1015 and the authorities referred to there. This principle is "included" in the Insurance (Agents and Brokers) Act 1984 in that the Act does not provide that a broker is liable to the insurer for the payment of the premium from his own pocket. See also s 59(1) of the Marine Insurance Act 1909.

200 See s 11(1)(a). Section 11(1)(b) further requires that the insured should have relied in good faith on the conduct of the agent.

201 The provisions contained in s 11 were part of the recommendations made by the Australian Law Reform Commission: see ALRC *Agents & Brokers* par 40. The Commission made the recommendation that it must be an offence for an agent to wilfully and with intent to deceive, misrepresent the premium payable under, or the effect of any terms of, an insurance policy.

202 See again par 7.5.3 above as to the effect of s 14 of the Insurance (Agents and Brokers) Act 1984.

203 Section 12 supplements s 11. Section 12 removes the difficulty in deciding whether an intermediary is the agent of the insurer or the agent of the insured. In terms of s 12, every insurance intermediary (apart for the exceptions provided for) is deemed to be the agent of the insurer: see Kelly & Ball *Legislation* 11. For the reasons why certain classes of insurance intermediary are excluded from the provisions of s 12, see ALRC *Agents & Brokers* par 118.

204 See also Kelly & Ball *Legislation* 11. As to the liability of insurers for the conduct of agents, see Kercher & Thomas 185; Marks 233 et seq. Some of the circumstances in which an insurer may incur liability for the conduct of an agent include liability for incorrect representations, comparative advertising of insurance products, giving of incorrect investment advice, and giving of benefits to prospective insured: see Marks 247 et seq.

"[w]here a marine policy effected on behalf of the assured by a broker acknowledges the receipt of the premium, such acknowledgment is, in the absence of fraud, conclusive as between the insurer and the assured, but not as between the insurer and broker".

Although the Australian Law Reform Commission considered the possibility that section 60 might possibly be interpreted as restricting the rule contained in section 59(1) to cases where the policy recites that payment has been received by the insurer, it nevertheless concluded that the rule in section 59 should apply to all policies of insurance which contain such recital.²⁰⁵ Section 14(1) of the Insurance (Agents and Brokers) Act 1984 should therefore be seen as an expansion on rather than as an exception to section 60 of the Marine Insurance Act 1909.

7.5.5 Statutory Provisions in Respect of the Receipt of Premiums by Insurance Intermediaries

The Insurance (Agents and Brokers) Act 1984 also provides for general, administrative provisions regarding the receipt of and dealings with premiums by an intermediary.

Section 26 of the Insurance (Agents and Brokers) Act 1984 imposes limitations on all registered brokers in respect of the manner in which they may handle insurance moneys. In terms of section 26(1) all insurance moneys, which include premiums, must be paid into a separate "insurance broking" account. Section 26(3) forbids withdrawal of moneys from this account,²⁰⁶ save for a limited number of purposes.²⁰⁷

Prior to the enactment of the Insurance (Agents and Brokers) Act 1984, there were no restrictions on the investments which a broker was allowed to make of insurance moneys.²⁰⁸ In terms of section 26(4), a broker may only invest the moneys in such a manner as is prescribed by the Act.²⁰⁹ But no investment whatsoever may be made of life insurance moneys. Any profit on the realisation of investments of general insurance moneys may be retained by the broker for his own benefit. Any profit by way

205 The Commission reasoned as follows: "If the rule applying to Lloyd's and to marine insurance is not based on the recital in the policy, but, rather, upon general accounting customs, it may apply to all policies of general insurance, not merely to those containing the relevant recital": see ALRC *Agents & Brokers* par 48.

206 Section 9 of the Insurance (Agents and Brokers) Act 1984 provides for an exception to this prohibition. If the Insurance and Superannuation Commissioner appointed under the Insurance and Superannuation Commissioner Act 1987, or the acting Commissioner, has given his approval, moneys may be withdrawn from the insurance broking account by the broker.

207 Eg, if the broker is entitled to a brokerage fee, or premiums which are due to the insurer: see s 26(3)(a)-(d).

208 The Australian Law Reform Commission recommended strict regulatory controls on insurance brokers directed to ensure financial probity. Most of these recommendations are now part of either s 26, or s 27, or s 28, or s 37 of the Insurance (Agents and Brokers) Act 1984: see ALRC *Agents & Brokers* par 111 et seq.

209 See reg 10 of the Insurance (Agents and Brokers) Regulations 1984.

of interest, dividends or other income received from the insurance broking account on an authorised investment may also be retained by the broker.²¹⁰ But any loss on those investments must be made up by a payment into the insurance broking account.²¹¹

Before the enactment of section 14 of the Insurance (Agents and Brokers) Act 1984, an argument might have been raised that, since payment by an insured to a broker did not discharge the insured's debt to the insurer, the broker held the moneys as fiduciary for the insured until payment to the insurer took place.²¹² Under section 14, however, a payment to a broker does discharge the insured's debt to the insurer. This renders the previous argument void. In terms of section 26(7) of the Insurance (Agents and Brokers) Act 1984, a registered insurance broker is entitled to keep the profits from investment of moneys paid to him by the insured. If the registered broker makes a profit that is clearly attributable to a breach of the provisions contained in section 26, he may be liable, being a fiduciary not protected by section 26(7), to account to the insurer for the profit.²¹³

Section 26(9) provides protection against legal action by third parties for moneys invested in terms of section 26.²¹⁴ Section 26(11) makes it clear that no liability is placed on a banker merely because of a failure by the broker to comply with the provisions of the Act.²¹⁵

Section 27(2) of the Insurance (Agents and Brokers) Act 1984 provides for the different periods of time within which insurance premiums must be paid over by the broker to the insurer. The general effect of this section may be summarised as follows:

- A broker who has received a premium or instalment from an insured, must pay over to the insurer the premium within 90 days after the insurance cover has commenced, and the instalment within 90 days after the first day of the period to which the instalment is related.²¹⁶
- A broker who has not received a premium or instalment which is due by the insured, must notify the insurer within seven days after the end of the relevant period.²¹⁷
- A broker who has received money in terms of a claim on the policy from an insurer for an insured, must pay it to the insured within seven days after receiving it.²¹⁸

210 See s 26(7)-(8).

211 See s 26(6).

212 See Kelly & Ball *Legislation* 26 where this argument is raised.

213 See Kelly & Ball *Legislation* 25-26.

214 Insurers are, of course, free to institute legal action in respect of moneys to which they are entitled: see s 26(10).

215 See also Kelly & Ball *Legislation* 26.

216 See s 27(1)-(2).

217 See s 27(3).

218 See s 27(10). See also Kelly & Ball *Legislation* 29; Tarr, Liew & Holligan 155.

Section 28 provides for the priority in the payment by which the moneys are distributed which form part of the broker's insurance broking account on his insolvency. As between insurers and insured, the priority in payment is as follows. Priority is given first to claims moneys owing to insured;²¹⁹ secondly, to other moneys owing to the insured, for example, overpayments by insured and return premiums under cancelled contracts of insurance;²²⁰ and thirdly, to moneys owing to insurers, for example, premiums paid by insured.²²¹

Whereas section 28 deals with the distribution of moneys in his insurance broking account on the insolvency of a *registered insurance broker*, section 37 deals more broadly with premium moneys paid to an *intermediary other than a registered insurance broker* as agent of the insurer. It makes those moneys trust moneys for all purposes²²² and requires payment over to the insurer as soon as practicable.²²³ The insurer and the intermediary are not allowed to contract out of the provisions of section 37.²²⁴

7.6 RETURN OF THE PREMIUM

7.6.1 Introduction

The landmark decision in English law in *Tyrie v Fletcher*,²²⁵ in which the different rules regarding the return of the premium were explained,²²⁶ is also referred to with approval in Australian insurance-law materials.²²⁷

The same principles which allow an insurer to recover payments made in response to a claim under the contract also govern the insured's right to restitution of premiums. For example, where there is a mistaken belief that a valid contract of insurance is in existence, the premium is recoverable by reason of a failure of consideration.²²⁸ Likewise, where a premium is paid under a mistaken belief as to the obligations imposed by the contract, that premium, or the excess over the insured's actual liability, may be sued for as money had and received.²²⁹

219 le, moneys which were paid by the insurer to the broker in respect of claims submitted to it by the insured, and which were still not paid over by the broker to the insured at the time of the insolvency of the broker: see s 28(4)(b).

220 See s 28(4)(c).

221 See s 28(4)(d). See also Kelly & Ball *Legislation* 30.

222 See s 37(1).

223 See s 37(2).

224 See s 37(4). See also Kelly & Ball *Legislation* 42-43.

225 (1777) 2 Cowp 666, 98 ER 1297.

226 See again ch 6 par 6.6.1.

227 See Chantler 251.

228 See s 90 of the Marine Insurance Act 1909 which provides a list of examples of failure of consideration relevant to marine insurance contracts. Section 90 corresponds with s 84 of the English Marine Insurance Act 1906: see again ch 6 par 6.6 above. See also Kelly & Ball *Principles* 23.

229 See Tarr, Liew & Holligan 350.

This phenomenon is further illustrated by the provisions of section 88 of the Marine Insurance Act 1909 which stipulates that "[w]here the premium, or a proportionate part thereof, is ... declared to be returnable - (a) if already paid, it may be recovered by the assured from the insurer; and (b) if unpaid, it may be retained by the assured or his agent".²³⁰

If there was a total failure of consideration on the part of the insurer, the premium must be returned. There is uncertainty as to the legal basis for the return of the premium in these circumstances. It is argued by some writers that the return is based on equity, while others argue that it is based on quasi-contract.²³¹ In general it may be said that it appears that no single answer is possible as to the basis of a claim for a return of the premium. Different circumstances in which the insured claims a return of the premium bring into play different grounds of claim.²³²

If there was fraud on the part of the insured, he is not entitled to a return of the premium.²³³ Fraud is not defined in the Insurance Contracts Act 1984 and recourse must be had to common law. The insurer must prove that there was an intention on the part of the insured to deceive it.²³⁴ The reason for the non-return of the premium in the case of fraud by the insured is apparently based on the principles of equity.²³⁵ Likewise, if the insured has been induced to enter into a contract by the fraudulent misrepresentation of the insurer or its agent,²³⁶ he can rescind the contract and claim a refund of the premium.²³⁷

It is to be noted that a party other than the insured may recover a premium paid under a mistaken belief inducing such payment. For example, where the insured's child paid premiums on behalf of his insured father under the erroneous assumption that all claims to the policy had been abandoned in his (the child's) favour, the child may claim a return of the premiums.²³⁸

7.6.2 In the Case Where the Contract Did Not Come into Operation

An insured is entitled to recover the premium where the insurer has never been at risk. If the insurer has never been at risk, it means that there was a total failure of

²³⁰ Section 88 corresponds with s 82 of the English Marine Insurance Act 1906: see again ch 6 par 6.6.1 above.

²³¹ See Chantler 240-241 and the different writers cited there.

²³² See Chantler 252.

²³³ See Chantler 237 240n20.

²³⁴ See McCabe 15-16 and the authorities referred to there. See also Vermeesch & Lindgren 997.

²³⁵ See Chantler 254.

²³⁶ See s 11 of the Insurance (Agents and Brokers) Act 1984 as to the liability of the insurer for the conduct of its agents.

²³⁷ See Sutton 439-440.

²³⁸ See Tarr, Liew & Holligan 351. See again par 7.3.5 above as to the question by whom the premium is to be paid.

consideration.²³⁹ In the case of a single, indivisible premium, there can be no apportionment of the premium for as soon as the insurer is at risk under a valid policy there can be no return of the premium.²⁴⁰

In the case of a marine insurance contract, it is regarded as a failure of consideration with a subsequent return of the premium where the insured vessel is laid up in port.²⁴¹ Section 90(2) of the Marine Insurance Act 1909 provides that where the consideration for the payment of the premium is apportionable, and there is a total failure of any apportionable part of the consideration, a proportionate part of the premium must be returned to the insured.²⁴² However, where there has been fraud on the part of the insured, no part of the premium is returnable.²⁴³

Section 90(3)(b) of the Marine Insurance Act 1909 provides that where the object of the risk has never been imperilled, the premium, or, as the case may be, a proportionate part of it, is returnable. This section does not apply to contracts which were concluded on a "lost or not lost" basis, except where the insurer knew of the safe arrival of the ship or the goods.²⁴⁴

7.6.3 In the Case Where the Contract Is Void

Because insurance contracts are subject to the general rules of the law of contract,²⁴⁵ an insurance contract may be avoided on all the usual grounds, for example, for mistake or illegality. If a policy is cancelled on the grounds of mistake, all premiums will be refunded. Generally it is immaterial whether the action is brought by the insured or the insurer.²⁴⁶ If the contract is void for illegality, special rules come into operation. The first consequence is that illegal contracts are unenforceable. This principle is contained in the maxim *ex turpi causa non oritur actio*, that is, from a base consideration no action arises. The second consequence flowing from the illegality of a contract is that any performance which is rendered under an illegal transaction is, as a matter of general principle, irrecoverable. This principle is contained in the maxim *in pari delicto potior est conditio defendentis* and entails that where two parties are equally guilty, the one who is in possession is in the stronger position.²⁴⁷ In the insurance context this means that an insured cannot recover a premium in terms of an illegal contract once it has been paid over to the insurer, where both the insurer and the insured are equally

239 See Tarr, Liew & Holligan 160. This rule is embodied in the phrase "no risk no premium": see Sutton 438. See again par 7.2.1 above, as well as ch 6 par 6.2.1 above.

240 See Sutton 438.

241 See s 90 of the Marine Insurance Act 1909.

242 Section 90(2) corresponds with s 84(2) of the English Marine Insurance Act 1906: see again ch 6 par 6.6.2 above.

243 See s 90(3)(a) of the Marine Insurance Act 1909. Section 90(3)(a) corresponds with s 84(3)(a) of the English Marine Insurance Act 1906: see again ch 6 par 6.6.1 and 6.6.2 above.

244 Section 90(3)(b) corresponds with s 84(3)(b) of the English Marine Insurance Act 1906: see again ch 6 par 6.6.2 above.

245 See again par 7.1 above.

246 See Wickens 52.

247 See Carter & Harland 525 et seq.

guilty.²⁴⁸ As far as marine insurance contracts are concerned, this rule is enshrined in section 90 of the Marine Insurance Act 1909. This section provides that a premium is recoverable on the ground of total failure of consideration provided that there has been "no fraud or illegality on the part of the assured or his agents". This proviso entails, it has been suggested, that the entire common-law position regarding the recovery of the premium has been incorporated into it.²⁴⁹

There are three exceptions to the common-law principle that the premium is irrecoverable in the case of fraud by the insured. First, if the parties are not in *pari delicto* and the insured is the "more innocent" of the two parties, he will be entitled to claim a return of the premium. This will be the case where, for example, the insured was induced by the fraudulent misrepresentation of the insurer (or its agent) that the contract is legal.²⁵⁰ Secondly, a person who belongs to a class of individual for the protection of which a contract is prohibited by statute, may recover money paid in terms of such contract. This will be the case where, for example, the insurer failed to register as an insurer.²⁵¹ Thirdly, a party may repudiate or "repent of" the illegal nature of a transaction and reclaim the money (premium) provided that the illegality has not in substance been carried into effect and provided that the withdrawal is not simply caused by a frustration of the illegal purpose.²⁵² However, the exact application of this third exception to the common-law prohibition against illegal contracts is not clear yet. The reason for the uncertainty is due to the fact that it is uncertain at what moment the insurance contract is no longer an executory contract. Two possible arguments are raised in this regard. First, it has been suggested that an action may be brought at any time before the period of the risk has elapsed or a loss has occurred. But it has also been argued that it appears to be more preferable to view the insurance contract as executory only during the period from the time when the contract takes effect until the moment when the risk attaches.²⁵³ The latter view would appear to be more correct, especially if seen against the fact that the undertaking by the insured to pay the premium is given in return for the undertaking by the insurer to bear the risk. The contract therefore takes effect as soon as the risk passes from the insured to the insurer and not only from the materialisation of the uncertain event.²⁵⁴

If the premium under an illegal contract is paid by the insured to the broker, it is not yet settled in Australian law whether the insured will be able to claim a return of the premium from the broker where the latter has not as yet paid it over to the insurer. In terms of the common-law principle regarding agency, the insured will be able to claim a return of the premium from the broker. But section 14 of the Insurance (Agents and Brokers) Act,²⁵⁵ by contrast, provides, that the receipt of the premium by the broker

248 See Kelly & Ball *Principles* 23; Tarr, Liew & Holligan 367.

249 See Tarr, Liew & Holligan 367n187.

250 See Sutton 439; Tarr, Liew & Holligan 367-368.

251 See Tarr, Liew & Holligan 368 and the authority from English law referred to there.

252 See Tarr, Liew & Holligan 368.

253 See Tarr, Liew & Holligan 368-369.

254 See again par 7.2.2 above.

255 See again par 7.5.2 above.

amounts to "a discharge, as between the insured and the insurer, of the liability of the insured to the insurer in respect of the premium". In the light of this apparent contradiction of the common-law principle by section 14, it has been suggested that the common-law position may require some reconsideration.²⁵⁶ If it is taken that section 14 entails that payment of the premium by the insured to the broker constitutes a payment to the insurer, then the insured must sue the insurer for the return of the premium. The return of the premium will in such instance depend on the general principles as to restitution between the parties to an illegal contract, that is, between the insurer and the insured in the case of an insurance contract, as opposed to the enforcement of the broker's duty as agent of the insured.²⁵⁷

7.6.4 In the Case Where the Contract Is Voidable for Misrepresentation

The Insurance Contracts Act 1984 has amended the common-law position as regards misrepresentations and non-disclosures. However, that position is still relevant as regards those contracts which were concluded before the commencement of the Act. In Australian common law no clear distinction is drawn between the concepts of misrepresentation and non-disclosure. But in terms of the Insurance Contracts Act 1984, a clear distinction is drawn between these two concepts. In the discussion of the concepts of "misrepresentation" and "non-disclosure" that follows, there will first be a brief discussion of the position under the common law, followed by the provisions of the Act which deal with these two concepts. The remedies at the disposal of the insurer which are provided for in the Act, are the same for misrepresentations as for non-disclosures, and they are discussed at the end of the paragraph.

In terms of the common law, the misrepresentation or non-disclosure of a material fact by the insured during the negotiations leading to the insurance contract entitles the insurer to avoid the contract, whether the misrepresentation was made innocently, negligently or fraudulently.²⁵⁸ As the law stands, it is clearly established in Australian law that the proper test of the materiality of a fact at common law is that of the prudent insurer. The test has been formulated as follows:

"A fact is material if it would have reasonably affected the mind of a prudent insurer in determining whether [it] will accept the [risk], and if so, at what premium and on what conditions."²⁵⁹

Section 26(2) of the Insurance Contracts Act 1984 provides that a statement is not to be treated as a misrepresentation unless the insured knew, or a reasonable person in the circumstances could be expected to have known, that the statement would have been relevant to the insurer's decision whether to accept the risk and, if so, on

256 See Tarr, Liew & Holligan 369.

257 See Tarr, Liew & Holligan 369-370.

258 See Vermeesch & Lindgren 972 et seq.

259 See Turner 623 and the decision in *Marene Knitting Mills Pty Ltd v Greater Pacific General Insurance Ltd* (1976) 11 ALR 167 (PC) referred to there. (The insertions are mine.) See also Sutton 132.

what terms. Section 26(1) provides that the statement will not be treated as a misrepresentation, even though it is untrue, where it was made on the basis of a belief held by the insured, being a belief which would have been held by a reasonable person in the circumstances.²⁶⁰

As far as the position regarding general insurance is concerned, the common-law position as regards the duty of disclosure has been affected by the provisions of the Insurance Contracts Act 1984. The Insurance Contracts Act 1984 defines the duty of disclosure as follows:

"[A]n insured has a duty to disclose to the insurer, before the relevant contract of insurance is entered into, every matter that is known to the insured, being a matter that - (a) the insured knows to be a matter relevant to the decision of the insurer whether to accept the risk and, if so, on what terms; or (b) a reasonable person in the circumstances could be expected to know to be a matter so relevant."²⁶¹

For example, an insured may argue that the reliance by an insurer on a forfeiture clause amounts to a failure to act with the utmost good faith.²⁶² It is argued by some writers that this argument may cause the Court to disregard the avoidance of the contract by the insurer, even where the misrepresentation or non-disclosure was made fraudulently.²⁶³

In terms of the common law of Australia, the insured is entitled to a return of the premium if the contract is avoided by the insurer for the innocent or negligent non-disclosure of a material fact by the insured.²⁶⁴

If the contract is cancelled by the insured for the misrepresentation or non-disclosure of a material fact by the insurer, he is in principle entitled to a return of the premium.²⁶⁵

Where the insured's failure to disclose was innocent, the insurer is, according to the provisions of the Insurance Contracts Act 1984, which are in contrast with the posi-

²⁶⁰ See Kelly & Ball *Principles* 64-65; Kelly & Ball *Legislation* 77; Turner 628-629.

²⁶¹ See s 21(1). This section changes the existing legal position in respect of the duty to disclose in the insurance context as follows. First, the section disposes of the common-law requirement of materiality in establishing whether the duty to disclose has been breached. Secondly, it has the effect that the concept of "prudent insurer" is no longer relevant in determining the content and extent of the duty to disclose. Thirdly, it has done away with the doctrine of constructive knowledge: see Kelly & Ball *Legislation* 71 et seq. This statutory duty of disclosure is therefore somewhat more favourable to the insured than that at common law. An insured is required to disclose a fact only if he or she knows it is relevant to the insurer's decision, or if a reasonable person in the circumstances would have known that it is relevant. Eg, the insured is not required to disclose matters that the insurer knows, or that in the ordinary course of its business, an insurer ought to know: see Vermeesch & Lindgren 976; Turner 624-625. See also McCabe 21.

²⁶² See s 31(1) of the Insurance Contracts Act 1984.

²⁶³ See Tarr, Liew & Holligan 160.

²⁶⁴ See Chantler 237; Turner 622.

²⁶⁵ See Kelly & Ball *Principles* 150-151 154.

tion at common law, not entitled to avoid the contract.²⁶⁶ The liability of the insurer for a claim in such a case is reduced to the amount that would place the insurer in the same position that it would have been in had the non-disclosure not occurred. For example, if the insurer would have charged a higher premium had the non-disclosure not occurred, it would be entitled to reduce the claim by the amount of such additional premium. Where an insurer can show that it would not have entered into the contract at all had it been aware of the true facts, then its liability under the contract will be reduced to nil. In this latter case the insurer will be entitled to avoid the contract.²⁶⁷ Section 28(3) provides that the insurer is not entitled to avoid the contract for innocent non-disclosure or misrepresentation by the insured, but that it may reduce the insured's claim by the amount of the insurer's loss. The method of assessing the insurer's loss is the one normally used at common law in assessing damages for fraudulent and negligent misrepresentation. This method is also explained in the Australian Law Reform Commission's report.²⁶⁸ Vermeesch and Lindgren are of the opinion that if the insurer can prove that it would not have entered into the insurance contract at all, section 28(3) can be construed to the effect that the insurer will not be liable under the policy but that it must refund the premium.²⁶⁹

Section 28(2) of the Insurance Contracts Act 1984 allows the insurer to avoid the contract for fraudulent misrepresentation or non-disclosure by the insured.²⁷⁰ The insured is generally not entitled to a return of the premium in these circumstances.²⁷¹ Section 31 of the Insurance Contracts Act 1984 provides for an exception to the penalty provided for in section 28(2). It allows the Court to exercise a discretion to disregard avoidance of a contract by an insurer as a result of a fraudulent misrepresentation or non-disclosure when it would be harsh and unfair to do so by the insurer. In exercising its discretion, the Court may allow the insured to recover the whole, or such part as the Court thinks fit and equitable, of the amount that would have been payable had the

266 See s 28(1) of the Insurance Contracts Act 1984. See Sutton 439.

267 See s 28(1)-(3) of the Insurance Contracts Act 1984. See also Kelly & Ball *Legislation* 78 et seq; Turner 625 et seq.

268 According to the Commission the correct method of applying s 28(3) is as follows:

"(a) Where the insurer would not have accepted the risk on any terms at all if the matter had been disclosed or the misrepresentation had not been made, the insurer's loss is the total amount of the claim made against it.

(b) Where the insurer would have accepted the risk for a higher premium, its loss is the difference between the two premiums.

(c) Where the insurer would have accepted the risk on different terms, its loss is the difference between:

- the amount for which it would have been liable but for its statutory entitlement to reduce the claim; and

- the amount for which it would have been liable under a contract incorporating the different terms": see ALRC *Contracts* par 192. See also Kelly & Ball *Legislation* 79.

269 See Vermeesch & Lindgren 983. See also McCabe 25-27 who refers to case law which hints that an insurer may be entitled to reduce its liability to nil under s 28(3) of the Insurance Contracts Act 1984.

270 See also McCabe 22 et seq.

271 See Wickens 52. See also Tarr, Liew & Holligan 160; Vermeesch & Lindgren 982-983.

contract not been avoided.²⁷² At common law, a court had no such discretion to disregard an avoidance of a contract by an insurer.

Section 29 of the Insurance Contracts Act 1984 provides for misrepresentation or non-disclosure in terms of a life insurance contract. Where the insurer would have entered into the policy even if the insured had made a full disclosure, the insurer will have no remedy.²⁷³ If the failure to disclose was fraudulent, the insurer may avoid the policy.²⁷⁴ In the case of an innocent non-disclosure, if the insurer would not have entered into the contract on any basis if the duty of disclosure had been complied with, the insurer may avoid the policy within three years after the policy was entered into.²⁷⁵

As regards the return of the premium in the case of a fraudulent misrepresentation or non-disclosure, it is striking that the relevant principle in terms of English law is not followed without criticism in Australian law. Under English law, a distinction is drawn between, on the one hand, the case where the insurer cancels the contract, and, on the other hand, the case where it repudiates a claim in terms of the contract because of the fraud of the insured.²⁷⁶ If the insurer *cancels the contract*, it must tender to return the premium; but where it merely *repudiates the claim*, it is not necessary for it to tender the return of the premium. In terms of Australian common law, a debtor (insured) who has acted fraudulently is, as a matter of general principle, not entitled to a return of the performance (premium) rendered under the contract.²⁷⁷ If the insurer repudiates a claim in terms of the contract because of the fraudulent misrepresentation or non-disclosure by the insured, it is entitled to retain the premium. But if the insurer wants to cancel the contract, it is suggested that it *may have to repay the premium*, even in the case of fraud.²⁷⁸ However, it is further suggested that the insurer does not usually have to seek relief of this kind. Thus, although the Australian writers acknowledge that this peculiar distinction from English law may also apply in Australian law,²⁷⁹ there are

272 See also Kelly & Ball *Legislation* 84-84; Vermeesch & Lindgren 983; Turner 625-626.

273 See s 29(1).

274 See s 29(2).

275 See s 29(3). See also Kelly & Ball *Legislation* 82; Vermeesch & Lindgren 983; Turner 627.

276 See again ch 6 par 6.6.4 above where the basis for this distinction in English law is discussed.

277 See Kelly & Ball *Legislation* 78.

278 It would appear that the Australian writers are not totally convinced of the correctness of the above-mentioned rule of English law. Kelly & Ball *Principles* 130 state that the insurer *may have to repay the premium* in the case of fraud by the insured, but in the same breath they also mention that "[i]n the case of fraudulent misrepresentation or non-disclosure ... the insured may not be entitled to recover his premium". From their writings it is not clear whether these two (apparent) conflicting statements relate to the distinction drawn in English law, or whether it has to be seen as confirmation that the position in terms of Australian law has not yet been settled. Although Sutton at 439n10 refers to the position under English law, one gets the impression that he is not altogether convinced that the distinction which is drawn in English insurance law reflects the (correct) position in Australian law. He states (at 439) that "[w]here the misrepresentation or non-disclosure was fraudulent the insurer seeking to rescind the contract *might be compelled* to repay the premiums as a condition of obtaining equitable relief but the assured could not set up his own fraud or misconduct in order to found a claim for such repayment" (my italics).

279 The decision in *London Assurance v Mansell* (1897) 11 Ch D 363 is also quoted in Australian insurance law as authority for the peculiar distinction under discussion: see Kelly & Ball *Principles* 130n473. But it has been shown that this case does not support the weight attached to it: see again ch 6 par 6.6.1 above where this case is discussed.

indications that this rule is not accepted by them without criticism. They suggest that in these circumstances an insurer should simply decline the insured's claim in which event it will be entitled to retain the premium.²⁸⁰ This suggestion further hints that the Australian writers are not convinced of the correctness of the distinction which is drawn in English law.

The contract itself may provide for the question of whether or not the premium must be returned to the insured in the case of his fraudulent misrepresentation or non-disclosure. Thus, the insurance contract often provides that in the event of fraudulent misrepresentation or non-disclosure, the premiums paid are to be forfeited. The courts usually give effect to such a forfeiture clause.²⁸¹

7.6.5 In the Case of Breach of Contract

In terms of the common law, a breach of contract by the insured does not automatically render the contract void. It simply entitles the insurer to terminate the contract. If the insurer does so, the contract is terminated from the time of the breach.²⁸²

It is common practice for the proponent of insurance to sign a declaration at the foot of the proposal form warranting that the answers given in the proposal are in every respect true and correct, and agreeing that the proposal and declaration will be the basis of the contract between himself and the insurer. Such clause is referred to as a "basis of the contract" clause. Section 24 of the Insurance Contracts Act 1984 would seem to effectively negate the operation of such clauses. It provides that a statement made in or in connection with a contract of insurance regarding the existence of a state of affairs, does not take effect as a warranty but has effect as though it were a statement made by the insured during the negotiations for the contract but before it was entered into.²⁸³

In the case where the risk has materialised and there has been a breach of contract by the insured, the insurer may reduce its liability by an amount that fairly represents the extent to which its interests were prejudiced as a result of the act or omission which has caused the breach. For example, if the insurer can show that it would have charged a higher premium in the circumstances had it been aware of the act or omission of the insured constituting a breach of the conditions of the policy, its liability will be reduced by the amount of the additional premium. It has also been decided that the prima facie liability of the insurer may be "reduced" to nil in terms of section 54 of the Insurance Contracts Act 1984.²⁸⁴ Section 54 deals with provisions in an insurance contract which entitle an insurer to refuse to pay a claim, either in whole or in part, because of some act or omission on the part of the insured *after* the contract was entered into.

280 See Kelly & Ball *Principles* 130.

281 See Kelly & Ball *Principles* 130.

282 See Kelly & Ball *Principles* 263-264; Sutton 457-458.

283 See Kelly & Ball *Legislation* 75-76; Turner 627 629.

284 See Turner 636-637.

In terms of the common law, the insured is entitled to a return of the premium if the contract is cancelled by the insurer for the innocent or negligent breach of contract by the insured.²⁸⁵ If the contract is cancelled by the insurer for the intentional breach of contract, the insured is not entitled to a return of the premium. The insured is not entitled to set up his own breach of contract to cancel the contract and to claim a return of the premium.²⁸⁶

7.6.6 In the Case Where No Insurable Interest Exists

In Australian law a distinction is drawn between indemnity and non-indemnity insurance. Although a life insurance contract is usually a non-indemnity insurance contract, it may also be contracted by way of indemnity. This will be the case where the parties contracted to limit the payment to be made by the insurer to one of indemnity only.²⁸⁷

Generally an illegal contract, including one of insurance, is void and any payment or premium under an illegal contract cannot be recovered.²⁸⁸ A distinction is drawn between, on the one hand, the situation where legislation forbids the conclusion of a contract, which if made, is illegal, and, on the other hand, the situation where the statute merely provides that such a contract is void. In the latter case payments or premiums are recoverable. The reasoning is that, while enforcement is precluded, there is no reason of public policy to justify a refusal by the courts to assist a party in reclaiming a sum that might otherwise unjustly be retained by the payee.²⁸⁹

As far as the requirement of an insurable interest is concerned, a distinction must be drawn between, on the one hand, the position under the common law and, on the other hand, the position as provided for by statute. A distinction should in this respect also be drawn between indemnity insurance, on the one hand, and non-

285 See Chantler 245.

286 See Wickens 52; Tarr, Liew & Holligan 160.

287 See *Havenga Life Insurance* 100-103 and the cases referred to there. The effect of s 19(5) of the Insurance Contracts Act on the distinction between indemnity and non-indemnity insurance contracts is uncertain. Section 19(5) provides that where a person has an insurable interest in the life of some other person, the amount of that interest is unlimited. It is argued that this provision has the effect of negating any indemnity principle that may be applied to a life insurance contract on the life of another: see *Havenga Life Insurance* 102-103. Section 52(1) of the Insurance Contracts Act furthermore provides that where a provision included in an insurance contract has the effect of excluding, restricting or modifying, to the prejudice of any other person than the insurer, the operation of the Act, the provision is void. Whether the cumulative effect of these sections is to preclude parties from concluding a life insurance contract by way of an indemnity remains to be seen: see *Havenga Life Insurance* 103.

288 See again par 7.6.3 above.

289 See Tarr, Liew & Holligan 369n198 and the authority referred to there. But see Vermeesch & Lindgren 969 who are of the opinion, without referring to any authority, that while the effecting of insurance without an insurable interest is not penalised, a claim under a resulting policy cannot be enforced and the premiums paid are not recoverable unless the proponent has been induced by the fraud of the insurer or its agent to effect the insurance.

indemnity insurance, on the other hand. For an indemnity insurance contract to be valid at common law, the insured must have an insurable interest, that is, some legal or equitable interest in the subject-matter of the insurance.²⁹⁰ The common law provides that a contract in terms of which the insured lacks the necessary insurable interest will be void. Without such interest the contract cannot be enforced.²⁹¹ Turner is of the opinion that in these circumstances the premium cannot be recovered by the insured in the absence of any wrongful conduct on the part of the insurer.²⁹² But in terms of the general rule, a distinction should be drawn between, on the one hand, the situation where the contract is illegal and consequently (also) void, and, on the other hand, the situation where the contract is merely void. Thus, if seen against the fact that the premium is returnable in all those instances where the contract is merely void for want of an insurable interest in terms of a statutory provision,²⁹³ it would appear that the premium is indeed returnable where the insured in terms of an indemnity contract lacks the necessary interest, including the case where there was not any wrongful conduct on the part of the insurer. In the case of non-indemnity contracts the position is different. In general, the same considerations will apply in Australian law as do in English law. A non-indemnity contract, for example, a life insurance contract, which is concluded without the required interest, is void and illegal. The insured will therefore, as a matter of general principle, not be entitled to a return of the premium. But if the insured can prove that he was induced by the fraudulent conduct of the insurer or its agent to believe that an interest existed, he will be entitled to a return of the premium.²⁹⁴

The concept of insurable interest is treated in some detail in Australian legislation. The requirement of such an interest is treated in separate statutes dealing with insurance in general, marine insurance, and life insurance. First, section 16(1) of the Insurance Contracts Act 1984 has done away with the requirement of an insurable interest in the case of all types of insurance contract to which the Act applies.²⁹⁵ However, this abolishment of the requirement of an insurable interest does not apply to "a contract that provides for the payment of money on the death of a person by accident or specified sickness".²⁹⁶ Section 17 of the Insurance Contracts Act 1984 provides that where the insured under a contract of general insurance suffers "a pecuniary or economic loss" by reason of destruction or damage to the subject matter of the con-

290 See Kelly & Ball *Legislation* 65-66; Vermeesch & Lindgren 968 et seq.

291 See Kelly & Ball *Legislation* 65-66.

292 See Turner 620.

293 This should further be seen against the fact that the common-law requirement of an insurable interest has been done away with by the Insurance Contracts Act 1984, with the exception of life insurance contracts.

294 See again ch 6 par 6.6.6 above. See also Havenga *Life Insurance* 108-109.

295 Section 16(1) provides that "[a] contract of general insurance is not void by reason only that the insured did not have, at the time when the contract was entered into, an interest in the subject-matter of the contract". From the wording of s 17 of the Insurance Contracts Act 1984 it is clear that it is also not required that the insured must have an insurable interest at the time of the loss to claim from the insurer under the policy.

296 See s 16(2). The reason for retaining the strict requirement of an insurable interest in the case of life insurance is to avoid creating an incentive for the insured to murder the life insured in order to obtain the benefits under the policy: see ALRC *Contracts* par 145; Kelly & Ball *Legislation* 66.

tract, the insurer is not relieved of liability by reason that at the time of the loss the insured did not have "an interest at law or in equity" in the property. In the case of general types of insurance, an insurable interest is therefore not a requirement for a valid insurance contract and the mere absence of an insurable interest will not necessarily entitle an insured to a return of the premium.²⁹⁷

Secondly, section 10 of the Marine Insurance Act 1909 renders void a marine insurance contract by way of gaming or wagering. A marine insurance contract is deemed to be a gaming or wagering contract²⁹⁸ where the insured has no insurable interest or where the contract is concluded on policy proof of interest ("ppi") terms.²⁹⁹ Section 11 of the Marine Insurance Act 1909 defines insurable interest as follows:

"Subject to the provisions of [the Marine Insurance Act 1909] every person has an insurable interest who is interested in a marine adventure. In particular, a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure, or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof."

Section 90(3)(c) of the Marine Insurance Act 1909 stipulates that where the insured has no insurable interest throughout the currency of the risk, the premium is returnable, except where the contract was effected by way of gaming or wagering.³⁰⁰ Thus, if the insured does not have an insurable interest in terms of a marine insurance contract, the contract will be void and the premium returnable.³⁰¹ As in the case of English law, there is general legislation in each Australian State, except Queensland, which render all contracts by way of gaming or wagering void.³⁰² This legislation applies equally to insurance contracts.³⁰³

297 The Australian Law Reform Commission recommended that the statutory requirement that an insured must have an insurable interest in the subject matter of the insurance should be abolished in its application to general insurance. It argued that sufficient protection against (intentional) destruction by the insured of the subject matter was already provided for by the indemnity principle and State gaming and wagering legislation: see ALRC *Contracts* par 117 149. See also Vermeesch & Lindgren 971-972; Turner 621.

298 For a list of the differences between insurance contracts and wagers, see Vermeesch & Lindgren 986.

299 In terms of a "ppi" clause, the insurer admits full interest of the insured in the object of the risk without further proof than the presentation of the policy. Thus, it is deemed that the insurer, through the issuance of the policy, has irrefutably acknowledged that the insured has an interest in the object of the risk. This will usually occur in the case of those types of insurable interest which, although they exist, are difficult to define or the extent of which is difficult to determine. An example of the former situation will be an insurance on anticipated "increased value" of cargo when the goods are lost en route, and it cannot be proved that they would have warranted the increase in value on arrival: see Brown *Dictionary* P16.

300 Section 90(3)(c) corresponds with s 84(3)(c) of the English Marine Insurance Act 1906: see again ch 6 par 6.6.6 above.

301 See also Vermeesch & Lindgren 971; Turner 657.

302 See Kelly & Ball *Principles* 28n50 and the different instruments of legislation referred to there. There is no federal legislation which deals with gaming or wagering.

303 See Kelly & Ball *Principles* 28.

Thirdly, an insurable interest is required by the Life Insurance Act 1945 and the Insurance Contracts Act 1984 for the conclusion of a valid life insurance contract. The Insurance Contracts Act 1984 repealed the Life Assurance Act 1774 but not the Life Insurance Act 1945.³⁰⁴ Section 4(1) of the Insurance Contracts Act 1984 specifically provides that it does not apply to an insurance contract which was entered into before the date of its commencement.³⁰⁵ Section 86 of the Life Insurance Act 1945 provides for categories of instances in which an insurable interest is deemed to exist.³⁰⁶ Section 19 of the Insurance Contracts Act 1984 is based on section 86 of the Life Insurance Act 1945 and confirms most of the provisions contained in section 86. However, section 19 differs from section 86 in certain respects, the most important of which are the following. First, section 19(1) specifically states the common-law rule that a person has an insurable interest in his own life. Secondly, section 19(3) provides that anyone who is likely to suffer a pecuniary or economic loss as a result of the death of someone has an insurable interest in that person.³⁰⁷ Section 18(1) of the Insurance Contracts Act 1984 provides that a life insurance contract which was concluded without the necessary insurable interest under the Insurance Contracts Act 1984 is only void and not also illegal.³⁰⁸ The main consequence of this is that payments made under such a contract are recoverable. The insurer can recover payments made to the insured, and the insured can recover the premiums paid to the insurer.³⁰⁹

7.6.7 In the Case Where There Has Been Over-Insurance

Before the statutory abolition of the requirement of an insurable interest in Australian law,³¹⁰ over-insurance was defined as the situation where the amount of the cover exceeds the value of the insured's interest in the object of the risk. It has been said that in the case of over-insurance the insurer obtains an artificially large premium in relation to the cover which it actually provides.³¹¹ As an insurable interest by the insured in the object of the risk is, as a matter of general principle,³¹² no longer a requirement for the conclusion of a valid insurance contract, the concept of "over-insurance" can no longer be defined in Australian law with reference to the concept of an "insurable interest". It would therefore appear that over-insurance must now be defined as the situation where the amount of the cover exceeds the maximum amount of damage which an insured may suffer as a result of the materialisation of the

304 See s 3(1) of the Insurance Contracts Act 1984.

305 The Insurance Contracts Act 1984 came into operation on 1 January 1986.

306 As to the effect of the Life Insurance Act 1945 on the requirement of an insurable interest, see Vermeesch & Lindgren 972; Turner 621-622.

307 Section 86(1)(f) of the Life Insurance Act 1945 gave an insurable interest to "a person who has a pecuniary interest in the duration of the life of another person". See also Kelly & Ball *Legislation* 70.

308 See also Kelly & Ball *Legislation* 68-69.

309 See Kelly & Ball *Legislation* 69.

310 See again par 7.6.6 above.

311 See ALRC *Contracts* par 276.

312 See again par 7.6.6 above for a discussion of those situations where an insurable interest is still required by law.

uncertain event. Over-insurance may arise through excessive cover through a single insurer, or it may arise from double insurance, when cover is arranged with more than one insurer and the aggregate of such cover exceeds the maximum possible loss which the insured may suffer as a result of the materialisation of the uncertain event.³¹³

Where the insured has over-insured by double insurance,³¹⁴ a proportionate part of the several premiums must be returned.³¹⁵ If the several policies were concluded at different times, and an earlier policy has at any time covered the entire risk, or if a claim has been paid on the policy in respect of the full sum insured in terms of that policy, no premium is returnable in respect of that policy.³¹⁶

Section 90(3)(e) of the Marine Insurance Act 1909 stipulates that where the insured has over-insured the object of the risk in terms of an unvalued policy, a proportionate part of the premium must be returned.³¹⁷

Where the over-insurance or double insurance has occurred with fraudulent intention by the insured to deceive the insurer(s), no premium is returnable.³¹⁸

7.6.8 In the Case Where the Policy Expressly Provides for the Return of the Premium

Insurance contracts often expressly provide for the return of the premium where a policy is cancelled by either the insurer or the insured. The recoverability of the premium will in these circumstances depend upon the provisions of the policy.³¹⁹ The contract usually provides that if the insurance is cancelled by the insurer, it is entitled to keep a pro-rata proportion of the premium.³²⁰

Section 64 of the Insurance Contracts Act 1984 provides that an insured under a life insurance contract³²¹ has a right to cancel the contract within fourteen days after he

313 See ALRC *Contracts* par 276. See also Vermeesch & Lindgren 991-992.

314 The concept of "double insurance" has been described as the situation "where, at the time of the loss, two legally enforceable policies cover the same interest in the same subject matter against the same risk": see Vermeesch & Lindgren 991.

315 Double insurance is often not concluded with fraudulent intentions by the insured. There may be good reasons for effecting double insurance. Eg, one policy may not cover the full range of risks: see Vermeesch & Lindgren 991.

316 See s 90(3)(f) of the Marine Insurance Act 1909. Section 90(3)(f) corresponds with s 84(3)(f) of the English Marine Insurance Act 1906.

317 Section 90(3)(e) corresponds with s 84(3)(e) of the English Marine Insurance Act 1906: see again ch 6 par 6.6.7 above.

318 See s 90(3)(f) of the Marine Insurance Act 1909.

319 See Tarr, Liew & Holligan 160.

320 See Vermeesch & Lindgren 998.

321 However, a blanket superannuation policy is excluded from the ambit of s 64. A superannuation policy, which is usually an endowment policy, is issued on the life of an employee but is owned by his employer or by trustees. Its purpose is to enable the employer to provide superannuation benefits, that is, benefits to which both employer and employee have contributed, for the employee on his retirement. The premiums in terms of a superannuation policy are usually shared by the employer and the employee: see Sutton 11; Collins 1161; *Oxford* 832.

receives the policy document, in which event the insurer must refund all amounts, including any premiums, paid to it under the contract.³²² This period of fourteen days serves as a "cooling-off" period.

Section 89 of the Marine Insurance Act 1909 expressly provides for the return of the premium in the case "where the policy contains a stipulation for the return of the premium, or a proportionate part thereof". In terms of this section, the parties are free to stipulate the different circumstances under which the premium will be returnable.³²³

In the case of a mutual insurance contract, the premium or contribution is usually levelled by the insurer without the intention of making a profit. The contract usually provides that after the deduction of business expenses, the excess premiums ("profits") will be divided among the policy-holders in the form of bonuses. Such distribution of bonuses amounts to a return of a portion of the premium.³²⁴

7.7 FORFEITURE OF THE PREMIUM

Generally the insured will forfeit the premium if he has acted fraudulently.³²⁵

A term is sometimes inserted in the policy to the effect that, if the policy is avoided by the insurer, the premiums already paid will be forfeited.³²⁶ As the parties are in principle entitled to determine the terms of their contract, the courts will usually enforce such a forfeiture clause.³²⁷ Contracts often provide that in the case of double insurance, no premiums will be returned.³²⁸

Generally, an insured may find relief against terms of insurance contracts which provide for the forfeiture of premiums, and which may be classified as harsh or unfair, either under the general principles of law, that is, the principles of equity, or under legislation such as the Contracts Review Act 1980 (NSW). But section 15 of the Insurance Contracts Act 1984 provides that any other *legislation* providing for such relief, including relief from the consequences of misrepresentation by the insured, does not apply to contracts within the scope of the Act. Section 7 of the Insurance Contracts Act 1984 provides for the preservation of the principles of general law. Thus, the relevant general principles of the law are currently the only measures of relief against an harsh or unfair contract which falls inside the scope of the Insurance Contracts Act 1984.³²⁹

322 See also Kelly & Ball *Legislation* 116; Vermeesch & Lindgren 1007; Turner 652-653.

323 Section 89 corresponds with s 83 of the English Marine Insurance Act 1906: see again ch 6 par 6.6.8 above.

324 See again par 7.2.2 above.

325 See again par 7.6.1 above.

326 See Wickens 52.

327 See Chantler 255-256. Such enforcement by the court will be in accordance with the principle of freedom of contract.

328 See Vermeesch & Lindgren 992.

329 See Vermeesch & Lindgren 999.

Similarly, equity will not grant relief against forfeiture of premiums because the retention of the premiums is in no sense a penalty, and the interests of the insurer must be considered, as well as those of the insured.³³⁰

7.8 FUNCTION AND INSURANCE OF THE PREMIUM

7.8.1 Function of the Premium

The premium is regarded as the counter-performance or *consideration* by the insured in return for the undertaking by the insurer *to bear the risk* of the materialisation of the uncertain event.³³¹ Some writers regard the premium as the *consideration* paid by the insured in return for the *promise* by the insurer to pay money or its equivalent to the insured on the occurrence of some uncertain event.³³² Other writers regard the premium as the counter-performance by the insured in return for the undertaking by the insurer to pay an amount in money or other benefit to the insured.³³³ Sutton provides what can perhaps be described as the most "inclusive" definition of the function of the premium. According to him the premium is "the consideration required from the assured in return for the obligation assumed by the insurer under the contract of insurance".³³⁴ This description of the contents of the insurer's counter-performance in return for the premium is wide enough to include both the undertaking by the insurer to bear the risk of the materialisation of the uncertain event, as well as the undertaking to indemnify the insured if and when such uncertain event materialises. In terms of a life insurance policy, the premium is described as the counter-performance of the insured in return for the *promise* by the insurer to pay a specified sum upon the death of a particular person. It is clear that the concepts of "consideration" and "promise" play an important role in the formulation of the function of the premium in Australian law. This is in accordance with the general requirement of the English law of contract that a promise must be supported by some consideration to be binding.³³⁵

From these apparently conflicting descriptions of the function of the premium, it is clear that the parameters of the function of the premium have not yet been demarcated. What is certain, however, is that the premium serves as counter-performance for the undertaking by the insurer to bear the risk or to pay the indemnity. This view of the function of the premium is reinforced by the primary purpose of insurance, namely to transfer the risk of loss from the insured to the insurer, in return for the payment of the premium.³³⁶

330 See Sutton 422.

331 See again par 7.2.2 above.

332 See Vermeesch & Lindgren 966; Turner 617.

333 See Kelly & Ball *Principles* 2.

334 See Sutton 419.

335 See again ch 6 par 6.2.1 and 6.2.2 above. See also par 7.2.2 above.

336 This view is further illustrated by the concept of reinsurance. Reinsurance, in short, is the spreading of the *risk* of the primary insurer with other (re-)insurers: see Turner 616. It is not the indemnity payable to the insured which is spread in the first place, but rather the risk of the materialisation of the uncertain event. The fact that the liability of the insurer to indemnify the insured is an accessory obligation to the obligation of bearing the risk is of secondary nature. The existence and validity of the insurance as well as the reinsurance contract do not depend on the actual indemnification of the insured by the insurer.

7.8.2 Insurance of the Premium

The question of whether the insured should be allowed to insure and recoup the premium, hinges, it is submitted, on the question of whether the insured has suffered a loss, and not whether the insured has an insurable interest in insuring the premium. An insured is not allowed to claim indemnity for a loss suffered as a result of his intentional conduct. It is submitted that the undertaking by the insured to pay the premium (and subsequently part with it) is the result of the insured's intentional and wilful conduct.³³⁷

Australian law acknowledges the practice of insuring the premium. For example, section 19 of the Marine Insurance Act 1909 provides that "[t]he assured has an insurable interest in the charges of any insurance which he may effect".³³⁸ Section 22(d) of the Marine Insurance Act 1909 provides that the insurable value of the subject matter of insurance includes "the amount at the risk of the assured when the policy attaches, plus the charges of insurance".³³⁹

However, in spite of this legislative authorisation for insuring the premium, the legal tenability of this practice has not yet come under scrutiny from either the Australian courts or writers. One must therefore assume that this practice is not regarded in Australian law as being in conflict with the general principles of insurance,³⁴⁰ or with the function of the premium.³⁴¹

7.9 CONCLUSION

A number of aspects concerning the premium were investigated by the Australian Law Reform Commission. The recommendations of the Commission were accepted and incorporated in the Insurance (Agents and Brokers) Act 1984 and the Insurance Contracts Act 1984. A number of other developments regarding the premium were also put into legislation. Some of these legislative measures concerning the premium merit a mention here.

337 Kelly & Ball *Principles* 23 correctly link the right of the insured to claim in terms of the contract with the question of whether the insured has suffered a loss. They argue as follows: "If the insured has no interest in the subject matter of the insurance, he suffers no loss if a specified event occurs. For that reason, he is not entitled to recover under the policy. The critical question is not whether the insured has an [insurable] interest but, rather, whether he has suffered a loss" (my insertion).

338 Section 19 corresponds with s 13 of the English Marine Insurance Act 1906: see again ch 6 par 6.8.2 above.

339 Section 22(d) corresponds with s 16(4) of the English Marine Insurance Act 1906.

340 In terms of the general principles of insurance the object of the risk, namely the premium in the case of the insurance of the premium, must be subject to damage, destruction or loss, which, in turn, depends on the question of whether or not an uncertain event will materialise. For a discussion of the concept of "uncertainty", which is one of the essential characteristics of an insurance contract, see Kelly & Ball *Principles* 4-5.

341 See again par 7.8.1 above.

As a starting point, it must be mentioned that the separation of the two above-mentioned Acts makes sense and is to be recommended should other jurisdictions embark on a similar program of legislative reform of their insurance laws.

It is acknowledged that the premium may take the form of something other than money. For example, in the case of mutual insurance, the premium may consist of the undertaking by the members to contribute to the losses of fellow members. These contributions may consist of labour or other goods.³⁴²

Strictly speaking, and if seen against the requirement that each promise must be supported by some consideration, Australian law is not supposed to acknowledge the concept of enforceable "free" insurance.³⁴³ However, an interesting example of statutory "free" insurance was encountered. Section 58(2) of the Insurance Contracts Act 1984 provides for the statutory renewal of an insurance contract where the insurer has failed to give the insured notice in writing of the expiry of "renewable insurance cover". Section 58(3)(b) provides that if the insurer has failed to comply with the requirements set in section 58(2), and if the insured has not obtained insurance cover from another insurer to replace that provided by the original contract, then the original contract is deemed to be renewed by operation of the law. Section 58(4)(a) provides that if no claim is made in terms of this statutorily renewed insurance contract, no premium will be payable. Section 58(4)(a) illustrates an important principle, namely that the undertaking by the insured to pay a premium is not given primarily in return for the actual indemnification of the insured by the insurer, but for the taking over of the risk by the insurer.³⁴⁴

The concept of a "reasonable premium" or "reasonable price" is acknowledged in legislation regarding insurance law and also in legislation pertaining to other types of contract, for example, the contract of sale.³⁴⁵

Both the Insurance (Agents and Brokers) Act 1984, by extending cover in the absence of notice of expiry or payment of an additional premium,³⁴⁶ and the Life Insurance Act 1945, by providing for non-forfeiture on non-payment of the premium,³⁴⁷ have made significant inroads into the general rule that a policy might lapse or be forfeited on the mere non-payment of the premium. These legislative provisions provide significant protection to the insured.³⁴⁸

342 See again par 7.2.2 above.

343 See again par 7.2.1 above.

344 See again par 7.2.2 above.

345 See again par 7.3.7 above.

346 See again par 7.4.2 above for a discussion of the relevant provisions of the Insurance Contracts Act 1984.

347 See again par 7.4.3 above for a discussion of the relevant provisions of the Life Insurance Act 1945.

348 See again par 7.4.1.

Section 28(3) of the Insurance Contracts Act 1984 provides an important further measure of protection to the insured. It provides that the insurer is not entitled to avoid the contract for innocent non-disclosure or misrepresentation by the insured, but that it may reduce the insured's claim by the amount of the insurer's loss. Guidelines on the calculation of this loss are also provided.³⁴⁹

The tripartite relationship between the broker, the insured and the insurer was affected drastically by the enactment of sections 11, 12 and 14 of the Insurance (Agents and Brokers) Act 1984. Section 11 provides that, as a matter of general principle, an insurer is responsible for the conduct of its agent. Section 12 provides that every insurance intermediary, except an insurance broker, is the agent of the insurer and not of the insured. Thus, an intermediary who is not registered under the Act in respect of the relevant class of business, is deemed to be the agent of the insurer in relation to any matter relating to insurance.³⁵⁰ Section 14 is central to the operation of the Insurance (Agents and Brokers) Act. Section 14 solves the problem which arose in the past where premiums paid by the insured to the broker were lost due to, say, the insolvency or the disappearance of the broker. In the absence of proof of an implied contractual term, or an industry usage or custom that payment by an insured to a broker should discharge the insured's liability to the insurer, it was decided in the past that such payment was not tantamount to payment to the insurer. Section 14 now provides that payment of the premium by the insured to the broker is regarded as a discharge of the insured's liability to the insurer.³⁵¹

But the provisions contained in section 14 of the Insurance (Agents and Brokers) Act 1984 are not yet watertight. There is nothing in section 14 or in any of its provisions which suggests that the broker is the agent of the insurer for purposes of entering into the contract. This fact creates a difficult and anomalous position. The only way an insured could currently be certain that his policy is renewed, would be by dealing direct with the insurer. An amendment of section 14 has been proposed in terms of which the payment of the premium by the insured to the broker would be regarded for all purposes, including the making of the contract, as payment to the insurer. Without such amendment the protection to the insured aimed at by the Act is not complete.³⁵²

Numerous other administrative aspects relating to the handling and investment of premiums by insurance intermediaries and brokers as well as the legal position in respect of the receipt and dealings with the premium by such intermediary or broker, are dealt with in the Insurance (Agents and Brokers) Act 1984.³⁵³

As regards the return of the premium in the case of a fraudulent misrepresentation or non-disclosure, it is of some interest to note that the writers on Australian

349 See again par 7.6.4 above.

350 See again par 7.5.3 above.

351 See again par 7.5.3 above.

352 See again par 7.5.3 above.

353 See again par 7.5.5 above.

insurance law are critical of the traditional distinction which is drawn in English law between the case where the insurer cancels the contract on the one hand, and where it repudiates a claim in terms of the contract because of the fraud of the insured on the other hand. The fact that this distinction is not followed without an amount of scepticism in the relevant materials, is perhaps an indication that the general principle of the law of contract may prevail. In terms of this principle, a party who has acted fraudulently is not entitled to a return of his performance under the contract. Whether this is indeed the position in Australian law, or whether the distinction will be drawn between the case where the insurer defends an action under the contract or where it claims avoidance when and if such a case serves before the courts, remains to be seen.³⁵⁴

Finally, although the practice of insuring the premium is acknowledged by legislation, its legal tenability has not yet been analysed by Australian writers.³⁵⁵

354 See again par 7.6.4 above.

355 See again par 7.8.2 above.

CHAPTER 8 SOUTH AFRICAN LAW¹

8.1 INTRODUCTION

The South African law of insurance is to be found in the general sources of South African law, namely, legislation, judicial precedent, customary law and Roman-Dutch law, being our common law.² English insurance law is sometimes held out as another source of South African insurance law.³ The most important legislative instrument for purposes of the insurance law is the Insurance Act.⁴ This Act, however, provides primarily for insurance-company law⁵ and has little impact upon the insurance-contract law.⁶ The concept of "insurance-contract law" comprises that part of the law which aims at regulating the contractual relationship between the insurer and the insured. The principles which govern the latter part of South African insurance law are therefore primarily to be found in Roman-Dutch law, decided cases of the Supreme Court of South Africa, and mercantile custom or commercial usage.⁷

Other branches of the South African law have to be taken in consideration when dealing with the insurance contract. The insurance contract is simply another type of contract.⁸ As a result, and in the absence of a contractual term to the contrary, all insurance contracts are governed in the first place by the general principles of the South African law of contract. To establish the legal position of the parties to an insurance contract, regard must therefore be had to other relevant branches of South African law, including the general principles of the law of contract.⁹

1 In writing this chapter, the following general works on South African insurance law were consulted: Reinecke & Van der Merwe; Gordon & Getz.

2 See Hahlo & Kahn 143 214 302-303; Van Niekerk *Decline* 1-2.

3 For a discussion of the early informal influence of English insurance law on its South African counterpart, see Van Niekerk *Decline* 2 et seq. For a discussion of the formal introduction of English insurance law into South African law by way of the enactment of the General Law Amendment Act 8 of 1879, see Van Niekerk *Decline* 15 et seq; Reinecke & Van der Merwe par 8. But the General Law Amendment Act has been repealed by s 1 of the Pre-Union Statute Law Revision Act 43 of 1977. Although the position is much more complex, it can be stated, by way of a broad generalisation, that English law is no longer binding authority in South Africa, but that it is an important secondary source of South African insurance law which may in appropriate circumstances be referred to. See in this regard, Reinecke & Van der Merwe par 9. It has also been decided in the decision in *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A) at 430G that "the South African law of insurance is governed mainly by Roman-Dutch law as our common law".

4 27 of 1943.

5 The concept "insurance-company law" entails that part of the law aiming at the control of insurers: see Gordon & Getz 11 et seq; Van Zyl "Langtermynversekering" 260 et seq.

6 The concept of "insurance-contract law" comprises that part of the law which aims at regulating the contractual relationship between the insurer and the insured.

7 See in general ch 1 par 1.2.1 above.

8 See Schulze "Agteruitbetaling" 215. See again ch 3 par 3.2 above for common-law authority for this statement.

9 See again ch 2 par 2.3 above.

8.2 THE PREMIUM AS AN ESSENTIAL FEATURE OF THE CONTRACT OF INSURANCE

Generally the definitions formulated for the insurance contract are not comprehensive enough either to include all the different forms of insurance, or to comply with all the distinguishable features of that contract. As a starting point, though, it is useful to note that our courts have referred with approval to the following definition of an insurance contract:

"A contract between an insurer ... and an insured ... whereby the insurer undertakes in return for the payment of a price or a premium to render to the insured a sum of money, or its equivalent, on the happening of a specified uncertain event in which the insured has some interest."¹⁰

As to the insurance premium in particular, the following definitions have been suggested:

"[T]he consideration required of the insured in return for which the insurer undertakes its obligations under the contract."¹¹

And:

"[T]he payment of a sum of money [by the insured in terms of an insurance contract]."¹²

But these two attempts do not provide an all-encompassing and contemporary definition of the concept of a "premium". In the first definition the reference to the concept of "consideration" smacks of the period before 1919 when the English-law concept

¹⁰ See *Lake v Reinsurance Corporation Ltd* 1967 (3) SA 124 (W) at 127A; *Sydmore Engineering Works v Fidelity Guards* 1972 (1) SA 478 (W) at 480F-G. See also *Iscor Pension Fund v Marine and Trade Insurance Co* 1961 (1) SA 178 (T) at 185H where the following definition of an insurance contract was provided: "[A]ny transaction which has for its object the recouping up to a specified amount of loss or damage sustained by a specific person as a result of a specific event." The new Draft Bill on Long-Term Insurance does not define the concept of "insurance" or "insurance contract", but it does define different types of long-term insurance policies, eg, "fund policy", "health policy", and "life policy". Eg, in terms of s 1(xvii) "life policy" means "a contract in terms of which a person, in return for a premium", undertakes to - (a) provide policy benefits upon, and solely for the reason of, the occurrence of a life event; or (b) pay an annuity for a period". These definitions of the different types of long-term policies are, unfortunately, not of much help in defining the concept or contract of insurance.

¹¹ See *Gordon & Getz* 192n1. See also *Lewis Ltd v Norwich Union Fire Insurance Co Ltd* 1916 AD 509 at 519. It has been decided that the undertaking by the insurer to indemnify the insured is the consideration or quid pro quo for the insured's undertaking to pay a premium: see *Van Straaten v Liebaert* 1907 EDC 231 at 232; *National Employers' Mutual General Insurance Association Ltd v Myerson* 1938 TPD 11 at 16; *British Oak Insurance Company Ltd v Atmore* 1939 TPD 9 at 15. But this description of the insurer's reciprocal undertaking is too general, and not without flaws: see further note 14 below.

¹² See *Reinecke & Van der Merwe* par 20. These two definitions clearly illustrate the reciprocal nature of an insurance contract.

of "consideration" was still regarded in South African law as a requirement for a valid contract.¹³ The second definition restricts itself to the possibility of the premium being a monetary obligation. It will be shown that the premium may also consist of something other than the payment of money.

The Insurance Act of 1943 does not attempt to define the insurance contract or the premium.¹⁴

It is doubtful whether it is possible to formulate an all-encompassing definition of the premium, especially in view of the vast array of different types of insurance contract. It is with this caveat in mind that the following definition of the premium is offered. The premium, which may take the form of money or something else, is the counter-performance by the insured in return for the insurer's undertaking to bear the risk of the materialisation of a specified uncertain event.¹⁵

From this definition it appears that the premium, being one of the essentials of the contract of insurance, touches upon at least three important aspects.

First, the *undertaking* by the insured to pay a premium is regarded as an essential of the contract of insurance.¹⁶ The *actual payment* of the premium is not necessary for the conclusion of a valid insurance contract.¹⁷ The undertaking to pay the premium need not be for a specific amount but the amount must be ascertainable for the contract not to be tainted with vagueness and consequently with voidness.¹⁸ The contract may, however, provide for the suspension or termination of cover in the case of non-

13 See par 8.6.5 note 412 below.

14 The new Draft Bill on Long-Term Insurance does, however, provide a definition of the concept of "premium". In terms of s 1(xxvi) "premium" means "the consideration given in return for an undertaking to provide policy benefits". "Policy benefits" means "one or more sums of money, services or other benefits, including an annuity". Although this attempt to give a wider meaning to the concept "premium" is a step in the right direction, it can be criticised. First, the term "consideration" is an unnecessary hark back to an English-law concept which does nothing more than creating the possibility of confusion. The word "consideration" should be replaced with the word "performance" or "counter-performance" depending which party's performance is compared with the other's. Secondly, the legislature must go all the way and expressly provides that the premium may consist of money or something other than money. The definition as it now stands is an half-hearted attempt to include other forms of premium than the payment of money.

15 This definition is also in accordance with that advanced in Roman-Dutch law: see again ch 3 par 3.2 above.

16 See *Iscor Pension Fund v Marine and Trade Insurance Co* supra at 182A, where this matter was mentioned, albeit by implication only.

17 In terms of the now repealed Compulsory Motor Vehicle Insurance Act 56 of 1972, the premium had to be paid before the insurance contract would take effect. For an example of this statutory exception to the rule that the premium is in principle payable in arrears, see *Santam Insurance Co Ltd v Tshiva Maxanti v Protea Assurance Co Ltd* 1979 (3) SA 73 (A) at 77H. See further par 8.3.2.1 below.

18 See Schulze "Premium" 103. See further par 8.3.7 below.

payment of the premium.¹⁹ Since the undertaking to pay a premium is an essential of the insurance contract, it is therefore a requirement before a contract can be treated as one of insurance.²⁰ In this regard one has to distinguish between, on the one hand, the general requirements for the formation of a valid (insurance) contract²¹ and, on the other hand, the essentials of a(n) (insurance) contract, that is, those characteristic features of a particular type of contract which distinguish it from other types of contract. The undertaking by the insured to pay a premium is an essential and not a general requirement for the validity of a contract of insurance. The absence of a particular essential (such as the undertaking to pay a premium) will merely disqualify the contract from being categorised as an insurance contract but will, as general rule, have no bearing on its validity.²² A contract which purports to be an insurance contract but which does not contain an undertaking by the "insured" to pay a premium, will not be invalid merely for that reason alone. At most it will not qualify as an insurance contract but may qualify as some other type of contract, for example, a contract of gratuitous indemnity.²³ Such a contract will, as general rule, not be governed by the Insurance Act. A further important consequence of the contract not being classified as one of insurance, will be that (all) the naturalia of insurance contracts, for example, the doctrine of subrogation²⁴ will not necessarily apply.²⁵

19 See *Govender v Standard Bank of South Africa Ltd* 1984 (4) SA 392 (C) at 399E-G where it was mentioned, by way of an example, that if the insurer cancelled the policy for non-payment of the premium, but subsequently (mistakenly) paid out on the policy, the policy nevertheless lapsed. The insurer would be able to claim the money from the insured with the *condictio indebiti* because its payment was undue.

20 See Reinecke & Van der Merwe par 21; Van Niekerk "Premium" 667-668.

21 Eg, consensus, capacity to act, possibility of performance.

22 See Schulze "Premium" 108-109. In some other jurisdictions the position is different. Eg, in English and Australian law the requirement of a (valuable) consideration, ie, the premium in the case of the insurance contract, is a general requirement for the validity of the contract. In the absence of such consideration the contract will be void: see again ch 6 par 6.2.2 and ch 7 par 7.2.2 above.

23 Those cases which are held out as examples of "free" insurance, are neither "free" nor "insurance" in the true sense of these words, since the premium is already included in the air or train ticket (in the case of "coupon insurance"), or in the price of the newspaper or magazine (in the case of "newspaper insurance"): see Schulze "Agteruitbetaling" 217; Gordon & Getz 475-476. See also Van Niekerk & Havenga 372-373 where a contract in terms of which an insurance company provides insurance cover free of charge, was considered to be a valid and enforceable contract of donation. For an example of such an "insurance" contract, see the decision in *Aegis Insurance Co Ltd v Smith en 'n ander* (unreported case no 12380/89 (C) 22 September 1993). For the facts and decision of the Court in the decision in *Aegis Insurance*, see in general Schulze "Premium" 106 et seq. Reinecke & Van der Merwe par 21 state that "[i]t will therefore not be insurance if an insurer extends cover free of charge for example in favour of a certain class of persons. This does not mean that such an undertaking will not be enforceable as a contract of a different kind if it meets all the requirements laid down by law for the validity of a contract."

24 But see Reinecke & Van der Merwe par 222 who hint that the principle of subrogation applies possibly to all contracts of indemnity and not only to insurance contracts.

25 See Schulze "Premium" 109.

There is legislative recognition of the fact that the *undertaking* to pay a premium is an essential of the insurance contract.²⁶

It would therefore appear that the *parties* to an insurance contract, by contrast with the *legislature*, may not *agree* that one or more of the essentials of an insurance contract will not apply to their contract, but that it will nevertheless be regarded as insurance. A distinction should be drawn between the situation, on the one hand, where the undertaking to pay a premium is an *essential* of the insurance contract and the situation on the other hand, where it is regarded as a *requirement for the validity* of the insurance contract. In our law the undertaking to pay a premium is an essential and not a general requirement for the validity of the insurance contract. It is consequently possible for the parties to waive the essential of the payment of the premium and for the contract to be regarded as a valid and enforceable contract. However, their contract will not be classified by the law as one of insurance. Thus, in the case where the undertaking to pay a premium is an essential of the contract, the parties may agree to exclude such essential from their contract but it will not be without effect.²⁷

Secondly, from the definition of the premium it appears that the premium may take the form of something other than money.²⁸ Reinecke and Van der Merwe are of the opinion that the premium denotes an obligation to pay money.²⁹ This, they argue, can be deduced from the definition of the insurance contract as quoted with approval in

26 Section 51(3) of the Insurance Act provides that in the case of a domestic life insurance policy the insurer is not entitled to assume an obligation, unless it has either actually received one-twelfth of the first year's premium, or provided that such portion of the premium *will be paid* by stop order, credit card, debit order or other instrument. Compliance with s 51(3) is not, however, a requirement for a valid insurance contract. Non-compliance with s 51(3) will not affect the validity of the insurance contract but will constitute an offence by the insurer: see s 68 of the Insurance Act. The provisions of s 51(3) are to a large extent repeated in s 53 of the Draft Bill on Long-Term Insurance. Section 53 of the Draft Bill on Long-Term Insurance provides further that the insurer is not entitled to undertake to provide policy benefits unless it has received payment of the premium where there is to be only one premium, or where there are to be two or more premium payments, the first of those payments. Section 62 of the Draft Bill on Long-Term Insurance is the equivalent of s 68 of the Insurance Act.

27 However, if seen against the fact that the requirement of an undertaking to pay a premium (consideration) is regarded in some other jurisdictions, notably in England and Australia, as a requirement for the contract (promise) to be binding and enforceable, it would appear that the parties there are not allowed to waive one or more of the general requirements for the validity of the (insurance) contract. If the parties agree that no premium will be payable no contract will come into being and the purported "insurance contract" will be invalid and unenforceable because of a lack of consideration: see again ch 6 par 6.2.2 above in respect of English law; and ch 7 par 7.2.2 above in respect of Australian law. However, if the legislature provides that one of the general requirements for the validity of a particular type of contract will not apply to that contract, the absence of such undertaking will not effect the validity and enforceability of the contract: see again s 58 of the Australian Insurance Contracts Act 1984 for an example in terms of which the legislature has waived the requirement of an undertaking by the insured to pay a premium.

28 See, eg, *May v Parity Insurance Co Ltd* 1967 (1) SA 644 (D) at 646C where Milne JP referred to an example from the English case law where the services rendered by an employee was regarded as the premium.

29 See Reinecke & Van der Merwe par 20n4.

the decision in *Lake v Reinsurance Corporation Ltd.*³⁰ The premium may, however, consist in the liability of members of a mutual society to contribute to the losses of other members.³¹ This liability of members of a mutual society may consist of money or be in kind. Where the members of the mutual society are, for example, a group of farmers, they may undertake to share a pro rata portion of their crops with a fellow-member whose crop has been destroyed. Reinecke and Van der Merwe counter this possibility by arguing that such an undertaking still sounds in money although the obligation is subject to a condition, and the final amount can only be calculated when the period of insurance expires.³² If Reinecke and Van der Merwe's argument entails that an undertaking to contribute to the losses of other members in terms of a mutual insurance contract would still sound in money, that is, have a monetary value, their argument is, of course, correct. It is true that most (if not all types of) contributions in terms of a mutual insurance contract do have a monetary value, that is, a value which can be expressed in a currency. But if their argument entails that the premium can never consist of something other than the payment of a sum of money, they are wrong. Examples from Roman-Dutch law³³ as well as South African indigenous law³⁴ illustrate that the premium or contribution in terms of a mutual insurance contract may consist of something other than a sum of money. For example, the undertaking by members of a mutual insurance contract to assist each other to repair the house of a member which has been damaged, does not consist of a sum of money, but of labour.

Where the premium consists of money, incomplete or defective performance by the insured usually does not pose any problems because of the generic nature of money.³⁵ Defective or incomplete performance where the premium consists of money is therefore rectified simply by a claim by the insurer that the insured must pay the full amount. However, where the premium takes the form of something other than money, the fact that the performance of the insured (to deliver the non-monetary premium) is incomplete or defective, may result in the insurer being satisfied with a supplementary performance. The general principles of the law of contract will govern the situation where the insured has rendered incomplete or defective performance. These principles are as follows. As a starting point it is necessary to note that incomplete or defective performance constitutes, as a matter of general principle, breach of contract in the form of positive malperformance.³⁶ Where incomplete or defective performance is the result of *vis maior*, that is, where neither party is at fault, the basic rule is that the obligations

30 *Supra.*

31 Gordon & Getz 192n1.

32 See Reinecke & Van der Merwe par 22n1. But it is clear that it is possible for the premium to consist of something other than a sum of money also in the case of insurance for profit. Eg, if a firm of attorneys receives free insurance cover in exchange for legal services to the insurer, the premium consists of something other than the payment of money (namely, legal services). Similarly, if an employee of an insurance company receives free insurance cover from his employer as part of his salary, the premium consists of something other than money (namely, services rendered).

33 See again ch 3 par 3.2 above.

34 See ch 9 par 9.2 below.

35 See Joubert *Contract* 183-184; Van der Merwe et al 194 et seq 360-361.

36 See Joubert *Contract* 207-208; Van der Merwe et al 250 et seq.

of the parties are extinguished.³⁷ Where the performance of the insured is incomplete or defective owing to the fault of the insurer, for example, where the insurer prevents the insured from performing properly, the insured will have an action for what he is due under the contract less any savings brought about by the fact that he has not performed fully. For example, where the members of a mutual insurance contract undertakes to repair the house of a member which has been damaged, and the owner of the house refuses the other members access to the site after the house is half repaired. The members (that is, the insured) due to perform will have an action under the contract less any savings brought about by the fact that they have not performed fully (for example, less the cost of materials not supplied).³⁸ Where the insured, owing to his own fault, no longer has it in his power to perform his obligation (premium) in full but is in a position to give incomplete performance, the insurer is entitled to demand such performance and retains his ordinary remedies in regard to that part of the performance which is incomplete or defective. The insurer's ordinary remedy is damages and the insured may be required to supplement his defective or incomplete performance by payment in money.³⁹ A distinction must also be drawn between seriously or substantial defective or incomplete performance, on the one hand, and defective or incomplete performance which is not substantially defective or incomplete, on the other hand. Generally the insurer may reject the performance (that is, the premium) if it is seriously or substantially defective or incomplete.⁴⁰ If the performance (the premium) is not substantially defective, the insurer (as creditor) will have to retain the defective or incomplete performance (the premium) and claim damages to supplement the defect.⁴¹

Thirdly, the insurance contract is a consensual contract. This entails that the sole basis for the binding effect of the obligations of the insured and the insurer is the agreement between them.⁴² Generally the mere acceptance of the premium by the insurer

37 See Kerr *Contract* 403-535. The discussion here concerns only the consequences of incomplete or defective performance. In the case of the total impossibility of performance (ie, the premium, where it takes the form of something other than money) the ordinary rules of the law of contract will apply. See in this regard Joubert *Contract* 124 et seq; Kerr *Contract* 403 et seq; Christie 107-563 et seq; Van der Merwe et al 135 et seq.

38 See Kerr *Contract* 535.

39 See Kerr *Contract* 535-536.

40 The test whether the insurer (as creditor) may reject the performance and claim proper performance is the same as that which is used to determine whether a creditor may cancel the contract on the ground of positive malperformance: see Van der Merwe et al 254n104. The creditor may cancel the contract on the ground of malperformance if the breach of contract is *serious* enough to justify cancellation. The test for *seriousness* has been expressed in a number of ways, eg, that the breach must go to the root of the contract, or that it must affect a vital part or term of the contract. In the end the question whether a breach is serious enough to warrant cancellation, is a matter of judicial discretion. Put differently, is the breach so serious that it would not be reasonable to expect that the insurer (as creditor) should retain the defective performance and be satisfied with damages to supplement the malperformance: see Joubert *Contract* 208n53; Van der Merwe et al 255.

41 See Van der Merwe et al 254.

42 See Reinecke "Lake" 76-77; Reinecke & Van der Merwe par 54-92. See also Zimmermann *Obligations* 230 et seq; Van der Merwe et al 13-14 for a discussion of the nature of consensual contracts.

will not result in the formation of an insurance contract, because the insurance contract is a consensual contract. Neither will the mere acceptance of the premium by the insurer be regarded as a waiver of the insurer's right to resile from the contract.⁴³ However, in appropriate circumstances the acceptance of the premium by the insurer may amount to an acceptance, by it, of the insured's offer to conclude an insurance contract. A continued acceptance of premiums after the insurer has conveyed its intention to cancel the contract to the insured, may again be indicative of the conclusion of a "new" insurance contract. Whether such conduct amounts to a fresh meeting and concurrence of the parties' minds will depend on the facts of each case.⁴⁴ An inference of a waiver may be drawn in certain circumstances from an acceptance of a premium. Such inference will only be permissible in regard to defences to claims in terms of the contract in respect of which the premium was in fact paid.⁴⁵ The insurer is usually not entitled to enforce the renewal of the contract upon the insured by suing him for the renewal premium. Likewise, the insured is usually not entitled to sue the insurer to compel it to accept the premium to bring about the renewal of the contract.⁴⁶

Until the uncertain event has occurred, the claim of the insured in terms of the insurance contract is a contingent one. In the case of the insurance company's being placed under liquidation, the trustee or liquidator, by repaying the premium or a portion of it, will not be able to avoid the liability towards the insured. The position will be different where the policy provides for such a course by the trustee or liquidator.⁴⁷

The insurance contract is further also a reciprocal contract.⁴⁸ A reciprocal contract is one in terms of which obligations are created one in exchange for the other.

43 See *General Accident, Fire and Life Assurance Co Ltd v National British and Irish Millers' Insurance Co Ltd* 1914 CPD 586 at 596; *Licences and General Insurance Company v Bassano* 1936 CPD 179 at 187; *Southern Insurance Association Ltd v Cooper* 1954 (2) SA 354 (A) at 362A.

44 See *Pienaar v Southern Insurance Association Ltd* 1983 (1) SA 917 at 924G-H and 925D-H. In *AJ Shepard (Edms) Bpk v Santam Versekeringsmaatskappy Bpk* 1985 (1) SA 399 (A) at 417E-H and 418D-E it was decided that the mere fact that the insurer presented a debit order for payment after it became entitled to cancel the contract, was not necessarily an indication of a waiver on the part of the insurer of its right to cancel.

45 See *Southern Insurance Association Ltd v Cooper* supra at 361G-H.

46 See *National Employers' Mutual General Insurance Association Ltd v Myerson* supra at 16, but see *British Oak Insurance Co v Atmore* 1939 supra at 16 where the decision in *Myerson* was distinguished. See also *Whyte's Estate v Dominion Insurance Company of South Africa Ltd* 1945 TPD 382 at 401; *Steyns' Estate v South African Mutual Life Assurance Society* 1948 (1) SA 359 (C) at 364.

47 See *Ex parte Liquidators of Parity Insurance Co Ltd* 1966 (1) SA 463 (W) at 471D-F. For a further discussion of and reference to the principle of contingency, see *Gillis-Mason Construction Co (Pty) Ltd v Overvaal Crushers (Pty) Ltd* 1971 (1) SA 524 (T) at 527A-H.

48 See Reinecke "Lake" 77; Reinecke & Van der Merwe par 23. However, the statement that an insurance contract is a reciprocal contract, must be qualified in so far as life insurance contracts are concerned. It has been argued that the normal life insurance contract is a continuous one, subject to defeasance on non-payment of any premium. Moreover, in so far as a life insurance is executory, so it is argued, it is unilateral. (The term unilateral is used to describe a contract in terms of which only one of the parties to the contract is required to perform. The term does not necessarily imply that such a contract is a unilateral legal act. A bilateral or multilateral contract, which is the opposite of a unilateral contract, is a contract in terms of which more than one party is required to perform something: see Van der Merwe et al 8-9.) The normal life insurance contract is unilateral in the sense that only the insurer is subject to an obligation throughout the duration of the contract. It must pay on the maturity of the policy or the materialisation of the

Reciprocal contracts are governed by the principle of reciprocity. This principle entails that the performance or tender of performance by the plaintiff is a requirement for the enforceability of his claim for counter-performance.⁴⁹ In the insurance contract the obligation of the insured to pay the premium is created in exchange for the obligation of the insurer.

At this stage it is necessary to establish what exactly the insurer undertakes to perform in return for the undertaking by the insured to pay the premium. Three main arguments may be advanced to explain the legal nature of the insurer's performance in terms of the insurance contract. First, one may argue that the insurer's performance consists of an unconditional undertaking to do something (that is, *do ut facias*). This refers to the insurer's unconditional undertaking to bear the risk of the materialisation of the uncertain event. Secondly, one may argue that the insurer's performance consists of a conditional undertaking to deliver something (that is, *do ut des*).⁵⁰ This refers to the insurer's conditional undertaking to indemnify the insured.⁵¹ Usually the insurer undertakes to indemnify the insured by payment in money.⁵² Thirdly, one may argue that the insurer's performance consists of the *actual* indemnification of the insured. The third argument may be rejected outright. If it is argued that the premium is paid by the insured solely in return for the actual indemnification by the insurer, it would entail that

uncertain event, ie, at the death of the life insured. The insured does not normally undertake to pay future premiums. He agrees that, if he fails to pay the premium, his rights under the policy will be forfeited or reduced: see Gordon & Getz 326. If it is assumed for the moment that life insurance contracts are indeed unilateral in the sense that the insured is usually not under an obligation to pay any premiums, then such contracts are not reciprocal. Only bilateral contracts are reciprocal. But it is conceivable for the parties to vary the above rules by agreement. Eg, a life policy could be drafted in an explicitly periodic form and renewable in its entirety from year to year. Such a policy would constitute a cumulation of term insurances and if each term were a year, such a life policy would be no different as far as its duration is concerned, than, eg, the usual property insurance policy: see Gordon & Getz 326. Furthermore, s 1(xxix) of the Insurance Act warrants an agreement which binds the insured to continue paying the premiums under a life insurance contract. This section provides that "[in terms of a life policy] the insurer assumes (in return for the payment or the promise of the payment of a sum or sums of money) an obligation to pay to a particular person certain sums of money". Any reference in the remainder of this chapter with regard to the insured's obligation to pay the premium, or the insurer's right to claim the premium, should be seen as a reference to an obligation or right in terms of a (true) reciprocal insurance contract.

49 See Kerr *Contract* 533; Christie 503 et seq; Van der Merwe et al 280.

50 It is, of course, possible for the policy to provide that the insurer may reinstate the object of the risk instead of indemnifying the insured in money: see Reinecke & Van der Merwe par 262. Then the insurer's performance will consist of a conditional undertaking to do something. For purposes of the remainder of this discussion this possibility will be ignored.

51 See Van der Merwe et al 2. The question whether the insurer's performance consists of an undertaking to do something, or of an undertaking to deliver something, may be relevant in the event of the supervening impossibility of the insurer's performance.

52 See Reinecke & Van der Merwe par 24. Such indemnification is also referred to as indirect compensation. The terms "direct compensation" and "indirect compensation" are used to indicate that in certain cases (ie, of direct compensation) the compensation results in a restoration of the status quo ante as nearly as possible, whereas in other cases (ie, of indirect compensation) a further step is necessary, eg, replacement or rebuilding, depending on the circumstances: see Reinecke & Van der Merwe par 24n1.

the insurer has failed to perform if there were no loss and consequently no need for an indemnification (performance) by the insurer. Consequently, if the insurer has failed to perform, the insured is in principle entitled to a return of the premium. Such a result would not only be in conflict with the legal principles covering insurance contracts⁵³ but also devoid of reality. The viability of the first two arguments will now be considered.

It is submitted that the insurer's performance consists of the unconditional undertaking to bear the risk of the materialisation of the uncertain event, *as well as* the conditional undertaking to indemnify the insured. These two undertakings by the insurer are inter-twined to such an extent that they should be regarded as two sides of the same coin, in this case, the insurer's performance. The undertaking by the insurer to indemnify the insured is a direct consequence of its undertaking to bear the risk. Without the undertaking to indemnify, the undertaking to bear the risk is ineffective. The undertaking to bear the risk, in turn, implies the undertaking to indemnify. Thus, the undertaking to indemnify is an implied and indispensable consequence of the insurer's undertaking to bear the risk. In this regard Reinecke and Van der Merwe argue that

"this, however, does not mean that the insurer's performance is in substance an undertaking to carry the risk (that is, an *obligatio faciendi*) as has been suggested. In fact the insurer's performance is normally in the nature of an undertaking to make payment of a sum of money subject to the fulfilment of a suspensive condition. The result that the insurer bears the risk is merely an incidence of the effect of a suspensive condition."⁵⁴

It is conceded that the insurance contract usually does not expressly provide that the insurer will bear the risk but, rather, that the insurer will indemnify the insured. However, it is submitted that the undertaking to indemnify is an incidence of the tacit undertaking by the insurer to bear the risk. The reason why the insurer has to indemnify the insured is precisely because it bore the latter's risk. If it did not bear the risk, it would never have had to indemnify the latter in terms of the insurance contract. The fact that the insurer's performance consists of the undertaking to bear the risk as well as the undertaking to indemnify the insured, was confirmed in *Lake and others v Reinsurance Corporation Ltd and others*⁵⁵ where it was stated that

"[the] price or premium is payable to the insurer *not merely* for his going on risk *but also* because it is expected he will pay the unforeseen loss if it occurs" (my italics).

Thus, the undertaking by the insured to pay the premium is given in exchange for the insurer's undertaking to bear the risk of the materialisation of the uncertain event

53 Reinecke & Van der Merwe par 24 describe this fact as follows: "[O]nce the term of the contract has expired, the contract comes to a natural end although the insurer has not paid a cent. Therefore if the payment has not already been paid, the insurer will be entitled to claim payment of it and if the insured becomes insolvent, his trustee will not be able to cancel the contract merely on the ground that the insurer has not paid anything."

54 See Reinecke & Van der Merwe par 24.

55 *Supra* at 128H.

(which inevitably includes the undertaking to indemnify the insured⁵⁶) and not only for the actual indemnification of the insured by the insurer upon the materialisation of the risk.⁵⁷ This fact underpins the right of the insurer to claim (or retain) the premium where the risk does not materialise. The right of the insurer to claim (or retain) the premium does therefore not hinge on the question of whether the risk has materialised, or whether it has indemnified the insured.⁵⁸ It has been said that a contract of insurance, the premium of which has already been paid, is an executory contract because the insurer may still be obliged to indemnify the insured on the happening of an uncertain event.⁵⁹ But this statement must be qualified. Although it is correct to argue that the premium is paid with a view to the actual indemnification by the insurer (if and when the risk materialises), it is incorrect to regard the insurer's undertaking to indemnify the insured as the only counter-performance for the undertaking by the insured to pay the premium. The insurer's primary obligation is its undertaking to bear the risk, an inevitable consequence of which is that it also undertakes to compensate the insured in the case of the materialisation of that risk, provided that the other requirements for an indemnification have been met.⁶⁰

If it is then taken that the insurer's performance consists of an unconditional undertaking to bear the risk of the materialisation of the uncertain event, coupled with the conditional undertaking to indemnify, the insurance contract will be a continuous contract for a determined or determinable period of time. The insurance contract is generally regarded as a continuous contract for a certain period.⁶¹ This entails, in turn, that the performance of the insurer is a continuous performance. The argument that once the insurer has assumed the risk under the contract its obligation may be regarded as a completed and not an executory (continuous) obligation was firmly rejected in *Lake and others v Reinsurance Corporation Ltd and others*⁶² where it was stated that

56 See again the definition of the contract of insurance in the text at note 10 above.

57 See also Reinecke & Van der Merwe par 24 where they state that "[i]f this is taken into consideration a contract of insurance is synallagmatic because the insurer undertakes to render its performance in exchange for an undertaking to pay a premium and not because the insurer will in fact perform something in return".

58 See again the definition of the insurance contract as formulated by Grotius *Inleidinge* 3 24 1. See ch 3 par 3.2 above. See also Reinecke & Van der Merwe par 24.

59 See *Lake and others v Reinsurance Corporation Ltd and others* supra at 128H where the Court reasoned that "insurance is a contract whereby in consideration for a price, i.e. the premium, the insurer undertakes to make good the losses from the unforeseen danger. This price or premium is payable to the insurer not merely for his going on risk but also because it is expected he will pay the unforeseen loss if it occurs. I can see no basis for saying that payment for the loss can be demanded without paying or tendering to pay the premium." See also Reinecke "Lake" 76.

60 The mere fact that the undertaking to pay the premium is given, or the fact that the premium is indeed paid, does not necessarily entitle the insured to an indemnification. If the contract is cancelled by the insurer, eg, for a fraudulent misrepresentation by the insured, the latter is, as a matter of general principle, not entitled to an indemnification.

61 See Reinecke & Van der Merwe par 264. See again note 48 above and the remarks concerning the duration of a life insurance contract.

62 Supra at 129B-C.

"[the Court in *Ex parte Liquidators of Parity Insurance Co* 1966 (1) SA 463 (W) went] too far when [it] said that once the insurer has gone on risk his obligations are no longer executory. It may well be that, whilst the obligation to pay a sum in the event of loss remains, the contract from that point alone remains executory."⁶³

A continuous performance continues for the duration of the contract, for example, the undertaking by the lessor to allow the lessee to use and enjoy a certain thing for a certain time, or the undertaking by the insurer to bear the risk and, if necessary, to indemnify the insured upon the materialisation of such risk. A non-continuous performance, in contrast, consists of a single performance, for example, the payment of the purchase price by the purchaser in terms of a contract of sale, or the payment of the premium by the insured.

The fact that the insurance contract is a continuous contract may have a bearing on the divisibility of the contract. Generally it may be stated that a contract which involves separate or divisible performances may be divided into several constituent parts, each comprising its own obligation, and where applicable, counter-obligation.⁶⁴ In the case of an insurance contract it is possible for the parties to conclude several independent though related contracts and to record the whole group of contracts in a single document or policy.⁶⁵ For example, the insurer may agree to insure the house of the insured against the risk of destruction by fire in return for the payment of a premium. If the contract is concluded for a period of twelve months and the premium is payable in twelve equal instalments, the contract may be regarded as divisible in twelve separate parts (contracts). But, the policy may provide that the contracts should be regarded as a single contract and the fact that the premium is payable in twelve monthly instalments is merely for the convenience of the insured. In such a case the contract will be treated as a single and indivisible contract. Take another example. If a shipowner insures his ship for a specified voyage "at and from Cape Town to London", the contract will be indivisible even if the premium is payable in instalments. In the final instance the question whether the contract is divisible depends on the intention of the parties.⁶⁶ The question whether more than one insurance contract has been concluded may be of importance for a number of reasons. For example, if a misrepresentation or a breach of contract has been committed by the insured (or by the insurer) and the innocent party wishes to cancel the contract,⁶⁷ or in the case of the return of the premium.⁶⁸ The divisibility of an insurance contract is also important in various other areas of the law of contract. For example, it may play a role when the requirements for the validity of a contract are applied, when supervening impossibility occurs, or in relation to the principle of reciprocity.⁶⁹

63 See also Reinecke "Lake" 76-77.

64 See Van der Merwe et al 226.

65 See Reinecke & Van der Merwe par 50.

66 See Van der Merwe et al 228-229.

67 See Reinecke & Van der Merwe par 50. Where the contract is divisible in a number of separate contracts, cancellation may relate to some of the contracts and not to others: see Van der Merwe et al 292.

68 See further par 8.6 below.

69 See Christie 638; Van der Merwe et al 226-227.

The *divisibility* of a *policy* into several contracts must be distinguished from the *divisibility* of the *performances* of the contracting parties in terms of a single contract. The question whether a performance is divisible depends in the first place on the nature of the performance. In certain circumstances the intention of the parties to the contract may determine whether the performance is divisible. Divisibility of performance is relevant to joint relationships, cession of rights, the proper remedy for breach of contract, and the discharge of a contract.⁷⁰ Generally the divisibility of the performance of the one party does not depend on the divisibility of any counter-performance.⁷¹ The fact that a performance is divisible has various consequences. Whether or not a reciprocal contract, for example, an insurance contract, is divisible, depends on how many different "sets" of independent reciprocal rights (and duties) are created by the contract. A reciprocal contract can be divisible only if both the performance and the counter-performance are divisible.⁷² This entails, for example, that the performance of the insured (that is, the payment of the premium) will only be divisible if the counter-performance of the insurer is also divisible. Whether the performance of the insurer is divisible will depend on the circumstances of each case, including the intention of the parties.

8.3 THE PAYMENT OF THE PREMIUM

8.3.1 Introduction

The law relating to the actual payment of the premium, as well as all related aspects, are generally governed either by the general principles of the law of contract, or by the terms of the policy, or by legislation, or by trade usages.

8.3.2 The Time of Payment of the Premium

8.3.2.1 *Where the Premium Is Payable in Arrears*

When one considers the time of payment of the premium, it is important to bear in mind that the insurance contract is simply another type of contract. The general principles of the law of contract therefore also apply here. In terms of the general principle regarding the payment of debts like rent in terms of a contract of lease (and the purchase price in terms of a contract of sale), payment of the lease is due only after the lease has come to an end. In the absence of a contrary agreement by the parties on the time of payment, payment is therefore to take place *postnumerando*, that is, after the lease, or a period of payment which has been set by the parties, comes to an end.⁷³ In the case of the contract of lease, for example, the general principle dictates

70 See Christie 563-564; Van der Merwe et al 227.

71 See Van der Merwe et al 228.

72 See Van der Merwe et al 228.

73 See again ch 2 par 2.3.3.3 above. See also Van Jaarsveld & Oosthuizen 456n173-174 and the authorities cited there; Zimmermann *Obligations* 374-375.

that in the absence of an agreement to the contrary, rent is payable on the expiration of the lease or, if the lease is periodic, on the expiration of each period, that is, at the end of the day, week, or month, as the case may be.⁷⁴

In terms of Roman-Dutch insurance law the premium was due only after the period of cover had lapsed.⁷⁵ As a result, and in the (rare) absence⁷⁶ of a contractual term providing otherwise,⁷⁷ the premium will be due only after the period of insurance cover has lapsed.⁷⁸ If the contract does not provide for the pre-payment of the premium for the contract to become effective, insurance cover will usually⁷⁹ take effect as soon as the parties have reached consensus.⁸⁰

The insured must, in principle, first pay the premium before he will be able to claim in terms of the policy.⁸¹ This requirement hinges on the application of the *exceptio non adimpleti contractus* (that is, the defendant has a right to withhold performance in order to secure counter-performance by the plaintiff).⁸² If the premium is payable in arrears and the risk materialises before the due date for the payment of the premium, it would appear that the insurer will not be able to rely on the *exceptio non adimpleti contractus*, as the performance (premium) of the insured is not yet due. One has to concede, however, that, if seen against the dilatory nature of legal procedure, this possibility is of little practical significance. The insurer will in most, if not all, cases where the premium is not yet due, be able to delay payment until the due date of the premium.

The insured further has a right to claim the policy document from the insurer or the latter's agent only if he has tendered the premium.⁸³

74 See again ch 2 par 2.3.3.2 above.

75 See again ch 3 par 3.3.2 above. See also *SA Eagle Versekeringsmaatskappy Bpk v Steyn* 1991 (4) SA 841 (A) at 846D-E where Botha JA referred to the fact that although a clause which provides for the payment of the premium in arrears is unusual, it is nevertheless in accordance with the common-law principle.

76 In terms of the general principle regarding the payment of the premium, it is payable in arrears. But this general rule is usually contradicted by a contractual term. Insurance policies usually provide that the premium is payable in advance. See further par 8.3.2.2 below.

77 See *African Guarantee & Indemnity Co Ltd v Couldridge* 1922 CPD 2 at 5 for an example of an insurance contract containing a condition in terms of which the insurance cover was expressly made conditional upon the prior payment of the premium. When the policy was executed the premium had not yet been paid. It was held (at 6-7) that the cover took effect only when the premium was paid. See also *National Employers' Mutual General Insurance Association Ltd v Myerson* supra at 15.

78 See *Hollet v Nisbet & Dickson* (1829) 1 Menz 391 at 394-395.

79 Cover in terms of an insurance contract may (irrespective of whether or not the premium is paid) be postponed or made conditional, eg, "insurance cover will commence only if and when the insured ship goes on a voyage".

80 See *Kahn v African Life Assurance Society Ltd* 1932 WLD 160 at 163.

81 See *Lake and others v Reinsurance Corporation Ltd and others* supra at 128F-G and *Petersen v Incorporated General Insurances Ltd* 1982 (3) SA 1 (C) at 9A.

82 See Van der Merwe et al 280.

83 See *Hollet v Nisbet & Dickson* supra at 396.

Where premiums are payable in arrears, a loss occurs during a particular period of insurance, and where the insured then fails to pay the premium which is due at the end of that period, the effect of such failure depends upon the terms of the policy in question. For example, if the premium is due on 1 April and the insured is granted fifteen days' grace in the event of late payment, payment of the premium (which was due on 1 April) in July of that year will amount to a breach of a material term. The policy will have lapsed and the insurer will be under no obligation to accept the premium in such circumstances.⁸⁴ However, until 15 April the policy was still valid and the insured could, strictly speaking, have claimed on the policy without having to pay the premium.

In *SA Eagle Versekeringsmaatskappy Bpk v Steyn*⁸⁵ the respondent instituted action against the appellant insurance company in terms of an insurance contract. In terms of this contract, the insured's house, its contents and his motor vehicles were covered in return for a premium which was payable monthly in arrears. On 23 June 1986 the insured's house was destroyed by fire and he claimed an indemnity in terms of the contract. The claim was rejected by the insurer on the ground that the insured had failed to pay the premium payable for June 1986 at the end of that month. The validity of this defence depended entirely on the interpretation of a clause in the policy, the relevant part of which read as follows:

"[T]hat each such insurance shall commence on the date indicated ... and continue until it is cancelled by the insured or the company on 14 days' written notice, subject to the payment of the premium for each period of insurance."⁸⁶

It was held that, on a proper interpretation of this clause, the words (commencing with) "subject to the payment of the premium for each period of insurance" qualified neither the words "that each such insurance shall commence on the date indicated" nor the words "until it is cancelled by the insured or the company on 14 days' written notice". It was also held that the correct interpretation of this clause was to link the words "subject to the payment of the premium for each period of insurance" to the words "and continue until it is cancelled by the insured or the company on 14 days' written notice", in such a manner that the failure to pay a monthly premium resulted in the insurance (contract) not continuing after the non-payment, but that the non-payment did not nullify the insurance for the preceding period. The insurer was therefore liable to indemnify the insured for the damage suffered on 23 June 1986 notwithstanding the non-payment of the premium for June 1986.

This decision is legally sound and cannot be faulted. It does, however, merit a few comments. First, it is clear that the non-payment of the premium by the insured resulted in the termination of the obligation of the insurer in terms of the insurance contract. Non-payment of the premium by the insured and cancellation of the contract by either the insured or the insurer were two separate methods of terminating the obliga-

84 See *Steyn's Estate v South African Mutual Life Assurance Society* supra at 365-366.

85 1991 (4) SA 841 (A).

86 At 846I-J. The translation is my own.

tions in terms of the insurance contract. The wording of the policy may create the impression that there is a distinction between, on the one hand, the insurance *cover* in terms of the contract, and, on the other hand, the insurance *contract* itself. Such impression will, of course, be wrong. As the concept "insurance *cover*" usually refers to the performance (obligation) of the insurer in terms of the insurance contract, legal certainty would have been enhanced if the policy had rather referred to the "commencement and continuation of the insurance *contract*".

Secondly, the insurer in *Steyn* would not have been entitled to rely on the *exceptio non adimpleti contractus*, that is, the right of a contracting party to withhold performance to secure counter-performance.⁸⁷ The reason for this is that the fact that the insured received credit for the payment of the premium and until the premium was due, the insurer would not have been allowed to claim it. Where the risk had materialised during the month and before the premium for that particular month was due, the insured would have been able to claim his indemnity without paying the premium at the same time and without the insurer having been able to rely on the *exceptio*.

Thirdly, the approach followed by the Court in *Steyn* in limiting itself to the principles of interpretation of contracts in reaching a conclusion is unsatisfactory. The Court did not refer to the general principles of contract regarding the time of payment of debts in order to illuminate the ambiguity in the clause under discussion.⁸⁸ This oversight is unsatisfactory, especially in view of the fact that the parties tried to incorporate the common-law principle in their contract by inserting a clause which confirmed that principle.⁸⁹

Fourthly, if the insured is late in the payment of the premium, but has been granted a period of grace to pay the overdue premium, the insurer is not permitted to reject payment of the premium during the period of grace. Where the premium is overdue and paid only after the materialisation of the risk, but still within the period of grace, the insurer is likewise not permitted to aver that the policy has lapsed.⁹⁰

Fifthly, in *Steyn* there were no obligation on the insured to pay the premium. Put differently, the insurer was not entitled to sue the insured for any outstanding premium. The result of the non-payment of the premium was merely that the contract was terminated and that the insured no longer enjoyed insurance cover in terms of the contract. The payment of the premium was therefore a resolutive condition for the continuation of the insurance contract. In *Steyn* a date for payment of the premium was set in the policy. But where no date for performance is set, the mere fact that the insured is late with his performance will not automatically constitute a breach of contract in the

87 See Van der Merwe et al 280.

88 See again note 73 above.

89 See Schulze "Agteruitbetaling" 227.

90 See *Collen v AA Mutual Insurance Association Ltd* 1954 (3) SA 625 (ED). See further par 8.4 below.

form of *mora debitoris*.⁹¹ Where the contract does not require performance on or before a certain day, the law allows (and requires) the creditor unilaterally to fix a time for performance by way of a demand for performance.⁹² Furthermore, even if a date for performance is set, mere *mora debitoris* itself will not entitle the insurer to cancel the contract. The right to cancellation will enure to the insurer only where it has been stipulated in the contract, or where the insurer has sent the insured a notice of rescission, or where time is of the essence in the contract and a term permitting rescission is implied.⁹³ The question as to whether time is of the essence in a particular contract is one of fact, and not of law. It has long been established that time is of the essence in what is usually described as a mercantile transaction, that is, a contract in a fluctuating market or a market in which prompt delivery or payment is necessary to keep the wheels of commerce turning.⁹⁴ Time may be of the essence in an insurance contract where, for example, in the absence of a relationship of trust between the insurer and the insured, the goods are insured on a "lost or not lost" basis⁹⁵ and the premium is a substantial amount.

8.3.2.2 *Where the Premium Is Payable in Advance*

Although the general rule regarding the payment of the premium dictates that the premium is payable in arrears, this is very seldom the position in practice. Insurance policies invariably provide that the premium is payable in advance. Likewise, insurance policies usually provide for the consequences of non-payment of the premium where it is payable in advance.

Usually the prior payment of the premium is made a suspensive condition of the cover in terms of the contract. This entails that the *contract* comes into being without the actual payment of any premium, but that the payment of the first premium is, in such a case, necessary for the *cover* in terms of the contract to commence. Likewise, the payment of subsequent premiums is necessary for the cover in terms of the contract to continue. If the premium is not paid, the contract (and thus also the cover) will (eventually) lapse.⁹⁶

91 See Christie 601.

92 See Joubert *Contract* 201-203.

93 See Joubert *Contract* 201 206.

94 See Kerr *Contract* 450 et seq; Christie 602.

95 If an insurer insures goods on a "lost or not lost" basis, the insurer undertakes to cover a loss even if unbeknown to the parties, the loss has already occurred: see Reinecke & Van der Merwe par 172. This type of undertaking is, of course, exposed to a real possibility of fraud on the part of both parties.

96 Gordon & Getz are of the opinion that if prior payment is not made "such a condition precedent", the insured may be able to recover for a loss before he has paid the premium. As authority for this statement they rely on *British Oak Insurance v Atmore* supra. But this statement can, after the decision in *Lake and others v Reinsurance Corporation Ltd and others* supra at 129C-F, no longer be regarded as a correct exposition of the law on this point, at least not from a practical point of view. From the decision in *Lake* it is clear that the insurance contract is a reciprocal contract and that the insured must tender the premium if it is due and he wishes to claim in terms of the contract. If the insured has not yet paid the premium, the insurance contract remains, as far as he is concerned, an executory contract. Although the decision in *Lake* was reported in 1967, this statement has been left unchanged in all the subsequent editions: see Gordon & Getz 2 ed 149; Gordon & Getz 3 ed 155; Gordon & Getz 165. See also par 8.4 below as to the

If seen against the fact that the payment of the premium is, in the absence of a contractual term providing otherwise, payable in arrears,⁹⁷ the mere fact that there is no provision in the insurance contract as to the time of payment of the premium cannot be regarded as an indication that the insured gave credit for the payment of the premium. As the premium is, as a matter of general principle, payable in arrears, the due date for payment is only after the period of cover. Of course, credit is given if the premium must be paid only after the due date. Thus, as the premium is, in terms of the common-law principle, payable in arrears, that is, after the duration of the insurance cover, it can therefore not be said that the insurer has given credit for the payment of the premium merely because it is payable in arrears.

However, if the contract provides that the premium is in principle payable in advance but the insurer nevertheless decides to waive its right to immediate payment of the premium by the insured, it must be taken to have given credit to the insured for the payment of the premium.⁹⁸ If credit for the payment of the premium has been given to the insured, the premium may be claimed only after expiry of the period for which credit has been given.

If the insurance contract provides that the premium must be paid on the issuance of the policy, that is, in advance, and the insurer mistakenly issues the policy before the actual payment of the premium, the premium will be deemed to have been paid on the day of issuance, although the premium was in actual fact paid only afterwards.⁹⁹ If the premium is never paid in such circumstances it will probably not affect the existence of the contract, but the insured will not be able to claim his indemnity in terms of the contract without actually paying or tendering to pay the premium. Where the premium is payable in advance the insured must, of course, first pay the premium before he will be able to claim in terms of the policy.¹⁰⁰

consequences in general of the non-payment of the premium.

97 See again par 8.3.2.1 above.

98 Section 51(3) of the Insurance Act provides for an exception to this rule in that in the case of a domestic life policy credit for one-twelfth of the first year's premiums is prohibited. See also *Hollet v Nisbet & Dickson* supra at 396. An interesting situation arose from the facts in *De Vos v SA Eagle Versekeringsmaatskappy Bpk* 1984 (1) 724 SA (O). The plaintiff (being the spouse of the deceased) had instituted an action for damages in terms of the (now repealed) Compulsory Motor Vehicle Insurance Act. The plaintiff alleged that the deceased applied for an insurance policy which had been approved subject to the payment of the first premium. Before the premium was paid, the insured was killed as a result of the negligence of the driver of a vehicle insured by the defendant. The plaintiff claimed on the policy. It was decided that the deceased's damages had to be calculated on the basis of him having acquired certain rights in terms of the contract of insurance during his lifetime, which did not include the right to payment of the benefits of the policy. The defendant was therefore not liable for damages because no contract between the deceased and his insurer had come into effect as the premium was never paid during the lifetime of the deceased.

99 See *Bailey v South African Liberal Life Insurance Co* 1928 CPD 463 at 467.

100 See *Lake and others v Reinsurance Corporation Ltd and others* supra at 128F-G; *Petersen v Incorporated General Insurances Ltd* supra at 9A.

The insured further has a right to claim the policy document from the insurer or the agent only if he has tendered the premium.¹⁰¹ The insurer will only be entitled to require the payment of the premium where the insured claims under the contract and the premium is in actual fact due.

8.3.3 The Mode of Payment

8.3.3.1 Introduction

Payment of money debts must be made in legal tender.¹⁰² In principle insurance premiums are payable in cash.¹⁰³ In practice, though, the overwhelming majority of insurance premiums are not paid in cash but by one of the more modern modes of payment.¹⁰⁴

The Insurance Act provides that, in a domestic policy,¹⁰⁵ the premium (as well as the sum insured and other amounts) must be expressed in the South African cur-

101 See *Hollet v Nisbet & Dickson* supra at 396.

102 Section 14(1) of the South African Reserve Bank Act 90 of 1989 provides that the Reserve Bank has the sole right to issue bank notes and coins in the Republic. Notes and coins issued by the Reserve Bank are regarded as the only examples of legal tender: Cowen & Gering 7; Willis 200; Malan, Pretorius & De Beer par 40. Bills of exchange, cheques, promissory notes and other modern methods of payment do not qualify as legal tender and the parties to a contract must first agree that such other method would be used to settle the debt, before the debtor will be allowed to pay by means of such other method. On the nature of money in South African law, see Burger 225 et seq.

103 "Legal tender", "cash" and "money" are not necessarily synonymous. The term "legal tender" entails the currency that a creditor must by law accept in redemption of a debt: see Collins 652; *Oxford* 468. The term "cash" generally connotes banknotes and coins, especially when it is in hand or readily available. The term "cash" also goes under a number of slang terms, eg, ackers, brass (in the Northern English dialect) bread, dibs, dosh (in British and Australian slang), dough, rhino (British slang) shekels, sponduliks and tin: see Collins 168; *Oxford* 124. The concept of "money" is probably the most difficult of the three concepts to explain or define. In general the term "money" is the medium of exchange that functions as legal tender. It is also described as the official currency, in the form of banknotes and coins, issued by a government or other authority: see Collins 736; *Oxford* 538-539. It has been suggested that the economist's definition of the term "money", namely "everything is money that functions as money", is unacceptable from a legal point of view. The following definition of the term "money" has been advanced as "a legal definition" of the term: "[I]n law, the quality of money is to be attributed to all chattels which, issued by the authority of the law and denominated with reference to a unit of account, are meant to serve as universal means of exchange in the State of issue": see Mann 8. It is submitted that for present purposes the use of the concepts of "legal tender", "cash" and "money" need not be kept apart as all three generally connote banknotes and coins. It is further submitted that these three concepts share an important common factor in that they all entail the medium of exchange: see Mann 24.

104 See par 8.3.3.2, 8.3.3.3 and 8.3.3.4 below. Section 49 of the Draft Bill on Long-Term Insurance provides that "[w]hen a premium is paid in bank notes or coins the recipient shall thereupon give to the payer a written receipt thereof". Clause 49 of the explanatory memorandum to the Draft Bill explains that s 49 was inserted in the Draft Bill for the protection of both insurer and insured. It states that adequate evidence exists in respect of payment by other means.

105 Ie, a policy issued or applied for in South Africa: see s 1(xiii) of the Insurance Act.

rency, unless there is a clear and express agreement that some other currency may be used.¹⁰⁶

In the case of a domestic life insurance policy, the insurer is not entitled to assume an obligation¹⁰⁷ unless he has either actually received one-twelfth of the first year's premium, or unless such portion of the premium will be paid by stop order, credit card, debit order or another method of payment¹⁰⁸ approved by the Registrar.¹⁰⁹

106 See s 63(2) of the Insurance Act.

107 In terms of s 48(1) of the Insurance Act 37 of 1923 (the equivalent of s 51(3) of the current Insurance Act), the words "accept any proposal" were used, in contrast with the words "assume an obligation", which are used in the current Insurance Act. It is submitted that there is no significant difference between the two phrases. By "accepting a proposal" an insurer accepts the offer made by the insured and an insurance contract takes effect. By "assuming an obligation" the insurer assumes the obligations which usually flow from an insurance contract. An obligation is assumed when the contract takes effect.

108 Section 51(3) of the Insurance Act refers to "other instrument", but this wording no longer reflects practical reality. Most insurance premiums are paid by means of the electronic transfer of funds, which is, strictly speaking, not an *instrument* of payment but rather a *method* of payment: see also Malan, Pretorius & De Beer par 202.

109 In terms of s 48(1) of the Insurance Act 37 of 1923 (the equivalent of s 51(3) of the current Insurance Act), "no [insurer or its agent] shall accept any proposal for life insurance in respect of which a promissory note, bill of exchange or other negotiable instrument (not being a cheque payable on demand) or any acknowledgment of debt (not being a stop order) in favour of the company or any person whatsoever is made for the first year's premium or any part thereof" (my insertion). In *Colonial Banking and Trust Co Ltd v Hill's Trustee* 1927 AD 488, the appellant bank and an insurance company sought to evade this prohibition. They devised a scheme in terms of which the bank supplied the agent of the insurer with two documents, one a blank cheque-form drawn on the bank in favour of the insurer, and the other a "request by the proposer for insurance" addressed to the bank. In terms of this request the applicant for insurance was to keep an account with the bank and all cheques were to be honoured whether or not the account was in credit. The request by the applicant for insurance to keep an account with the bank was followed by an agreement to pay all overdrafts with interest. The agent got the proposer to sign the documents, the cheque being filled in for the amount of the first year's premium. The signed request was handed to the bank by the agent while he retained possession of the cheque. The bank made enquiries with regard to the proposer's financial position and if it was satisfactory, the request was granted and the cheque cashed on presentation. It was held (at 495) that this type of document was not a cheque drawn on a bank by a drawer on his banker in the ordinary course of banking practice. It was in reality a bill of exchange drawn by the insured on the bank with which he had no account, but with which he had arranged that the bill should be honoured on presentation. This was the very mischief against which the prohibition contained in the Act was directed. The effect of the decision in *Colonial Banking* was that a cheque in the ordinary business meaning of the term is something equivalent to cash, in contrast with a bill of exchange which creates a future liability: see *Van Straaten NO v Van Niekerk NO* 1958 (2) SA 315 (E) at 319B-C. In *Collins v Minister of the Interior and another* 1957 (1) SA 522 (A) at 573F this type of cheque was described as a cheque for purposes other than those intended in s 48(1). It had all the objective qualities of a cheque but by reason of the circumstances in which it was drawn, it was not a cheque for purposes of the sub-section. The giving of a cheque is generally regarded as the equivalent of the giving of cash: see *Freeman v Standard Bank of South Africa* 1905 TH 26 at 31; Malan, Pretorius & De Beer par 106n51. However, payment of the debt (premium) remains conditional until the cheque is honoured: see further par 8.3.3.4 below.

There are strong indications that the majority of insurance premiums are currently paid by way of either a stop order or a debit order.¹¹⁰ Due to the particular nature of most insurance premiums, namely a regularly occurring obligation of payment of a fixed amount, the stop-order and debit-order mechanisms of payment are ideally suited for the payment of such premiums. Despite this widely used practice in the insurance industry, the legal significance of the tripartite relationship between bank, insured and insurer in terms of a stop or debit order has, until recently, not received the attention of the courts.¹¹¹

8.3.3.2 Stop Orders

In *Cambanis Buildings (Pty) Ltd v Gal*¹¹² Steenkamp J referred with approval to the following definition of a stop order:

"A stop-order consists of an authorization by a customer to a bank to deduct a fixed amount of money from his account at regular intervals and to pay it over to someone else."¹¹³

Stassen's definition does not differ much from this definition, except for his requirement that the customer's authorisation must be in writing.¹¹⁴ Writing is, of course, not a requisite for a stop order to be valid - it merely serves as prima facie proof of the contract of mandate between the bank and the customer. The stop order is merely the physical proof of the general contract of mandate that exists between banker and customer.

The stop order is a mechanism of payment employed in conjunction with a current or transmission account and is used to effect regular payments of fixed amounts such as rent, certain insurance premiums,¹¹⁵ credit-agreement payments, and loan repayments. The instruction to the bank to deduct a fixed amount of money and to pay it over to a third party is usually accepted by the bank, subject to the condition that the client either has sufficient funds to his credit or has arranged for overdraft facilities at the bank concerned.

The stop order does not create any legal bond between the client (debtor/insured) and the third party (creditor/insurer), nor between the bank and the insurer.¹¹⁶ The insured is free to cancel the instruction to the bank in terms of a stop order at any time.¹¹⁷ The legal relationship between the bank and the insured is

110 Section 51(3) of the Insurance Act acknowledges stop orders and debit orders as alternatives to cash for the payment of the premiums due under a life insurance policy.

111 See *Penderis and Gutman NNO v Liquidators of the Short-Term Business, AA Mutual Insurance Association Ltd, and another* 1991 (3) SA 342 (C).

112 1983 (2) SA 128 (NC) at 135D-E.

113 See also Willis 194.

114 See Stassen "Aftrekorders" 88.

115 Eg, the premium in terms of a fixed-premium whole-life insurance contract: see *Havenga Life Insurance 3*. See also *Steyns' Estate v South African Mutual Life Assurance Society* supra at 369.

116 See *Cambanis Buildings v Gal* supra at 136B-C.

117 See *Consolidated Frame Cotton Corporation Ltd v Sithole* 1985 (2) SA 18 (N) at 24D-E.

founded on mandate and the obligation of the bank is that of a mandatary.¹¹⁸ Where the bank fails to perform the instruction in terms of a stop order, it commits breach of contract towards the insured. The bank can be sued for damages, should the insured suffer any.¹¹⁹ As a result of the particular nature of the contract of mandate, the insured (mandator) is free to cancel the instruction in terms of the stop order even where he has undertaken towards the insurer not to cancel the instruction.¹²⁰ The stop order also does not constitute a stipulation in favour of a third party in terms of which the insurer can claim the amount from the bank. For such a stipulation to exist, the intention of the bank and the insured must be aimed at creating a benefit for the third party to contract.¹²¹ Such an intention cannot normally be inferred from the mere fact that the stop order authorisation was produced and implemented.¹²²

Should the bank fail to perform the instruction while there are sufficient funds available, the insurer's only remedy lies against the insured. If there are not sufficient funds available, the bank is usually entitled to refuse payment in terms of the stop order. If the premium has to be paid on a specific day and the insurer is entitled to resile from the contract if this is not done, the insurer can exercise its right even where the bank fails to perform the instruction, which is what happened in the decision in *Cam-banis Buildings (Pty) Ltd v Gal*.¹²³ The fact that the bank does not have a reason for non-payment will usually mean only that the bank did not fulfill its obligation under the mandate towards the insured, who would then be able to sue the bank for damages on the basis of breach of contract. Damages are computed on the basis that the injured party (the insured) should be placed in a position that is as close as possible to that he would have been in, had the contract of mandate been performed (in other words, on the basis of positive interest). In this particular situation it means that the insured should be placed in the position he would have been in had he been indemnified in terms of the contract of insurance.¹²⁴

The premium owed by the insured to the insurer is not paid until the bank has actually paid the amount involved to the insurer. Other than with the acceptance of a cheque by the insurer where the liability for the payment of the insured's premium is suspended¹²⁵ pending the honouring of the cheque, the instruction by the insured to

118 See Cowen & Gering 367n85; Stassen *Regsbetrekkings* 50; Malan, Pretorius & De Beer par 203 211n167; Pretorius 342 347; *Steyn's Estate v South African Mutual Life Assurance Society* supra at 369-370; *GS George Consultants and Investments (Pty) Ltd and other v Datasys (Pty) Ltd* 1988 (3) SA 726 (W) at 735F-G and 736D-E.

119 See Stassen "Aftrekorders" 88-89.

120 But the revocation of an irrevocable mandate may involve the mandator in liability to pay damages to the mandatary if the latter has suffered any damage: see *Kerr Agency* 246.

121 See *Kerr Contract* 70n150.

122 See *Consolidated Frame Cotton Corporation Ltd v Sithole* supra at 24F-J.

123 Supra. See also Reinecke & Van der Merwe par 192.

124 See Reinecke & Van der Merwe par 192.

125 The acceptance of a cheque for a debt amounts to payment of the debt subject to the condition that the cheque is paid on presentation at the drawee bank. Acceptance of a cheque in payment of the premium by an insurer only suspends the rights of the insurer under the underlying obligation (the insurance contract) until such time as the cheque is paid or dishonoured: see Malan, Pretorius & De Beer par 199n190-192.

his bank in terms of a stop order neither suspends his liability nor constitutes payment in terms of his contract with the insurer.¹²⁶ The insurer is thus entitled to payment as soon as the date for performance has elapsed, even if the expectation of payment by the bank of the stop order still exists. The position will be different where the insurer has accepted the insured's "offer" to pay by means of a stop order. It can be argued that the insurer in such case has consented to suspension of the insured's liability pending payment in terms of the stop order. But each case will depend on the terms of the agreement between the parties on the manner in which payment in terms of the insurance contract should be effected.¹²⁷

In the decision in *Cambanis Buildings (Pty) Ltd v Gal*¹²⁸ the debtor (lessee) had signed a stop order to ensure payment of the monthly rental in terms of a contract of lease. The Court experienced little difficulty in deciding that in failing to effect payment in terms of the stop order, the bank acted as agent of the lessee. The Court held that failure by the agent to effect payment amounted to failure by the principal. The mere depositing at the bank of an amount sufficient to cover the stop order did not constitute payment by the lessee to the lessor. A further step was required, namely the due and proper payment of the stop order by the bank.¹²⁹ This is in accordance with the general principle that payment is a bilateral juristic act.¹³⁰ The Court held that the lessor was, therefore, justified in cancelling the lease in terms of the cancellation clause.

Apart from the reason stated above, the decision reached by the Court can also be endorsed on another basis. The parties did not stipulate the means to effect payment under their contract of lease. According to the Court, the lessee was therefore at liberty to pay in cash, by way of cheque, or by means of a stop order, as long as the rental was paid.¹³¹

Since the creditor (lessor) in the *Cambanis Buildings* case had neither requested nor recommended payment by means of a stop order, it may be argued that the risk for any failure in the system was borne by the lessee. The fact that the bank there acted as mandatary of the lessee is of minor importance.

126 See Stassen "Card Issuer" 35-37; Stassen "Betaling" 136-139.

127 See Schulze "Stop Orders" 55-56.

128 Supra.

129 See *Cambanis Buildings* supra at 134F-136H.

130 See *Volkskas Bank Bpk v Bankorp (h/a Trust Bank) en 'n ander* 1991 (3) SA 605 (A) at 612C-D.

131 See *Cambanis Buildings* supra at 133G-H. Whether a debtor is entitled to effect payment by means of a cheque (or a stop order) purely because no agreement on the specific payment mechanism was reached, is open to doubt. In *Esterhuysen v Selection Cartage (Pty) Ltd* 1965 (1) SA 360 (W) at 361D-F Trollop J set out a detailed approach to this question of law: "In contract, where the debtor is obliged to pay money to the creditor, the medium of payment must be that which the contract expressly or impliedly specifies, as determined by reference to its terms and such evidence of custom, usage and the surrounding circumstances as is admissible to aid in its interpretation ... [i]n the absence, however, of such contractual definition of the medium, the payment must be made in legal tender. In that case, a tender of payment by cheque, if objected to by the creditor, is not valid."

If the payment mechanism in the *Cambanis Buildings* case had been a debit order¹³² and not a stop order, and if the parties had agreed in advance on the use of a debit order, the outcome of that case could have been different. This would have been so not only because of the type of payment mechanism used, but also because the creditor (lessor) would have (by agreement) agreed to bear the risk of late payment due to an delay inherent in the system. It is, of course, also possible to argue that the insurer, by not objecting to payment by way of a stop order, agreed by implication to accept the risk of late payment or non-payment due to a defect inherent in the stop-order system. Where the stop-order or debit-order system of payment has been preferred by the insured, or insisted upon by him, any risk inherent in that system of payment should be borne by him. But each case must be considered in the light of its own circumstances. The agreement (or its absence) between the parties in respect of the type of payment mechanism to be used is of vital importance in order to establish who will bear the risk of late payment or non-payment of the premium.

8.3.3.3 *Debit Orders*

Like a stop order, a debit order is used by an account holder (debtor/insured) to effect regular payments to a third party (creditor/insurer) via his bank.¹³³

There are various types of debit order. For present purposes it will suffice to discuss the mechanics of debit orders with reference to the common form of debit order.¹³⁴

In its common form, the debit order is a document in which the insured requests the insurer to make periodic withdrawals from his bank account, and in which he directs his bank to debit his account with such withdrawals. Like a stop order, the debit order is suited to effect regular payments of a fixed amount.¹³⁵ But a debit order is more flexible than a stop order, in that, subject to agreement between the insured and the insurer, it also allows for a fluctuating amount to be deducted from the insured's bank account. The debit order is thus also suited to effect monthly payments of fluctuating amounts such as telephone bills and (certain) insurance premiums.¹³⁶ The

¹³² See also par 8.3.3.3 below.

¹³³ See Stassen "Aftrekorders" 89.

¹³⁴ For a discussion of the other types of debit order, see Stassen "Aftrekorders" 89.

¹³⁵ See *AJ Shepard (Edms) Bpk v Santam Versekeringsmaatskappy Bpk* 1985 (1) SA 399 (A) at 406H-407A for an example of a clause in a policy which required the payment of the premium by way of a debit order. Although the policy referred to a debit order (at 406I), the English translation of the head note to this case (at 400H), incorrectly refers to the paying instrument as a "stop order".

¹³⁶ Eg, the premium in terms of certain endowment policies is subject to an inflation clause. In terms of an inflation clause, the parties agree beforehand that the amount of the premium could increase, say by ten percent every twelve months, to combat the effect of inflation. In the case of short-term insurance, the insurer often reserves the right to increase the premium by giving notice of the increase to the insured. In these cases the debit order is a more convenient mode of payment than the stop order because the latter does not allow for a variation in the amount payable in terms of the stop order.

debit order is completed and signed by the insured, and handed to the insurer. The insurer sends a copy to the insured's bank. The bank checks the insured's signature and account number, and makes a note of the debit order. Subsequently, the insurer regularly requests, at specified intervals, the amount from the bank by completing a debit slip against the account. The insured's bank makes out a mail-transfer slip in favour of the insurer, and sends it to the insurer's bank. The insurer's bank credits the insurer's account with the amount of the mail-transfer slip and collects it from the insured's bank. It, in turn, debits the insured's account.¹³⁷ Payment by debit order, like all bank payments, is therefore a matter of book entries.¹³⁸

It is clear that the main advantage for the insurer of the debit order over the stop order is the fact that the debit order is handed over to the insurer. In the case of a stop order the insurer has to rely on the punctuality of the insured in instructing payment, and of the insured's bank in carrying out payment in terms of the stop order. But with a debit order the burden of requesting the monthly payment rests on the insurer. In this sense the insurer is in a more favourable position, since, subject to cancellation by the insured of the instruction to his (the insured's) bank, it can be ensured of a regular monthly payment.¹³⁹ The insurer therefore has greater control over the (punctual) payment of the premium in the case of a debit order than in the case of a stop order.

The question of whether an action for provisional sentence can be founded on either a debit order or a debit slip has not yet been considered by our courts.¹⁴⁰ The answer depends on whether a debit order or a debit slip fits the definition of a "liquid document". Possession of a liquid document is a requirement in a claim for provisional sentence.¹⁴¹ A liquid document may be described as an unconditional acknowledgement or undertaking to pay an amount certain in money.¹⁴² A debit slip is prepared and completed by the insurer alone and the insured plays no part in it. From this it is clear that a debit slip does not qualify as a liquid document since it does not contain an unconditional undertaking by the insured towards the insurer to pay the premium. Whether a debit order is a liquid document is less clear. To determine whether a debit order is liquid, its terms must be construed. It can be argued that since the insured is (normally) free to cancel the contract of insurance at will without any legal

137 See Stassen "Aftrekorders" 89.

138 See *Penderis and Gutman* supra at 345C; Oelofse "Bankwese" 8-11; Malan, Pretorius & De Beer par 202.

139 See Schulze "Stop Orders" 57.

140 This question is, of course, irrelevant in the case of a stop order, as the creditor is not in possession of the stop order.

141 See Malan, Pretorius & De Beer par 164. The insurer (or plaintiff for that matter) is usually not in possession of the stop order. This is one of the differences between the stop order and the debit order: see again par 8.3.3.2 above.

142 See Malan et al 16. A mortgage bond is usually a liquid document. If a mortgagee has paid the insurance premium due in respect of the mortgaged property, and the mortgagor has defaulted, the mortgagee will be entitled to the amount of the premium when he sues for provisional sentence on the bond: see *Century Insurance Co Ltd v Postles* 1958 (1) SA 168 (SR) and *Commonwealth Building Society v Potter* 1961 (4) SA 629 (SR) at 630A. For a contrary opinion, see *Alliance Building Society v Dry and another* 1949 (2) SA 160 (O).

repercussions, his acknowledgement or undertaking to pay the premium is not unconditional. But since this fact is not normally apparent from a debit order, such an order may be capable of constituting a liquid document.¹⁴³

The debit order, like the stop order, entails a mandate of payment from the insured to his bank. Non-payment by the bank for reasons other than a lack of sufficient funds will normally entitle the insured to sue the bank for breach of the contract of mandate. Since the bank acts as mandatary of the insured, any mistake by the bank will, generally, be for the account of the insured. But the insurer will not be able to rely on late payment by the insured as constituting a breach of contract where the fact that it is credited later than the stipulated date results from a delay inherent in the system.¹⁴⁴ By accepting the debit order, the insurer also accepts the risk of such late payments. This risk can, of course, be passed on to the insured by the insertion of a cancellation clause in the contract of insurance.

The decision in *Penderis and Gutman NNO v Liquidators of the Short-Term Business, AA Mutual Insurance Association Ltd, and another*¹⁴⁵ was the first reported South African decision in which the legal ramifications of an insurance premium being paid by way of a debit order were considered. The facts were as follows: On 22 August 1985 the insurer and the insured entered into a written agreement of insurance. In terms of this agreement the insurer undertook, in return for payment of the agreed monthly premium, to indemnify the insured against the destruction of or damage to its property. Payment of the premium would be effected by the submission of a debit order by the insurer to the insured's bank. Clause 13 of the policy provided as follows:

"[I]f any debit order be dishonoured for lack of funds, all cover under this policy shall cease with effect from 16:00 hours on the last day of the last period for which the premium has actually been paid."

On 1 October 1985 the insured property was damaged by fire. The insured's claim in terms of the policy was rejected by the insurer. It contended that the policy was not in force on 1 October 1985 by reason of the fact that the premium for October 1985 had not been paid. The insurer further contended that the debit order had been returned by the bank unpaid "for lack of funds" within the meaning of clause 13. In terms of the contract of mandate, the bank was the mandatary of the insured. The bank's refusal to honour the debit order was tantamount to the insured's refusal to pay

143 Although not directly in point, the decision in *Southern Life Association v Bezuidenhout* 1926 TPD 185 could perhaps provide some substance to this argument. In this case the Court (at 188-189) granted provisional sentence for an insurance premium. The liquid document sued upon was a mortgage bond. The amount of the insurance premium was not set out and acknowledged in the mortgage bond, but the premium was referred to in it. See also *Herbstein & Van Winsen* 542 544 561-562.

144 See Stassen "Aftrekorders" 90.

145 1991 (3) SA 342 (C), reversed on appeal, the decision of which is reported as *Penderis and Gutman NNO v Liquidators, Short-Term Business, AA Mutual Association Ltd* 1994 (2) SA 836 (A).

the premium.¹⁴⁶ The bank's undertaking to honour the debit order was subject to the insured's having sufficient funds to its credit at the bank, or to the availability of a facility sufficient to cover the amount of the debit order. A facility, in the form of a notarial general covering bond, was passed in the bank's favour over the insured's machinery on its factory premises. The machinery was destroyed by the fire. Upon being informed of the fire and the destruction of the collateral security, the insured's bank decided to "freeze" the insured's account. The end result was that the debit order was returned to the insurer marked "not provided for".¹⁴⁷

The insured instituted action against both the insurer and the bank. The Court a quo held that the insured had to fail in his claim against the bank for breach of contract of mandate. The undertaking to honour the debit order was, in the final instance in this case, subject to the provision and maintenance of the security (the machinery). Without the provision and maintenance of the security, the bank was under no obligation to honour the debit order.¹⁴⁸ This, of course, does not mean that an insured is without recourse against his bank in such a case. It is submitted that the insured would be entitled to succeed in a claim for damages in delict.¹⁴⁹

In respect of his claim against the insurer, the insured contended that the dishonouring of the debit order had not been "for lack of funds" within the meaning of clause 13. The debit order had been dishonoured because the bank had "frozen" his account. But the meaning ascribed by the Court to the term "frozen" was that the insured was no longer entitled to operate on his bank account. This, according to the Court, meant that the insured's bank account lacked the necessary funds to meet its obligation to pay the premium.¹⁵⁰

Unfortunately the reasons why the bank had frozen the insured's account were regarded as irrelevant.¹⁵¹ The Court thought that it would be impractical to burden an insurer with an obligation to launch an investigation, on each occasion a debit order presented by it in respect of a premium was dishonoured, into the reason for such dishonour.¹⁵² The Court based its finding on the principle that the bank acted as

146 See the decision of the Court a quo at 346D-F; on appeal at 839I-840B.

147 See the decision of the Court a quo at 344D-345J and 347C-349D.

148 See the decision of the Court a quo at 347B-I and 349B-E.

149 Since the decision in *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A) it is possible for the injured party to sue the wrongdoer in delict for pure economic loss. The bank's delictual liability rests on the application of Aquilian liability for pure economic loss, caused by the bank to its client or other party (eg, the liability of a collecting bank towards the true owner of a cheque). Economic loss is loss which does not arise from a physical injury to a person or property. See in this regard *Boberg* 103-149; *Malan & Pretorius* 705 707n14 and the authorities referred to there; *Arthur E Abraham & Gross v Cohen* 1991 (2) SA 301 (C) at 309D-E; *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 449 (A) at 570E-G; *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A) at 796E-797A; *Kwamashu Bakery Ltd v Standard Bank of South Africa Ltd* 1995 (1) SA 377 (D) at 389E-395G; *Malan, Pretorius & De Beer* par 240 et seq.

150 See the decision of the Court a quo at 345H-346D.

151 See the decision of the Court a quo at 345I-J.

152 See the decision of the Court a quo at 346E-F.

mandatary of the insured.¹⁵³ On appeal the decision in *Penderis and Gutman* was reversed in part. It was held by the Appellate Division that the dishonour of the debit order was not necessarily the result of a lack of funds. The dishonour in this case could have and did in fact result from other causes. In the ordinary course of events the dishonour of a debit order would usually be the result of a lack of funds. But the dishonour of a debit order may be the result of a malfunctioning of the electronic system or because of negligence on the part of the bank.¹⁵⁴ It was further held that there was no reason to believe that the insurer (which had been the scribe of the contract) had not intended to bear the risks which were inherent to the system of payment by way of a debit order, particularly since it had insisted that the premiums be paid by debit order.¹⁵⁵

Although the aspect of mandate was not raised on appeal, it is submitted that the Court a quo erred in restricting itself to the issue of mandate. It would indeed be impractical to burden an insurer with such a far-reaching obligation. But it would not be impractical to expect the insurer either to investigate the cause of the dishonour of the debit order, or at least to give the insured an opportunity of explaining the reason for the dishonour of the debit order before it (the insurer) rejects a claim in terms of the policy, on the basis of the non-payment of the premium by reason of such a dishonour. This would be fair, especially where the insurer has either encouraged payment by means of a debit order (as insurers frequently do by granting a discount on the premium where payment is effected by way of a debit order) or required payment by means of a debit order to ensure the punctual payment of the premium. It is equitable to burden the insurer with this duty, not because the bank is deemed to be the "agent" of the insurer, but because it is the insurer which has stipulated payment by means of a debit order.¹⁵⁶

A further interesting aspect of the *Penderis and Gutman* case related to the interpretation of clause 13 of the policy. In terms of this clause the insurer was entitled to rely only on the dishonour of the debit order in the case of lack of funds. This was, therefore, an instance where the insurer contractually limited his right to rely on non-

153 See the decision of the Court a quo at 346D-E.

154 See the *Penderis and Gutman* appeal at 840B-C.

155 See the *Penderis and Gutman* appeal at 840C-D.

156 This is also a general principle of our law and was confirmed in the decision in *Mannesman Demag (Pty) Ltd v Romatex Ltd* 1988 (4) SA 383 (D) at 389G-H where Nienaber J (as he then was) explained that "when the creditor stipulates (or requests) a particular mode of payment and the debtor complies with it, any risk inherent in the stipulated method is for the creditor's account. That is said to be "the legal position" (*Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 (4) SA 901 (N) at 908B-E), "the principle", or "the law" *Barclays National Bank Ltd v Wall* [1983 (1) SA 149 (A) at 156H-157C]) (my insertion)." The principle that the insurer must bear the risk of non-payment in cases where there were sufficient funds to the insured's credit, is also propagated in the English law of insurance: *MacGillivray & Parkington* par 942 state that "if at the invitation of the insurer, the assured consents to the use of the direct debit system, the assured has no further obligations except to keep his account in funds. All further steps to obtain payment are to be taken by the insurer, who must take the consequences of anything which may go wrong." See also ch 6 par 6.3.3.3 above.

payment to those instances where the insured failed to provide sufficient funds. This clause also protected the insured against mistakes on the part of his agent, the bank. Based on the general principles of the law of contract, the insured would have enjoyed such protection even in the absence of such a clause - the clause thus merely confirmed the insured's common-law rights.¹⁵⁷

A last striking aspect of the *Penderis and Gutman* case is the confusing practice of referring to the bank as the "agent" of the account holder (insured).¹⁵⁸ The contract of mandate should not be confused with the concept of representation.¹⁵⁹ The contract between bank and client is one of mandate and does not constitute representation.¹⁶⁰ The gist of the contract of mandate is that the mandatary (here the bank) undertakes to perform a mandate or instruction for the mandator (the client).¹⁶¹ Representation, by contrast, is the phenomenon where one person (the "agent") concludes a juristic act on behalf of or in the name of another (the "principal").¹⁶² It is submitted that in order to avoid ambiguity, the term "agency" should be used only in the context of representation.¹⁶³ This distinction is not merely of academic importance but it also entails important legal consequences. The contract of mandate creates rights and duties only between the mandator and the mandatary; it does not necessarily confer any authority to represent the mandator legally. But with representation the agent can create, alter or extinguish rights for its principal.¹⁶⁴ Normally a bank does not have the power to

157 See again the decision in *Mannesman Demag (Pty) Ltd v Romatex Ltd* supra at 389G-H where it was explained that "when the creditor stipulates (or requests) a particular mode of payment and the debtor complies with it, any risk inherent in the stipulated method [including mistakes on the part of the agent of the debtor in the utilisation of the stipulated method] is for the creditor's account" (my insertion). The Court confirmed that this is said to be "the principle", or "the law".

158 See *Penderis and Gutman* in the Court a quo at 346D. See also *Steyn's Estate v South African Mutual Life Assurance Society* supra at 370; and *Cambanis Buildings v Gal* supra at 134E-F and 135E-G for a similar mistake in respect of payment by way of a stop order. See also par 8.3.3.2 above.

159 See *Eksteen v Van Schalkwyk en 'n ander* 1991 (2) SA 39 at 45D-E.

160 See Malan, Pretorius & De Beer par 203 211n167.

161 See LAWSA vol 17 par 3; Wille 593; Kerr *Agency* 29-30.

162 See Kahn *Contract* 849.

163 The term "agency" is firstly used to denote an agreement in terms of which one person (the agent) performs some task for another (the principal) relating to the conclusion of a juristic act by or for the principal. But this contract is merely a species of the genus mandate, and is therefore governed by the common-law rules relating to the contract of mandate in general. Secondly, the term "agency" is also used for the phenomenon of one person (the agent) concluding a juristic act on behalf of or in the name of another (the principal). Here "agency" is merely an instance of representation. An agent who acts on behalf of another is therefore a representative, and the rules of representation thus apply to "agency" in the meaning of representation. See Kahn *Contract* 848-849 for the different meanings ascribed to the term "agency" and the confusion which could arise from a haphazard use of the term "agency". For a discussion of the different meanings which may be ascribed to the term "agent", see also *Pace Real Estate (Pty) Ltd v Wilson* 1983 (3) SA 753 (W) at 755G-756G. There it was decided that in English the word "agent" could connote a person to whom authority is given to contract on behalf of his principal, or it could merely connote a mandatary. Each case must be decided in the light of its own circumstances.

164 See Kahn *Contract* 848; LAWSA vol 17 par 6.

create, alter or extinguish rights for its client, and the term "agent" is therefore a misnomer in describing the role of the bank in the bank-client relationship.

8.3.3.4 *Cheques*

Payments of money debts must be made in legal tender.¹⁶⁵ A cheque is not regarded as legal tender.¹⁶⁶ Changing commercial practices, however, necessitate acknowledgement of the fact that a large number of commercial debts are nowadays paid by some modern mode of payment, and not in cash. For this reason a court will not require very strong evidence to show that the parties to the particular transaction contemplated that payment could be made by cheque.¹⁶⁷ Payment of a debt by way of a cheque normally does not pose any particular problems apart from the question as to who bears the loss if the cheque is stolen or lost in the post.

When an insured tenders payment of the premium by way of a cheque, the payment remains conditional and the debt is only discharged once the cheque is honoured. Furthermore, if the insured decides to send the cheque by post a real danger exists that someone other than the payee may, by fraudulent means, convert the cheque into cash. This risk is borne by the insured since, on general principles, it is the duty of the insured (as debtor) to seek out and ensure that payment reaches the insurer (as creditor).¹⁶⁸

But when the insurer (as creditor) stipulates (or requests) a particular mode of payment and the insured complies with it, any risk inherent in the stipulated method is to be borne by the insurer. This will be the case where the insurer (or the broker on behalf of the insurer) has, for example, requested payment of the premium by way of a cheque to be sent by post. This means that, if the worst comes to the worst and the cheque is intercepted in the post and misappropriated by a thief, the obligation to pay is deemed to have been fulfilled even though the amount of the cheque was never credited to the insurer.¹⁶⁹ But if the cheque is intercepted in the post by a thief and dishonoured for say, a lack of funds, the obligation will not be deemed to have been fulfilled because there was no payment whatsoever by the insured.¹⁷⁰

¹⁶⁵ See again par 8.3.3.1 above.

¹⁶⁶ See *Schneider and London v Chapman* 1917 TPD 497 at 500.

¹⁶⁷ See *Schneider and London v Chapman* supra at 500.

¹⁶⁸ See also par 8.3.4 below.

¹⁶⁹ See *Mannesmann Demag (Pty) Ltd Romatex Ltd* supra at 389G-H; *Penderis* appeal at 840B-D; Malan, Pretorius & De Beer par 222n71-77.

¹⁷⁰ See the decision in *Goldfields Confectionary and Bakery (Pty) Ltd v Norman Adam (Pty) Ltd* 1950 (2) SA 763 (T) at 769 where it was said that "[t]he principle is that if a debtor is asked by his creditor to make payment in a particular way, eg, by drawing a cheque and putting it in the post, then, when he has done what he was asked to do and has posted the cheque, he has, *subject to the cheque being honoured*, made due payment, and the risk of loss thereafter is on the creditor" (my italics). See also Malan, Pretorius & De Beer par 199 222n73.

8.3.4 The Place of Payment of the Premium

The parties to an insurance contract usually agree on the place of payment of the premium. This they may do either expressly or impliedly. Usually they provide that payment will take place at the insurer's head office. The Insurance Act also provides for the case where the premium must be collected from the insured at his residence or place of work.¹⁷¹ Nowadays the majority of insurance premiums are paid by way of either a stop order or a debit order.¹⁷² This means that the question as to the place of performance in terms of most insurance contracts is governed by the principles of the law relating to electronic payment of premiums. Payment by way of a stop order or a debit order is effected at the place when and where the account of the creditor (insurer) is credited.¹⁷³ The insurer is, nevertheless, entitled to reject the premium tendered at a place other than that stipulated in the contract.¹⁷⁴

In the absence of such a term, the place of payment is determined by the general principles of the law of contract regarding the place of payment of a debt. In the absence of an express agreement as to the proper place for performance, it will be where the contract has come into being.¹⁷⁵ As a general rule a contract comes into effect when and at the place where the offeror is informed of the acceptance of his (that

171 See s 1 of the Insurance Act which defines "funeral business" as "the business of assuming the obligations of an insurer under *funeral policies*" (my italics). Section 57A(1) of the Insurance Act provides that "[i]f any payment is received in respect of a premium on a *funeral policy* by a person sent to collect the premium by the insurer ... or by such insurer direct from the owner of the policy ... such person or such insurer, as the case may be, shall in respect of such payment issue a receipt which shall clearly indicate the due date of the premium in respect of which the payment has been received" (my italics). Section 57A(2) of the Insurance Act provides that "[a] premium collected in terms of [s 57A(1)], shall be deemed to have been received by the insurer" (my insertion). In *Paarl Funeral Fund (Pty) Ltd v Registrar of Insurance* 1948 (3) SA 763 (C) at 766 it was held that a funeral business is not a funeral business as intended in s 1 of the Insurance Act if the insurer has not expressly or tacitly undertaken to send a person from time to time to the owner of the policy or to his residence or place of work to collect the premiums. Because the insurer did not undertake to send a person to collect the premiums due in terms of the policies issued by it, the policy in question could not be regarded as a funeral policy in terms of the Act. In addition the Court decided that the policy did not qualify as a funeral policy because the policy specifically provided that if the insurer did not collect, the insured had to pay the premiums at the insurer's head office.

172 See again par 8.3.3.2 and 8.3.3.3 above.

173 As to the principle that an electronic payment, like all bank payments, is a matter of book entries, see Oelofse "Bankwese" 8-11; Oelofse "Tjekreg" 369; *Penderis* appeal at 839I-J. Section 43(4)(a) of the Bills of Exchange Act 34 of 1964 provides that a bill (and by implication a cheque) is presented at the proper place if a place of payment is specified in the bill and if it is presented there. Accordingly, a cheque which contains an indication of the branch on which it is drawn, is payable at that particular branch of the drawee bank, and must in principle be presented for payment at that branch. The Bills of Exchange Act therefore contemplates the physical presentation of cheques. The physical presentation of a cheque is, however, the exception rather than the rule and it is suggested that the question as to the place of the payment of a cheque is governed by the same principles which govern payment by way of stop order or debit order: see also Meiring 380-382.

174 See Joubert *Contract* 281; Farlam & Hathaway 711.

175 The so-called *locus contractus*. See also Lee *Introduction* 260n6; Joubert *Contract* 282n76; De Wet & Van Wyk 263n72.

is, the offeror's) offer by the offeree.¹⁷⁶ If it is not possible to establish the place of the conclusion of the contract, the law of contract provides guidelines, which are embodied in a number of principles, to establish the proper place of payment. These principles (in no particular order) are the following.

The first of these principles entails that the debtor (insured) may effect payment at any place which is convenient to both parties. The creditor (insurer), in turn, cannot claim performance of the debt (premium) at any place other than a convenient or proper place. What a convenient place is, will depend on the circumstances and available facilities. The debtor (insured) is entitled to pay the premium at any convenient place which he thinks fit, but in each case he would run the risk of falling into *mora debitoris*, that is, into default as debtor, if payment at his chosen place would fail to discharge the debt.¹⁷⁷

The second principle in this regard is that if no place has been fixed for payment of the debt (premium), the creditor (insurer) must seek out the debtor (insured) when they have different domiciles, and that the debtor (insured) must seek out the creditor (insurer) when they have the same domicile.¹⁷⁸

The third principle is that if the contract does not fix a place for payment but a date for payment has been fixed (either in the contract or subsequently by the creditor (insurer) who has made a demand for payment), a duty rests upon the debtor (insured) to seek out the creditor (insurer) and effect payment.¹⁷⁹

A final principle concerns the situation where a place for performance was agreed upon but the creditor thereafter departs from that place without nominating a place of payment within his new domicile. Although this is not a likely problem in the insurance context, it would seem that if the creditor's move affects the place of payment, the risk of failure of normal methods of payment is borne by the creditor (insurer).¹⁸⁰

8.3.5 By Whom the Premium Is to Be Paid

The general rule of the law of contract requires that any party to a contract must have reached majority to incur contractual liability.¹⁸¹ In terms of this general rule the insured must have reached the age of 21 in order to bind himself as debtor in terms of

176 The so-called theory of ascertainment or recognition. See Joubert *Contract* 45-46; Kerr *Contract* 91 et seq; Christie 76 et seq.

177 See *Venter v Venter* 1949 (1) SA 768 (A) at 778 780.

178 See Joubert *Contract* 281-282.

179 See *Venter v Venter* supra at 788.

180 See Kerr *Contract* 391-392.

181 See Lee *Introduction* 253-254; Christie 277-278.

a valid and enforceable insurance contract. The Insurance Act does provide for an exception to this rule.¹⁸²

The premium, like most other debts, is generally paid by the debtor (insured) himself.¹⁸³ Contracts generally provide for performance by the debtor personally, but may expressly provide that performance may be made by someone other than the debtor.¹⁸⁴ Performance by a third party will discharge the debt, but the third party, as a stranger to the contract, is not bound to perform.¹⁸⁵ But it frequently happens that a debt is paid on behalf of the debtor without his being aware of it, for example, if provision was not made in the contract for payment on his behalf. Such payment will discharge the debt, even if it takes place against the wishes of the debtor.¹⁸⁶ This will be the case provided that the third party has paid the debt with the intention of discharging the debt. Payment must further be made in the name of the debtor.¹⁸⁷ Payment by someone other than the debtor must be accepted as such by the creditor. As a general rule the creditor is entitled to reject payment by a third party if it is not made in the name and on behalf of the debtor.¹⁸⁸ However, if the payment by the third party is made in

182 See s 37(1)(b). This section provides that a minor who has reached the age of eighteen has the right to effect a life policy on his own life. The minor is also allowed to bind himself to pay the premium. Section 60 of the Draft Bill on Long-Term Insurance contains a similar provision.

183 The creditor (money-lender) in a contract of money-lending often requires that the repayment of the loan is secured by the debtor (money-borrower) by a guarantee policy. In terms of s 20(2)(b) of the Insurance Act, the premium in terms of a guarantee policy can be paid by either the creditor or the debtor: see *Johannesburg Livestock Auctioneers Association v President Insurance Co Ltd* 1987 (1) SA 539 (W) at 543D-E. It was decided (at 543E-F) that it is clear that the legislature was indifferent as to the source of payment, as long as such payment was made or an undertaking given to effect such payment.

184 For an example of where the directors of a company undertook, in terms of an agreement of settlement reached with another party, to take out a life insurance policy for the benefit of the latter party and to pay the premium in terms of that life policy, see *Biografic (Pvt) Ltd v Wilson* 1974 (2) SA 342 (R) at 344B-C. Financial institutions frequently obtain life-insurance cover on the lives of their debtors, usually to secure the debt, and undertake as against the insurer, to pay the premiums in terms of the contract. For an example of where the financial institution (as beneficiary) contracted with the insurer and was personally liable towards the insurer for the payment of the premium (although it recouped it at a later stage from the insured (debtor)), see *Western Bank Ltd v Van der Merwe* 1976 (4) SA 119 (SWA) at 121A.

185 See Christie 485.

186 See *De Wet & Van Wyk* 260n54 and the authorities cited there. The tenability of this principle may be questioned. In the final instance it remains the prerogative of the debtor to decide if and when his debt is to be settled. Problems may arise, for instance, where the debt is on the verge of being extinguished by prescription, or where the debtor is in the process of negotiating a compromise or release with his creditor. The debtor may also be prejudiced if his debtor paid one debt where he would have used the money to discharge a more onerous debt: see Schulze "Performance" 128.

187 See *Kerr Contract* 381; Christie 485n33 and the authorities cited there. However, it is apparently not necessary to express in whose name payment is made if it is understood by both parties (ie, the debtor and the third party) that payment is in discharge of the debtor's debt: see *Kerr Contract* 381n181; *Van der Merwe et al* 367-368.

188 However, some performances call for the skill and attention of the debtor himself, eg, an obligation to paint a picture in which case the debtor is the only person who can validly perform (a so-called "delectus personae"): see *Kerr Contract* 380; Christie 485-486. It is submitted that since the premium usually consists of a sum of money or in kind, that the performance by a delectus personae is not of particular importance to the insurance contract. See again par 8.2 above.

the name and on behalf of the debtor, the creditor rejects payment at his peril, making the third party's attempted performance a valid tender.¹⁸⁹

Payment of the premium by a third party in the insurance context is quite common. Third parties may for various reasons have an interest in paying or continuing with the payment of premiums in terms of an insurance contract. For example, the beneficiary in terms of a life insurance policy, the employer in terms of key-man life insurance,¹⁹⁰ the moneylender in terms of a policy on the life of his debtor,¹⁹¹ or (in the case of liability insurance) the person to whom the insured is liable. The seller in terms of a credit agreement frequently reserves the right to continue the payment of premiums should the purchaser fail to do so.¹⁹² Lessors also often include a term in the contract of lease which enables them to pay the premium in terms of property insurance and to recoup it from the insured, should the latter fail to pay the premium to the insurer.¹⁹³ The premium in terms of property insurance is often paid by the lessee of immovable property.¹⁹⁴ It is also possible for a person to undertake, as against the owner of movable property, to insure that property and to pay the premiums in terms of the insurance contract.¹⁹⁵

Third parties may also act under a legal obligation (other than a contractual obligation)¹⁹⁶ in paying the premium in terms of an insurance policy of which they are neither the owner, nor the insured, nor the beneficiary.¹⁹⁷ For example, in one particu-

189 See Christie 485-486.

190 See *Havenga Life Insurance* 255-256. For an example of where the moneylender, a financial institution (as beneficiary) contracted with the insurer and was personally liable for the payment of the premium in terms of a life insurance contract concluded on the life of its debtor, see *Western Bank Ltd v Van der Merwe* supra at 121A.

191 See *Gutman NO v Standard General Insurance Co Ltd* 1981 (4) SA 114 (C) at 118E.

192 See *Botha v Rondalia Versekeringskorporasie van Suid-Afrika Bpk* 1978 (1) SA 996 (T) at 998A-B.

193 See *Smith v Rand Bank Bpk* 1979 (4) SA 228 (N) at 234H.

194 See, eg, *Van Achterberg v Walters* 1950 (3) SA 734 (T).

195 See the decision in *Brian Hilton Manderson v Standard General Insurance Co Ltd* (unreported case no 4898/92 (D) 2 September 1993) where the insured agreed to insure the vehicle of his subcontractor and to pay the premium to the insurer. Although the Court noted that it is indeed possible for an insured and an insurer to agree that a policy will confer a benefit on a third party (and that the insured will pay the premium on behalf of the third party), the claim in the instant case was rejected as the policy in question excluded liability for any claims arising from contractual liability incurred by the insurer. For a discussion of this decision, see Van Niekerk "Insurable Interest" 263 et seq.

196 See, eg, note 198 below.

197 The owner of a policy is the party who concludes the insurance contract with the insurer and who assumes the obligation to pay the premiums, or on whose behalf the contract is concluded. The owner is usually entitled to dispose of the rights in terms of the contract, eg, the right to appoint a beneficiary or to revoke an appointment as beneficiary in terms of the contract. The insured is the person on whose life (in the case of a non-indemnity policy) or property (in the case of an indemnity policy) the contract is concluded. The owner of movable or immovable property is usually the insured in terms of the policy, but the insured may be someone else, eg, the lessee of the property. The beneficiary is the person who may be appointed in terms of the contract to receive the sum insured: see in general *Havenga Life Insurance* 1. The concept of "beneficiary" is usually employed in the sphere of non-indemnity contracts only, but it is, strictly speaking, not incorrect to refer to the person who is entitled to the indemnity in terms of an indemnity contract, as the beneficiary. The beneficiary in terms of a life insurance contract is often not a party to the

lar case one spouse was ordered by the terms of an order of divorce to pay the premium of a single-premium policy towards a retirement annuity or endowment policy which belonged to the other spouse.¹⁹⁸ In another case the premium on property insurance was paid by the buyer of immovable property at a stage when he was not yet the owner but already bearing the risk of damage to or destruction of the property.¹⁹⁹

Two or more parties may also agree to share the responsibility for paying the premium in terms of a policy concluded by one of them. This frequently happens in the case of a contract of lease where the lessor and lessee agree to share the premium on, for example, fire or plate glass insurance.²⁰⁰ In practice either the lessee or the lessor pays the premium to the insurer, and then set-off of debts takes place between the lessee and the lessor.²⁰¹

8.3.6 To Whom the Premium Is to Be Paid

The general rule laid down in our common law,²⁰² followed by modern-day text books²⁰³ and applied by the courts²⁰⁴ is that performance by a debtor to a person other than his creditor or the creditor's authorised agent does not discharge the debt. The debtor can, however, satisfy the debt by paying a person named in the contract as a *solutionis causa adiectus* (that is, a person to whom the debtor is entitled to pay but who cannot claim performance). The debtor has the choice of paying either the creditor personally or the *adiectus*.²⁰⁵ This right of the debtor to pay to the *adiectus* is a contractual one and cannot be revoked unilaterally by the creditor.²⁰⁶ Generally the insured is therefore, in the absence of a contradicting contractual term, not entitled to pay the premium to someone other than the insurer or its agent.

For practical considerations, however, an exception to this general rule was acknowledged by the common law.²⁰⁷ If a debtor has an acceptable reason for believing that a particular payment, even though it has not actually been authorised by his creditor, would amount to a discharge of his obligation towards his creditor, and he in

contract. The owner of the policy, the insured and the beneficiary may be the same person.

198 See *Kretschmer v Kretschmer* 1989 (1) SA 566 (W) at 584D-E.

199 See *Da Mata v Otto NO* 1971 (1) SA 763 (T) at 764A-H.

200 See *Lakhani and another v Khan & Son* 1973 (4) SA 236 (N) at 237E.

201 Eg, if the lessor undertakes to pay the premium to the insurer, the insured's share of the premium is included in the rent.

202 See ch 3 par 3.1 above, for an exposition of the sources of the South African common law; see also ch 3 par 3.3.6 above.

203 See Wessels *Contract* par 2207; Lee *Introduction* 254; Joubert *Contract* 276; Farlam and Hathaway 708; Kahn *Contract* 609; Kerr *Contract* 381; Christie 402; De Wet & Van Wyk 262n58-59.

204 See *Odendaal v Van Oudtshoorn* 1968 (3) SA 433 (T) at 436H-437A; *Blesbok Eiendomsagentskap v Cantemessa* 1991 (2) SA 712 (T) at 718C-D (by implication); and *Bouwer NO v Saambou Bank Bpk* 1993 (4) SA 492 (T) at 498A-C.

205 It is possible that the debtor's choice to pay either the creditor or the *adiectus* is restricted in the contract. Eg, the contract may provide that the debtor may pay the *adiectus* only.

206 See Joubert *Contract* 276-277; Kerr *Contract* 382-383; Christie 403; De Wet & Van Wyk 261-262.

207 See again ch 3 par 3.3.6 above.

good faith so acts and the creditor's estate is enriched thereby, then the debtor is discharged to the extent that the creditor's estate is enriched.²⁰⁸

In the context of insurance, the imminent insolvency of the insurer provides an example of where the debtor (insured) might be eager to pay the insurer's creditor rather than the insurer itself. Such a creditor of the insurer may be the reinsurer in terms of a reinsurance contract. In such instance the debtor (insured) may have a real interest in keeping up the payment of the premiums due under the reinsurance contract. Payment by the insured of the premium due under the reinsurance policy will ensure that the reinsurance policy, which serves as additional security of the indemnification of the insured in the event of the realisation of the risk, is kept in force. Payment to the reinsurer may then, provided no provision of the Companies Act relating to the insolvency and liquidation of companies has been contravened,²⁰⁹ constitute a discharge of the insured's debt (premium) towards the insurer.²¹⁰ It is important to note that the exception provided for in the common law is not restricted to the payment of the creditor's creditor. Payment to someone other than the creditor's creditor may also, in certain circumstances, discharge the debt owed to that creditor.

If the insurer agrees that the insured may pay the premium to a third party, it will not be necessary for the insured to rely on this exception in pleading discharge of the debt. Such an agreement between the insured and the insurer as to whom payment may be made, is a term of their contract and may be agreed upon expressly, tacitly or by implication.

8.3.7 The Amount of the Premium

The amount of the premium is determined after due consideration by the insurer of the material facts conveyed to him by the insured in the application form.²¹¹

208 See *Bouwer v Saambou* supra at 501B-C. See also Schulze "Performance" 125 et seq for criticism of the Court's formulation of the exception in terms of the common law.

209 Eg, s 31(1) of the Insolvency Act 24 of 1936 provides that if a debtor (the insurer (which is the insured in the reinsurance contract)) has, before sequestration, in collusion with another person (the insured) disposed of any property belonging to him (the premium due in terms of the insurance contract) in a manner which had the effect of prejudicing its creditors or of preferring one of them (the reinsurer) above another, the court may set aside the disposal. Section 340 of the Companies Act 61 of 1973 provides that the provisions contained in s 31(1) of the Insolvency Act apply with equal force to collusive dealings by a company before its winding-up. If the insurer is liquidated only after the insured has paid the premium to the reinsurer, the liquidator of the insurance company will usually not be successful in setting aside the payment to the reinsurer as a collusive dealing between the insurer and the insured. However, if the liquidator can nevertheless prove collusion between the insurer and the insured, the disposal will be set aside.

210 Admittedly this example is only relevant where the reinsurance contract reinsures the contract of the insured only, and not where the reinsurance contract reinsures all (or other of the) insurer's contracts.

211 See, eg, *Pereira v Marine and Trade Insurance Co Ltd* 1975 (4) SA 745 (A) at 755F; *Kelly v Pickering and another* 1980 (2) SA 758 (R) at 762H; *Nel v Santam Insurance Co Ltd* 1981 (2) SA 230 (T) at 240G; *Pienaar v Southern Insurance Association Ltd* supra at 921D-E; *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* supra at 432E-F and 435F-G; *Anderson Shipping (Pty) Ltd v Guardian National Insurance Co Ltd* 1987 (3) SA 506 (A) at 515A-E.

Likewise, the insurer considers other information gathered in other ways, for example, from statistical averages. The insurer creates certain risk categories which demand different premium levels. The information gathered and considered by the insurer in respect of a particular risk determines the category into which the risk will fall. The amount of the premium is therefore the calculated product of a combination of factors which may have an influence on the extent of a particular risk.

Usually the parties to an insurance contract agree on either a fixed amount of premium or a fixed rate of premium.²¹² The parties to a non-indemnity insurance contract²¹³ usually agree on a fixed amount of premium, for example, R100 per month for the duration of the life of the insured.²¹⁴ This method of expressing the amount of the premium is in accordance with the nature of a non-indemnity insurance contract in general, namely an investment.²¹⁵ The parties to an indemnity insurance contract usually agree to insure the object of the risk at a fixed rate of the (insured) value of the object, for example, two percent of the (insured) value of a motor-vehicle. If the motor-vehicle is valued at R120 000 and the insured wishes to insure it at full-value, the premium payable will be R2 400 per year, usually payable in twelve equal monthly instalments of R200 per month. If the parties agree that the insurer will be permitted to add a fixed amount to the premium, say for instance a health loading in the case of a life insurance policy, or an inflation clause of, say, ten percent, to ensure that the insured is not under-insured in the case of property insurance, the court will give effect to such a term.²¹⁶ The position will be different if the parties did not agree on a fixed amount to be added but left the amount to be calculated by the insurer. Such a contract, it has been suggested, would be void for vagueness.²¹⁷ It is submitted that this is not a case where the contract would be void for vagueness, but rather a policy consideration that one of the essentials of a contract is not to be left to the sole discretion of one of the parties. A unilateral fixing of the price by one of the parties may result in the removal of an important institutional check against a gross and unreasonable contractual imbalance, namely negotiation about the price.²¹⁸ If the contract is indeed void where the amount of the premium is to be calculated (at a later stage) by the insurer, the reason for such voidness can perhaps be ascribed to the fact that such a term is in conflict with the

212 In life insurance the amount of the premium is, to a large extent, predetermined in that insurers are compelled to "furnish the registrar with a copy of every table or statement of the rates of premium which he ordinarily undertakes to grant in respect of domestic policies insuring the lives of normal [sic] individuals". Such tables or statements should be accompanied by an actuarial report stating that such table or statement is actuarially sound: see s 34(1)-(2) of the Insurance Act. The provisions of s 34(1)-(2) are confirmed in s 48 of the Draft Bill on Long-Term Insurance.

213 Although a life insurance contract is not the only type of non-indemnity insurance contract, it is the most common form of non-indemnity insurance. For examples of some of the different types of life insurance contracts, see *Havenga Life Insurance* 1-2. As to the distinction between indemnity and non-indemnity insurance contracts, see par 8.4.1 below.

214 So-called "whole-life insurance": see *Havenga Life Insurance* 2.

215 See *Gordon & Getz* 323 361; *Havenga Life Insurance* 292. As to the manner in which premiums are determined in terms of life insurance contracts, see *Havenga Life Insurance* 3.

216 See *Robin v Guarantee Life Assurance Co Ltd* 1984 (4) SA 558 (A) at 567A-I where it was held that such a term will be enforced only if the wording of the contract is clear and unambiguous.

217 See *De Wet & Van Wyk* 93 314n8.

218 See *Zimmermann Obligations* 254.

convictions of the community. It is also possible that the premium may be determined by a third party. Such third party may either be appointed by the parties to the contract,²¹⁹ or legislation may provide that the premium will be determined by an impartial third party, for example a government official.²²⁰

The mere fact that the amount of the premium is expressly stated in the policy does not render it a liquid document for purposes of provisional sentence against the insured for payment of the premium. Proof of the making of the disbursement by the insured (for example, payment to a third party on the basis of the personal liability of the insured) is also required.²²¹

In the absence of an agreement on a fixed premium, parties to an insurance contract are deemed to have agreed on the usual premium for the particular type of insurance contract.²²² Previous premiums levied by the insurer for similar types of insurance may be taken into account in establishing what the usual premium is. The parties may also agree to pay an "appropriate" or "reasonable additional premium".²²³

More problematic is the situation where the parties did not agree on a fixed premium or where they agreed to insure "at a premium to be agreed". The first question is whether the parties intended that a reasonable premium would be payable. Does the South African insurance law acknowledge that in principle a reasonable premium will be payable in the absence of an express agreement as to the amount of the premium? And if so, on what basis? Secondly, does an agreement, whether expressed or implied, to pay a reasonable premium satisfy the criterion of certainty generally required in South African law for the validity of contracts? This question, of course, concerns the requirement that there must be certainty about the obligations to be created by the contract. If there is no ascertainable agreement concerning the performances of the

219 See Zimmermann *Obligations* 255.

220 For an example of where the premium in terms of a reinsurance contract is determined by the Minister of Trade and Industry in consultation with the Minister of Finance, see s 4 of the Export Credit and Foreign Investments Reinsurance Act 78 of 1957.

221 See *Industrial Units (Natal) (Pty) Ltd v Platberg Quarries (Pty) Ltd* 1979 (2) SA 312 (O) at 317A-B.

222 See De Wet & Van Wyk 314-315n10. The requirement that the performance must be determined or determinable is one of the general requirements for contracts and is not exclusive to the contracts of sale or insurance, to name but two. See also *Petersen v Incorporated General Insurance Ltd* supra at 8F-G where it was decided that "[i]n the absence of an expressed [premium] it may be inferred to be the [insurer's] ordinary rate if it has a fixed tariff and there is no doubt as to how the risk should be classed, or, again, it may be inferred to [be] the same rate as that at which the risk was previously insured" (my insertions).

223 See, eg, *Aris Enterprises (Finance) (Pty) Ltd v Protea Assurance Co Ltd* 1981 (3) SA 274 (A) at 284C. The facts in this decision were that the appellant hired out catering equipment to restaurants and cafés. The appellant insured this equipment with the respondent against loss or damage. In terms of the insurance contract the insurer had fixed scales in terms of which the additional appropriate premium could automatically be determined, having regard to the sum insured and the term of the lease between the appellant (as lessor) and the lessees. In this case the practice was that once an agreement of lease was declared (ie, brought to the attention of the respondent (the insurer)) in terms of the insurance policy, the "appropriate" premium was paid in a lump sum for the full period of the lease. It was therefore a once-and-for-all payment, and not a periodic payment of premiums: see at 284C.

insurer and the insured, no obligations result.²²⁴ The contract will then be void for vagueness.

As a point of departure a distinction must be drawn between, on the one hand, the validity of a term to insure at "a premium to be agreed", and, on the other hand, one to insure at "a reasonable premium". The sufficiency of a term to insure at "a premium to be agreed", or "a reasonable premium" (whether the term is an expressed, tacit or implied term) depends on whether evidence can be adduced to quantify the performance due in terms of the stipulation.²²⁵

The first question to be considered is whether the South African law regards a term to lease, purchase or insure at "a rent, purchase price or premium *to be agreed*", respectively, as sufficiently certain. The validity of a stipulation to "negotiate and agree upon a rental" was considered in *Letaba Sawmills (Edms) Bpk v Majovi (Edms) (Bpk)*.²²⁶ The lessor concluded a contract of lease in terms of which a certain plantation was leased for a period of nine years and eleven months. The contract also granted the lessee the option of renewing the lease for a further such period. Clause three of the contract (which contained the option) specified that the rental for the further period had to "be negotiated afresh between the parties subject to the rental being fixed within the limits of market related prices for the timber on the leased property and the rental payable in respect thereof". The clause further provided that in the event of the parties being unable to reach agreement on the said rental, it had to be determined by arbitration.²²⁷ The Court decided that if the option had not provided for the possibility of an arbitrator determining the premium, it would have been void. The Court reasoned that an agreement to negotiate and agree upon a rental was unenforceable and that it made no difference that the parties had circumscribed the envisaged agreement by merely limiting the ambit of the negotiations and the resulting agreement.²²⁸ It can therefore be taken that a contract in terms of which the parties agree to lease "at a rent to be agreed" will, as a matter of general principle, and in the absence of evidence to quantify the performance, be invalid.²²⁹

In *Zava Trading (Prop) Ltd v Santam Insurance Ltd*²³⁰ the Court was confronted with the question whether an agreement to insure "at a premium to be agreed" is suffi-

224 See Joubert *Contract* 179-180; Christie 117 et seq; Van der Merwe et al 161.

225 See Van der Merwe et al 163n19.

226 1993 (1) SA 768 (A).

227 At 773C-F.

228 At 773H-774A.

229 In *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* 1993 (1) SA 179 (A) at 182F-G it was said that "a lease is invalid if the rent is to be determined by the lessor - or the lessee - in his *unfettered* discretion". This rule applies with equal force to a contract of sale where the purchase price is to be determined by one of the parties to the agreement. According to Roman-Dutch writers such rent or purchase price is not definite or definable and the lease or sale is therefore invalid: see at 185B-E 186C-D. This rule flows from the broader principle that contractual obligations must not be vague or uncertain: see at 182G.

230 Unreported case no 4108/89 (D) 29 November 1989. See also in general, Van Niekerk "Premium" 661 et seq for a discussion of the facts and decision in this case.

ciently certain. Zava Trading was the insured in terms of a floating (open) policy which provided, inter alia, that certain goods would be held covered on conditions and at rates to be agreed. After the materialisation of a covered risk, the insured instituted a claim for his loss. The insurer submitted that no valid contract had been concluded because no agreement had been reached on one of the essential elements of the contract of insurance, namely the premium payable by the insured.

The Court concluded that, apart from the fact that no premium or rate of premium for the goods in question had specifically been agreed upon, the policy "laid down no method whereby the premiums ... could be determined independently of the will of the parties". It noted also that there was no provision "in our insurance laws" which merited an application of the principle of "a reasonable premium" in the absence of an arrangement by the parties as to the amount of the premium.

This decision merits a few comments. First, is it correct to say that by agreeing to insure "at a premium to be agreed", the parties intended that, in the absence of any subsequent agreement on the premium, there was to be no insurance contract because the contract which they purported to conclude would be void for vagueness? It is correctly argued that it is a question of the parties' intention in every case and of an interpretation of the contract in question to decide this question.²³¹ Factors like the type of contract in question, relevant trade usages, the nature of the matter left by the parties for subsequent agreement, previous dealings between the parties and their subsequent conduct may all be of relevance in deciding the matter.²³² It is submitted that insurers frequently provide cover "at a premium to be agreed", and although such a term is not altogether free from uncertainties, it can be argued convincingly that a "reasonable premium" should be payable in such circumstances.²³³ The need to give business efficacy to the contract together with the general principle of the interpretation of contracts that a court of law must be reluctant to declare void contracts which were clearly intended to be legally binding,²³⁴ necessitate such a conclusion.²³⁵

Secondly, the notion by the Court that there was no provision "in our insurance laws" which merits an application of the principle of a reasonable premium in the absence of an arrangement by the parties as to the amount of the premium is misleading, if not incorrect. Although not cast in such express language as in its English

231 See Van Niekerk "Premium" 663.

232 See Van Niekerk "Premium" 662-663.

233 In *Trident Sales v AH Pillman & Son* 1984 (1) SA 433 (W) at 439C-D Coetzee J referred to the following passage from the English decision in *Martin-Baker Aircraft Co Ltd v Murison* [1955] 2 QB 556: "The common law, in applying the law merchant to commercial transactions, has always proceeded more on the basis of reasonableness in filling up the gaps in a contract which the parties have made on the basis of what is reasonable ... where the contract makes no provision for either fixing price or premium or time at which an act has to be performed, then the law is that a reasonable price and *reasonable premium* or reasonable time will be imported (my italics)." He concluded (at 441D) that it remains a question of construction of the agreement according to the ordinary principles of construction.

234 See Joubert *Contract* 62.

235 See Van Niekerk "Premium" 664-667. See again ch 3 par 3.3.7 above.

counterpart,²³⁶ our Insurance Act²³⁷ does acknowledge the concept of a "reasonable premium". Section 20*bis*, which deals with the handling of premiums by agents, provides that for purposes of that section the term "premium" includes "a deposit premium", while "a deposit premium" is defined as a provisional premium which is agreed upon in the event of it being impossible at any stage to determine the exact premium. Such provisional premium should represent "a reasonable estimate" of the premium.²³⁸

Thirdly, what are the general principles applicable in this case, but not considered by the Court? The terms of a contract must be certain or ascertainable for the contract to be valid and enforceable. The agreement on the payment of the premium (as opposed to the actual payment itself) is an essential term of a contract of insurance.²³⁹ If it is not possible to define what portion of a payment in terms of a contract constitutes the "premium", the contract cannot be classified as an insurance contract.²⁴⁰ This will be the case even where all the other essentials of the insurance contract are present. The relevant question in the present case is whether the requirement of certainty is met where the insurer agrees to insure "at a premium to be agreed". Certain general principles regarding the payment of rent or the purchase price in terms of a contract of lease or a contract of sale respectively, may be of some assistance in answering this question. Apart from the fact that the contract of insurance is but another type of contract, the analogy between the contract of insurance on the one hand and the contracts of lease and sale on the other hand should also be kept in mind in this context.²⁴¹

The position as regards the payment of rent or the purchase price in 1989, when the decision in *Zava Trading* was handed down, was that a mere agreement to agree (at some later stage) on the rent or price could not prevent an agreement from being void for vagueness.²⁴² This principle was subsequently confirmed in the decision in *Letaba Sawmills*.²⁴³ But an agreement to pay the usual or customary or market price or

236 See s 31(1) of the English Marine Insurance Act 1906 which provides that where insurance is effected at a premium to be arranged and no arrangement is made, a reasonable premium is payable. Section 31(2) contains a similar provision in respect of insurance at an additional premium. Section 88 of the English Marine Insurance Act 1906 provides that what is a reasonable premium is a question of fact. See again ch 6 par 6.3.7 above.

237 Although the English Marine Insurance Act 1906 deals (strictly speaking) only with marine insurance law, it has a much wider application. As it is furthermore the most important instrument of legislation in English insurance law, it is comparable with our Insurance Act: see again ch 6 par 6.1 above.

238 See s 20*bis*(6) as to the definitions of "premium" and "deposit premium".

239 See *Sydmore Engineering Works (Pty) Ltd v Fidelity Guards (Pty) Ltd* supra at 480G where Steyn J remarked that "it is an essential element of any insurance agreement that a determinable payment of a premium in consideration for the risk undertaken by the insurer, must be provided for". See again par 8.2 above.

240 See *Sydmore Engineering Works* supra at 481A-B.

241 See again ch 2 par 2.3 above in this regard.

242 But see Cooper 56 who suggests that "if an article is sold for a fair and reasonable price, a price to be fixed *arbitrio boni viri*, it is sufficiently ascertainable to constitute a contract of sale".

243 Supra at 773l.

rental was regarded as sufficient to constitute a valid contract.²⁴⁴ If applied to insurance contracts those principles entailed that the premium did not have to be expressed but it at least had to be determinable or ascertainable.²⁴⁵

However, the possibility that the courts will in future be prepared to infer a tacit term that the parties intended that "a reasonable premium" will be payable where they agreed to insure "at a premium to be agreed", appears to be remote.²⁴⁶ If seen against the fact that the Appellate Division declared in no uncertain terms that a lease "at a rent to be agreed" is invalid,²⁴⁷ one has to concede that, notwithstanding the fact that insurers frequently provide cover "at a premium to be agreed", the courts will probably rule that such an "insurance contract" is invalid. It is, of course, also true that an "agreement" to insure "at a premium to be agreed" is, strictly speaking, and in the absence of a tacit term that "a reasonable premium" was intended by the parties, not a contract. It is said that "a contract comes into existence if the parties are agreed on creating between themselves an obligation, as well as on all its particulars, such as its content and subsidiary features".²⁴⁸ It is therefore clear that it cannot be said that the parties have reached consensus where they are still negotiating on the terms of the contract.

If it is accepted that a term which provides for "a premium to be agreed" will be regarded as invalid for its vagueness, the second question remains, namely, whether an express or tacit term to insure "at a reasonable premium" will suffer the same fate. An express or tacit term which provides for "a reasonable premium" is, of course, different from a term which provides for "a premium to be agreed". In the case of an express or tacit term to insure "at a reasonable premium" the parties have reached consensus that a reasonable premium will be payable. It is submitted that a term which provides for "a reasonable premium" to be paid is sufficiently certain to constitute a valid insurance contract. Although there is no decision which deals directly with the question whether a term to insure at "a reasonable premium" is valid, there is authority from the law of lease and sale that "a reasonable rent" or "a reasonable price" is sufficiently certain to constitute a valid contract.²⁴⁹ Certainty will be attained where the parties agree upon an objective standard for determining a performance, for example, the "usual" or "market" price of a commodity.²⁵⁰ Although it has in the past been said that "a reasonable price" is not a sufficiently objective standard in contracts of sale and lease, there is authority to the contrary.²⁵¹ The question whether such term is indeed sufficiently certain seems to be whether the provisions of the contract, objectively applied to its factual context, give meaning to the term "reasonable".²⁵² Moreover, in

244 See Cooper 56-57n101 and the authorities referred to there. See again ch 2 par 2.3.3.2 above.

245 See Van Niekerk "Premium" 667-668. See again ch 2 par 2.3.2.3.3 above.

246 It is, of course, true that courts are generally slow to import a tacit term into a contract: see Van der Merwe et al 197.

247 See again the decision in *Letaba Sawmills (Edms) Bpk v Majovi (Edms) (Bpk)* supra.

248 See Van der Merwe et al 13.

249 See again ch 2 par 2.3.2.2 and 2.3.3.2 above.

250 See Van der Merwe et al 163.

251 See Van der Merwe et al 163n19 and the cases referred to there.

252 See Van der Merwe et al 164n19.

the recent past there have been a number of cases which indicated that an agreement to lease at "a reasonable rent" or sell at "a reasonable price" may be valid. They are the following.

In *Kerkraad van die Nederduitse Gereformeerde Kerk, Gemeente Douglas, en 'n ander v Loots*²⁵³ the Court decided that a stipulation to pay rent on the basis of "fair terms and conditions" was not void for vagueness as it was intended that the lessee should lease the property on terms and conditions that were fair in all respects, which would necessarily include a fair rental. To determine a fair rental for the property (in this case, a farm) the Court decided that the rental values in the particular district had to be taken into consideration as market-related rentals.

In *Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd*²⁵⁴ the lessee in terms of a contract of lease was liable to pay rent, certain rates and "levies of whatever nature". It was decided that the phrase "levies of whatever nature" in this particular contract of lease was not void for vagueness as they were to be determined by a public body or a local authority, and would be easily ascertainable.

In 1991 the decision of the Appellate Division in *Genac Properties Jhb (Pty) Ltd v NBC Administrators CC (previously NBC Administrators) (Pty) Ltd*²⁵⁵ was handed down in which it was hinted that the strict requirement of certainty may well be relaxed in future. The Court remarked (albeit obiter) that

"[t]here is no general agreement that a lease for a reasonable rent is invalid [per se].²⁵⁶ The question is moot. It is difficult to see on what principle a sale for a reasonable price, or a lease for a reasonable rent, should be regarded as invalid".²⁵⁷

A term to insure at "a reasonable premium" usually does not occur in the run-of-the-mill type of insurance contract which is concluded between a large insurance company and the average person in the street who has little if any experience of insurance, or who finds himself in an unequal bargaining position. The protection of the average person against possible exploitation by insurers is therefore of little practical relevance in this regard. Moreover, as the term to insure at "a reasonable premium" usually occurs in insurance contracts where merchants and large commercial companies (who usually have experience of insurance matters and usually also have a long-standing relationship with a particular insurer) often require immediate insurance cover, the possibility to validly insure at "a reasonable premium" is an indispensable tool in the modern commercial world.

253 1990 (3) SA 451 (NC) at 463F-G.

254 1991 (3) SA 738 (A) at 750G.

255 1992 (1) SA 566 (A). For a discussion of the decision in *Genac Properties Jhb*, see Hawthorne 644-646.

256 My insertions.

257 At 577F-G.

It would appear that the question as regards the validity of a term to insure at "a reasonable premium" has not been settled yet. Another court on another day may well find that an agreement to insure at a reasonable premium is not only in accordance with the common law²⁵⁸ and with the general principles of our law of contract, but that it may also conform with modern-day business practices.²⁵⁹

8.4 NON-PAYMENT OF THE PREMIUM

8.4.1 Introduction

The actual payment of the premium is not necessary for the conclusion of a valid insurance contract.²⁶⁰ Failure to pay the premium will not affect the otherwise binding nature of the arrangement between the insurer and the insured. In the absence of a provision that the policy is not to attach until payment of the premium, such a provision will not be implied by the courts.²⁶¹

A distinction must be drawn between indemnity insurance contracts and non-indemnity insurance contracts as regards the consequences flowing from the non-payment of the premium.²⁶² In the case of indemnity insurance the insurer is liable for a determinable but unliquidated amount. Although the insured may obtain cover for a fixed amount, the amount for which the insurer will be liable is not necessarily the sum insured. Subject to the sum insured, the insured is entitled to a complete or full indemnity, but he is not allowed to recover more than the sum insured. Examples of indemnity insurance are property insurance (for example, marine, fire, theft and motor-vehicle insurance) and liability insurance. In the case of non-indemnity insurance the insurer undertakes to pay a fixed and liquidated amount. The extent of the insured's claim and the insurer's liability on the materialisation of the specific misfortunate event are already determined at the time of the conclusion of the contract. Examples of non-indemnity insurance are life and (most) personal sickness insurance.²⁶³

258 See again ch 3 par 3.3.7 above. See also Erasmus, Van Warmelo & Zeffertt 271.

259 Practical reform in respect of the requirement that a performance must be certain or ascertainable according to an independent and objective standard has already been implemented in England, America and the codifications of Germany and the Netherlands: see Hawthorne 647-648. See also Zimmermann *Obligations* 255. As to the legal position on this issue in the Netherlands, see again ch 4 par 4.3.7 above.

260 See again par 8.2 above.

261 See *Lake and others v Reinsurance Corporation Ltd and others* supra at 127; *Petersen v Incorporated General Insurances Ltd* supra at 8B-D.

262 There are also other legal consequences attached to the distinction between indemnity insurance contracts and non-indemnity insurance contracts which are not relevant for present purposes: see Reinecke & Van der Merwe par 12.

263 Gordon & Getz 82 et seq.

8.4.2 Non-Payment of the Premium in Terms of Indemnity Insurance Contracts

Indemnity insurance contracts do not normally allow for any period of grace.²⁶⁴ But a renewal notice is often sent to the insured, which would be construed as an offer by the insurer to the insured to conclude a new insurance contract on payment of the premium within the period stipulated in the notice. This offer can be withdrawn by the insurer before acceptance of it by giving notice to the insured,²⁶⁵ but it cannot be withdrawn after the insured has accepted the offer by the insurer.²⁶⁶

The difference between the effect of a period of grace and a renewal notice appears to lie in the fact that in terms of a "period of grace", the insured is given the opportunity to keep the existing contract in force, while in terms of a renewal notice the insured is invited to make an offer to conclude a new insurance contract.²⁶⁷ One of the legal consequences flowing from this construction is that the pre-contractual duty to disclose material facts arises each time a renewal is made, because it is a new contract which is being concluded and not merely a continuation or a renewal of an existing contract. But in the case of a payment which takes place within the period of grace, the duty to disclose does not arise. Furthermore, the payment of the premium within the period of grace ensures that the existing contract stays in force and that no further stamp duties need to be paid. The conclusion of a new insurance contract is inevitably accompanied by the payment of (further) stamp duties,²⁶⁸ as well as the possibility of different terms, including a possible increase in the premium.

This construction also accords with one of the underlying differences between indemnity insurance contracts and non-indemnity insurance contracts. Indemnity contracts are generally terminated at the end of each insurance period. By paying the premium, the insured in effect makes an offer to conclude a new contract on the same terms which applied to the previous contract. If the insured chooses not to pay the premium, there is simply no longer a contract. Non-indemnity contracts, by contrast, are generally concluded for an indefinite period. If the period of grace relates to payment of a premium for the renewal of the contract, it is usually an offer by the insurer to grant cover provided the offer is accepted by payment of the premium within the period of grace. If the insured fails to pay the premium within the period of grace, the contract simply lapses.²⁶⁹

²⁶⁴ See par 8.4.3 below. See also Gordon & Getz at 169 who confirm this fact and continue by stating that the usual renewal notice sent by an insurer in terms of an indemnity policy usually allows for fifteen days.

²⁶⁵ See Gordon & Getz 169n54.

²⁶⁶ See Kerr *Contract* 61; Christie 55n34.

²⁶⁷ See Gordon & Getz 169-170.

²⁶⁸ See s 3 of the Stamp Duties Act 77 of 1968, read with schedule 1 which provides that the following insurance policies are subject to stamp duties: life insurance policies (item 18(1)-(2)); disability policies (item 18(2A)(a)-(b)); marine insurance policies (item 18(4)); insurance contracts concluded in terms of s 2 of the Export Credit and Foreign Investments Reinsurance Act 78 of 1957 (item 18(5)); and any other insurance policy or certificate (item 18(6)). See also Schulze "Formaliteite" 77-79.

²⁶⁹ See Reinecke & Van der Merwe par 46-47.

The preceding principles are illustrated in the following cases. In *Licences and General Insurance Co v Bassano*²⁷⁰ it was held that in the case of indemnity insurance neither the insurer nor the insured could sue the other to respectively pay or receive the new premium necessary for renewal. On the lapse of the policy, for example, on the non-payment of the premium, a new insurance contract has to be concluded.²⁷¹ In *Whyte's Estate v Dominion Insurance Co of SA Ltd*²⁷² the principle that each period of insurance is regarded as a separate insurance contract, worked to the advantage of the insured. At the conclusion of the (first) insurance contract the insured answered "no" to the question of whether he had had a serious motor-vehicle accident during the previous three years. When the insurer renewed the contract three years later, he relied for his information on the answers given by the insured contained in the original proposal. However, at the time of the relevant renewal the answer of the insured was no longer incorrect since by then more than three years had elapsed since his last accident.²⁷³ The Court held that

"[each] renewal [of the motor-vehicle policy] is a new contract for a defined period. If it is a new contract it entirely replaces the contract which has expired by the lapse of time. The new contract is on the same terms as the old. [The insured] shall be considered to have answered the questions afresh as if on a new proposal when making a new contract by tender and acceptance of the premium."²⁷⁴

In *Southern Insurance Association Ltd v Cooper*²⁷⁵ the indemnity policy which was concluded between the parties had been renewed from time to time by the tendering and acceptance of the premium by the insured and the insurer respectively.²⁷⁶ However, it was decided that the insurer was not bound to renew the policy and that it was entitled to reject the insured's offer (which consisted of a tendering of the premium) to renew the policy. The mere acceptance of the premium by the insurer's agent did not constitute a waiver by the insurer of its right to rely on breach of contract by the insured.²⁷⁷

It is submitted that the insured in terms of an indemnity insurance contract does not enjoy sufficient protection in our law against the lapse of the insurance cover in terms of the policy in the case of the non-payment of the premium. Such protection of the insured can only be achieved through legislative intervention. Thus, it would appear that the enactment of the following legislative provisions in South African insurance law are called for. First, a statutory period of grace in the case of indemnity insurance contracts should be introduced during which the insured is given the opportunity to pay the

270 Supra.

271 At 187.

272 Supra.

273 At 387-389.

274 My insertions. See at 399.

275 Supra.

276 At 357G-359E.

277 At 361G-362C.

premium and to ensure that claims which might arise during the period for which the premium was unpaid, are paid by the insurer. Secondly, the insurer should be required to inform the insured in writing of his right to pay the premium during the period of grace to ensure continuation of the cover. Thirdly, the insurer must send the insured a second notice in writing if the insured fails to pay the premium within the period of grace, informing him of its intention to cancel the contract within a stipulated period of time. It should then be possible for the insured, if he so wishes, to be able to ensure the continuation of the cover in terms of the policy by paying the overdue premium.²⁷⁸ In order to compensate the insurer for the inconvenience caused by the insured's neglecting to pay the premium timeously and the consequent administrative costs involved for it, the insured should perhaps be expected to pay a small amount in addition to the premium to ensure continuation of the cover. Such additional amount would serve as a penalty for the insured's failure to pay the premium.

This proposal applies to the ordinary type of indemnity insurance where the contract is generally terminated at the end of each insurance period, as indemnity insurance contracts are not usually concluded for an indefinite period. Although it may be argued that a statutory period of grace in the case of indemnity insurance contracts will result in the insured having the unilateral option to renew the contract, and that he may consequently be enticed to withhold the payment of the premium pending the possible materialisation of the risk, such argument is not convincing. By giving the insured the unilateral option to renew the contract, so it is argued, he has the unilateral option to pay the premium and should he decide not to pay the premium and thereby renew the contract, he will have enjoyed free insurance cover during the period of grace. Four main arguments may be raised against the objection against a statutory period of grace in the case of indemnity insurance. First, the practical reality is that insured do not enjoy free insurance cover during a period of grace. The premium that the insured pays for the preceding period of cover inevitably includes a portion which provides for the cover during the period of grace. Secondly, why would an insured intentionally risk the lapse of the insurance cover by withholding his premium? If the insured fails to pay the premium timeously the existing contract lapses. The conclusion of a new insurance contract is usually to the detriment of the insured because it will result in the payment of further stamp duties and the possibility of an increase in the premium. Thirdly, the insured in terms of non-indemnity insurance enjoys similar statutory protection. There the insured also has the unilateral choice to continue the contract by paying the premium during the period of grace. For example, in the case of life insurance the executor of the deceased's estate (or the beneficiary in terms of the policy or any other person for that matter) is allowed to pay the premium after the insured life has passed away, provided that the premium is paid during the period of grace. It may therefore be argued that the insured in terms of a life insurance contract also enjoys "free insurance cover" pending his decision whether or not to pay the premium. The fact that the insured in terms of non-indemnity insurance has a unilateral choice whether or not to continue with the insurance contract did not militate against the enactment of the rele-

278 This proposal is based on similar legislation enacted in Australia. See again ch 7 par 7.4.2 above.

vant statutory provisions with regard to non-indemnity insurance.²⁷⁹ Fourthly, the proposed statutory period of grace is based on similar legislation which was enacted in Australia. The Australian legislation was the result of intense research and modern thinking on insurance law in general, and the issue under discussion in particular.²⁸⁰

Alternatively it may perhaps be argued that indemnity insurance, like non-indemnity insurance, should be regarded as a contract for an indefinite period with provision for a statutory period of grace for the payment of the periodic premiums. Such a hypothetical construction of the duration of indemnity insurance would have far-reaching consequences. For example, the insurer would then be entitled to sue the insured for the premium if it wishes to continue with the insurance contract. Provision should then also be made for the cancellation of the contract by either party by giving notice to the other party. The continuation of the obligations of the parties would then depend on the question whether the premium was paid within the period of grace, or whether the contract was cancelled by one of the parties by giving notice to the other party. It is submitted that it is an unacceptable proposition to regard indemnity insurance as a contract for an indefinite period. First, it is contrary to the nature, history and development of indemnity insurance to regard it as a contract for an indefinite period. The examples of (indemnity) insurance from the Roman-Dutch insurance law provide ample proof that insurance on, for example, a ship, was always concluded for a determined or determinable period of time. The insured then enjoyed insurance cover for, say, one year, or, for the duration of a particular voyage, say, "at and from London to Rotterdam".²⁸¹ Secondly, the nature of the object of the risk in terms of indemnity insurance generally does not allow for such insurance to be regarded as a contract for an indefinite period. For example, the insurance of a crop or the insurance of goods for a the duration of a certain voyage or period of transport, is not and can never be concluded for an indefinite period. Thirdly, it will result in an unnecessary formality for the insurer and the insured, and for the latter in particular, if indemnity insurance has to be formally cancelled.

8.4.3 Non-Payment of the Premium in Terms of Non-Indemnity Insurance Contracts

In the case of non-indemnity insurance contracts, the periods of insurance and the corresponding premiums must be specified. The parties usually agree that the

²⁷⁹ See further par 8.4.3 below.

²⁸⁰ The reasons for the enactment of a statutory period of grace in the case of indemnity insurance in the Australian law, apply with equal force in the South African law. These reasons are explained as follows. "[T]he possibility of a cancellation of insurance cover without prior notification to an insured who has overlooked a payment remains a matter of concern. A payment may be missed for a number of reasons. [S]tatistical information supplied to the Commission suggests that the increase in costs would be very small. There is clearly a market for instalment insurance. Trivial increases in its cost in order to provide proper protection to the insuring public will not affect its growth. Unless notified to the insured in the manner and subject to the conditions already proposed, a contractual right of cancellation by the insurer for non-payment of an instalment should not be capable of being exercised until one month has elapsed from the date when the instalment became due": see *ALRC Contracts* par 254. See again ch 7 par 7.4.2 above.

²⁸¹ See again ch 3 par 3.4.1 above.

premiums are payable in advance of an insurance period. Failure to effect timeous payment of the premium will, in theory, result in the lapse of the policy. But non-indemnity policies frequently allow a period of time within which to pay the premium after it has fallen due. This is known as the period of grace. Non-payment of the premium at the stipulated time will therefore usually not result in the lapse of the policy, provided that the premium is paid within the period of grace. Failure to pay the premium within the period of grace will cause the policy to lapse.²⁸² The policy can be "renewed" after it has lapsed but in reality it is a new insurance contract which is concluded between the parties.

The Insurance Act provides for statutory periods of grace in the case of certain classes of non-indemnity insurance.²⁸³ Section 62(1) provides for a period of grace of 30 days (one month) in the case a life policy, industrial policy, home service policy or sinking fund policy in terms of which the premium is paid (presumably) annually. If the premium in terms of these types of policy is paid in monthly instalments, the period of grace is reduced to 15 days. The parties are not allowed to exclude (or to reduce) these statutory periods of grace from their contract. But they are allowed to increase the days of grace in the policy.²⁸⁴ If a claim arises during the statutory period of grace and the premium is still unpaid, the insurer is allowed to deduct the amount of the unpaid premium from the amount of the claim. Section 62(2) provides that if the premium is still unpaid after the period of grace provided for in section 62(1), the insurer is in certain circumstances under an obligation to issue a paid-up policy or to apply the non-forfeiture value of the policy to maintain the policy for a certain period.²⁸⁵

282 See Reinecke & Van der Merwe par 192; Gordon & Getz 169-170.

283 Section 62(1)-(3) provides for periods of grace in the case of a life policy, industrial policy, home service policy or sinking fund policy. Section 62(3)*bis*-(4B) provides for and regulates the period of grace in the case of a funeral policy. Section 54 of the Draft Bill on Long-Term Insurance reiterates the protection which is provided to policy holders in terms of s 62 of the Insurance Act. The aim of the provisions contained in s 62 and 54 is to provide protection to policy holders where a policy has already been in force for a reasonable period and has therefore acquired a realisable value. At present this distinction is made by reference to a period of time (three years). But values accrue at different rates on different policies and it is now proposed to base the process on the level of the accrued value - by reference to the future premiums it could finance. Section 54(1) establishes a statutory minimum period of grace for the payment of premiums and applies to all long-term policies other than a fund policy or a reinsurance policy. It provides that if premium payments take place at intervals of one month or less, the policy will remain in force for a minimum period of 15 days after the due date. If the premium payments take place at intervals of longer than one month, the policy will remain in force for a minimum period of one month after the due date. Section 54(2) provides that the insurer must inform the policy holder in writing of the realisable value (if any) after deducting any loan debt). If such value does not exceed half a year's premiums, the insurer must apply the non-forfeiture rules until the value is exhausted, whereupon the policy will lapse. If such value does exceed half a year's premiums, the insurer must apply the non-forfeiture rules but it must also notify the policy holder of his option to make the policy paid-up, or to surrender it.

284 Section 62(5) of the Insurance Act.

285 The insurer is under an obligation to issue a paid-up policy only if the particular policy has been in force for a certain number of years. (A particular policy is deemed to be in force for a specific period if the premiums are paid-up for that period.) Eg, a life policy and a sinking fund policy must be in force for at least three years and an industrial policy and a home service policy must be in force for at least five years for the insured to claim a paid-up policy or to request the insurer to apply the non-forfeiture value of the policy to maintain the policy for a certain period: see s 62(2)(a)-(d) of the Insurance Act.

In *Steyn's Estate v SA Mutual Life Assurance Society*²⁸⁶ the life insurance policy provided that the premium was due in advance, payable in twelve equal instalments. Each instalment was payable on the first day of each month. Provision was made for 15 days' grace within which to pay each instalment. The first instalment was due on 1 May 1944. Clause 3 of the policy provided that for the first two years of the policy, the prompt payment of the premiums was a material term of the policy and a resolute condition to the continuance of the risk. The first eleven premiums were paid punctually but the premium due on 1 April 1945, as well as the premiums payable on 1 May and 1 June 1945, remained unpaid until 1 July 1945. The insurer sent the insured three letters during August, September and October 1945 in terms of which the insured was informed that the policy had lapsed on 1 April 1945 and that its restoration would be considered only after the insurer was supplied with a declaration of good health by the insured.²⁸⁷ The insured never supplied the insurer with the declaration.²⁸⁸ The insured life passed away on 15 November 1945.²⁸⁹ The Court held that since the policy expressly provided that the prompt payment of the instalments of the premium was a material term of the policy as well as a resolute condition for the continuation of the policy, the insurer had the right to treat the policy as having lapsed.²⁹⁰ The Court concluded that the mere acceptance of the late premiums as well as the subsequent instalments of the premium for July 1945 until 1 November 1945 did not constitute a waiver on the part of the insurer as regards its right to regard the policy as lapsed.²⁹¹

Life insurance policies often provide that if the premium is not paid before the expiration of the period of grace, the policy may be reinstated within a specified period from the due date of the first unpaid premium. The payment of all overdue premiums in terms of the original policy as well as the fulfilment of other requirements for a valid insurance contract, for example, the existence of an insurable interest, or a declaration of health of the insured life, are usually suspensive conditions for the new contract to take effect.²⁹² In *Marnewicke's Executor v SA Mutual Life Insurance Society*²⁹³ the insured failed to pay the half-yearly instalment of the premium on the due date (1 November 1895) or within the 30 days' period of grace. On 18 May 1896 the insurer's agent accepted the premium which was due on 1 November 1895, on condition that a declaration about the health of the insured life was submitted to enable the insurer to decide whether to "reinstate" the policy. The insured life was, however, severely ill and

286 *Supra.*

287 *At 374.*

288 *At 373-374.*

289 *At 363-364.*

290 *At 366-367.*

291 *At 373-374.*

292 *Gordon & Getz 172.* Although reference is sometimes made to "the revival of the contract", it is more correct to refer to a new insurance contract which is concluded between the parties. For a comparison between the terms, "renewal", "revival" and "reinstatement" of a policy, see again ch 6 notes 215, 231 and 235 above.

293 (1898) 15 SC 43.

decided not to submit the declaration.²⁹⁴ The Court decided that the mere acceptance of the late premium did not result in the "reinstatement" of the policy. A new contract had to be concluded which required, amongst other things, the submittance of a declaration of health of the insured life. This was not complied with and a (new) insurance contract consequently never took effect.²⁹⁵

It is therefore clear that the mere payment of the premium in terms of a non-indemnity contract after the period of grace has lapsed, will not result in the revival of the original contract. A new contract must be concluded which must satisfy all the requirements for a new insurance contract to take effect.²⁹⁶

8.5 THE ROLE OF BROKERS AND OTHER INTERMEDIARIES IN THE PAYMENT OF THE PREMIUM

8.5.1 Introduction

Insurance contracts, like all other contracts, are concluded between two or more parties. One of the parties to a contract of insurance is always an insurer. Save for certain exceptions,²⁹⁷ every insurer who conducts insurance business in South Africa is, and must be, either a corporate body registered under the Insurance Act or an underwriter at Lloyd's.²⁹⁸ A corporate body can act only through a natural person. Insurers are therefore invariably represented by an agent. The concept of "agent" therefore includes employees of the insurer, agents, brokers and other intermediaries.²⁹⁹ However, both the terms "broker" and "agent" are used in South Africa when referring to the insurance intermediary.³⁰⁰

294 At 45-46.

295 At 46.

296 See also *Wood's Trustees v South Africa Mutual Life Insurance Society* (1892) 9 SC 220 at 226.

297 Eg, a co-operative society: see s 3bis of the Insurance Act. However, although a co-operative society is exempted by the Insurance Act from being a corporate body for purposes of the Act, a co-operative society by its very nature cannot act without an "agent" in the general sense of the word. The activities of certain bodies and juristic persons may sometimes amount to insurance business but they are exempted by the Insurance Act from the requirement of registration as an insurer because these activities are deemed not to amount to insurance business: see s 1 of the Insurance Act for the definition of "insurance business".

298 Lloyd's is not an insurance company but rather an international insurance market and a venue where a society of underwriters gathers to insure risks for individual account on an unlimited basis. Although an underwriter at Lloyd's is not a corporate body, the trade usage at Lloyd's dictates that underwriters are not allowed to transact insurance business directly with the insured, but only to provide cover through a broker: see Dillon & Van Niekerk 115 et seq; Brown Hazard 60 et seq.

299 See Schulze "Broker" 13.

300 As to the uncontrolled use in South Africa of the title "insurance broker", see Atkins "Free Market" 3 et seq; Atkins "Control" 53 et seq. See also Borrowdale 97 et seq for a discussion of the difficulties involved in ascertaining the precise legal standing of any given insurance intermediary. For a discussion of the role and functions of a broker in general, see Joubert *Verteenwoordigingsreg* 242 et seq.

A general distinction may be drawn between brokers (that is, those insurance intermediaries who are not bound or controlled by an insurer or an insured) and other insurance intermediaries. So-called other insurance intermediaries include officials and employees who are employed by the insurer or the insured, and canvassing agents and assessors who often do not have any formal ties with the insurer or the insured. Reinecke and Van der Merwe are of the opinion that the most important distinction in this regard is between a person who has authority to perform a juristic act (for example, to conclude a contract) on behalf of his principal (the insurer or the insured), and one who does not. They are, however, quick to admit that this test to distinguish between different intermediaries is not watertight. Authorisation to act on behalf of another is often embodied in a contract of mandate but not all mandataries have authority to act.³⁰¹ Most "insurance agents" are merely canvassing agents who introduce prospective insured to the insurer. These canvassing agents do not have the authority to act on behalf of either the insurer or the insured.

For the purposes of this paragraph the following classification of insurance intermediaries may be made. First, there is the broker, who possesses the necessary authority to conclude insurance contracts on behalf of the insured and who is neither under the direct control nor in the employment of the insurer or the insured.³⁰² Secondly, there is the insurance agent, who is usually employed by the insurer and who has the necessary authority to act on behalf of the insurer. However, the policy (which is inevitably drafted by the insurer) usually provides that the insurance agent concerned is deemed to be the agent of the insured for certain purposes, for example, the completion of the proposal form for insurance. Thirdly, there is the canvassing agent and the assessor, neither of whom is a full-time employee of the insurer or of the insured, and who does not possess any authority to act on behalf of any of the parties to the contract.

From a different perspective, insurance intermediaries may be classed broadly as either agents of the insurer or agents of the insured. However, this distinction is not absolutely clear and not always easily drawn. The same intermediary may in a given case act in connection with a particular transaction as the agent of both the insurer and the insured. A general distinction is also often drawn between independent inter-

301 Reinecke & Van der Merwe par 140.

302 The authority of the broker to conclude insurance contracts on behalf of the insured includes, of course, the responsibility to convey to the insurer all information relative to the proposed insurance. In *Rabinowitz & another NNO v Ned-Equity Insurance Co Ltd & another* 1980 (1) SA 403 (W) at 407A the liability of the insured for the conduct of his broker was formulated as follows: "Where a person employs an insurance broker to obtain insurance for him, the broker is his agent, and responsibility for the acts and omissions of the broker is governed by the ordinary law of agency. The communication of information relative to the proposed insurance during the course of negotiations therefor is plainly within the authority of an insurance broker." In a recent decision the responsibility of an insurance broker towards his client to act with "reasonable and proper care, skill and diligence" in his (ie, the broker's) negotiations with the insurer, was recognised. The broker was held liable to his client for loss suffered by the latter as a result of the broker's failure to maintain the insurance: see *Stander v Raubenheimer* (unreported case no 31/94 (O) 11 August 1994).

mediaries (that is, those not bound to or even controlled by any insurer) and dependent intermediaries. So-called independent intermediaries or agents are sometimes regarded as the agent of the insured even though they receive their commission from the insurer.

The remuneration received by brokers is calculated with reference to the amount of premiums generated by such broker on behalf of the insurer or insurers for which he concludes insurance contracts.³⁰³ Agents who are employed by an insurer receive a fixed salary which is usually supplemented by a bonus. The bonus is calculated with reference to the number of insurance contracts which are concluded by the insurer as a result of the particular agent's canvassing, and which are sustained by the insured for a certain period of time.

For practical purposes the term "broker" will be used in the remainder of this paragraph to connote brokers and insurance agents.

8.5.2 The Relationship Between the Insured and the Insurer

Due to the fact that the broker or agent acts on behalf of both the insured and the insurer, albeit in respect of different juristic acts, the relationship between the insured and the insurer is rather insignificant.

Once the insured has paid the premium to the broker, the insurer may no longer claim the premium from the insured. Payment of the premium by the insured to the broker is tantamount to payment to the insurer.³⁰⁴ The insurer is generally not permitted to claim the premium from the insured if it (the insurer) has given credit to the broker for the payment of the premium. This is, however, not an absolute rule and the insurer may claim the premium from the insured if the broker goes insolvent and is not able to pay over the premium to the insurer. But this will be the case only if the insured has not yet paid the premium to the broker.³⁰⁵

If there was no broker or agent involved in the conclusion of the contract, the insurer is, of course, permitted to claim the premium from the insured. If the insurer has given credit to the insured for the payment of the premium, the insurer may claim the premium from the insured only after the extended period for payment has expired.

303 For examples illustrating this principle, see *Shacklock Phillips-Page (Pvt) Ltd v Johnson* 1977 (3) SA 85 (R) at 86E-F; *Smit v Workmen's Compensation Commissioner* 1978 (1) SA 339 (C) at 342A. In practice a broker becomes entitled to the commission on a policy only if it remains in force for a certain period, eg, one year, as was the case in the decision in *Wholesale Builders & Plumbers Suppliers (Pty) Ltd v Van den Heever* 1985 (4) SA 360 (W) at 363A.

304 See s 20bis(5) of the Insurance Act. See also par 8.5.3 and 8.5.4 below.

305 See *Hollet v Nisbet & Dickson* supra 396 where the Court referred with approval to Van der Linden *Koopmans handboek* 4 6 6, who stated that if the underwriter (insurer) gave credit to the broker, the underwriter was not allowed to claim the premium from the insured, except where the insured did not pay the premium to the broker. See again ch 3 par 3.5.3 above.

8.5.3 The Relationship Between the Broker and the Insured³⁰⁶

The broker acts on behalf of the insured in the conclusion of the contract with the insurer. This relationship between the broker and the insured is based on mandate. The insured is usually allowed by the insurer to pay the premium to the broker. This is a trade usage which has its origins in South African common law.³⁰⁷ In the receipt of the premium, the broker acts as agent of the insurer and not as agent of the insured.³⁰⁸

Should the broker become insolvent after having received the premium from the insured and before the transfer of the premium to the insurer, the latter has no recourse against the insured because payment of the premium by the insured to the broker is tantamount to payment to the insurer.³⁰⁹

Section 20*bis*(1)-(7) provides in detail for the receipt of premiums by agents, brokers and other persons on behalf of insurers. It has been amended a number of times since its enactment and the relevant parts of section 20*bis* now provide as follows:

"(1) Subject to the provisions (2), (3) and (4), no registered insurer shall authorize or permit an agent, broker or other person, not being a registered insurer, to retain or deal with any moneys in respect of premiums received other than in terms of subsection (3) on behalf of such insurer and relating to short-term insurance business carried on by such insurer in the Republic: Provided that the provisions of this section are not applicable to a reinsurer or to premiums received in respect of a reinsurance policy.

(2) ...

306 On the relationship between the broker and his client (the insured), see in general Havenga *Versekeringsmakelaars* 80 et seq.

307 See again ch 3 par 3.5.3 and 3.5.4 above. Payment of the premium by the insured to the broker is acknowledged in s 57A of the Insurance Act which provides that any agent or broker who receives payment of a premium on a funeral policy, whether in cash or by cheque, or postal or money order, is under an obligation to issue a receipt to indicate the due date of such premium. The normal methods of payment of the premium (ie, stop orders, debit orders and cheques) usually are in themselves evidence of the payment of the premium. This protection to the insured in terms of s 57A is necessitated by the method of payment of the premium in terms of a funeral policy. Premiums in terms of a funeral policy are usually paid in cash and are often collected from the insured. The insured in a funeral policy is therefore exposed to a greater extent to the underhand dealings of a dishonest broker or agent and needs the protection of a statutory requirement of a receipt for premiums received by the broker.

308 See also par 8.5.4 below for a discussion of the relationship between the broker and the insurer.

309 However, where the policy concerned is a SASRIA policy, the insurer is granted protection in the case of the broker's insolvency: see s 3 of the Reinsurance of Material Damage and Losses Act 56 of 1989. This statutory protection entails that premiums paid in terms of a SASRIA policy to a person other than the insurer, will not form part of that person's estate and will not be subject to attachment by any creditor other than the insurer. The insurer is a creditor of such other person for the payment of premiums by the insured to the other person, who received such premiums on behalf of the insurer. SASRIA is the acronym for the South African Special Risks Association, which undertakes, in co-operation with the South African government, to insure risks which are connected with politically motivated conduct which may cause damage to the insured.

(3) Every such agent, broker or person who receives such premiums on behalf of an insurer shall [pay the premiums received over to the insurer within a specified time].³¹⁰

In *Premier Milling Co (Pty) Ltd v Van der Merwe and others* NNO³¹¹ the Court had to consider the meaning and effect of the phrase "[person] who receives such premiums on behalf of such insurer" as used by the legislature in section 20bis(1) and (3) of the Insurance Act. In view of the subsequent amendment of section 20bis it is important to note that this case was decided before the amendment of section 20bis(5). Briefly the facts were as follows: An insured instructed his broker to obtain insurance cover on his behalf. The insurer issued a policy. The premium was paid by the insured to his broker. Before the premium was paid over by the broker to the insurer, the insurer was liquidated. Thereupon the insured instructed his broker not to pay over the premium to the liquidators of the insurer. The question therefore arose as to whether the broker was authorised to receive and to hold the premiums on behalf of the insurer so that payment to the broker was tantamount to payment of the premium to the insurer.

The Court decided that although there was no express authorisation by the insurer to the broker to collect the premium, there was an implied authorisation to that effect.³¹² The broker was thus ordered to pay the liquidator of the insurance company the premium despite his mandator's (the insured's) instruction to the contrary. Although the finding in this case was a factual one, it is also true that a trade usage to the effect that the broker is responsible to the insurer for payment of the premium received, has already been recognised in certain types of insurance, for example, in the case of marine insurance³¹³ and all business placed at Lloyd's.³¹⁴

Shortly after this decision was handed down, legislation to a similar effect was promulgated. Section 20bis(5) of the Insurance Act now provides that "payment of a premium by a policyholder in terms of his insurance policy to an agent, broker or other person [not being a registered insurer]³¹⁵ shall be deemed to be payment in terms of such policy".³¹⁶

In *Connolly v National Aviation Insurance Brokers Ltd*³¹⁷ the insured paid his premium to the broker who in turn paid it to the insurer by means of a cheque. Before

310 My insertion.

311 1989 (2) SA 1 (A). See also the decision in the Court a quo in *Schalk W van der Merwe v Price Forbes & Federale Volkskas (Bpk) Ltd* (unreported case no 12144/87 (W)). For a discussion of this case, see *Havenga Broker* 168 et seq.

312 See *Premier Milling* at 12D.

313 See *Hollet v Nisbet & Dickson* supra; Gordon & Getz 196n32.

314 See *Havenga "Regsverhoudings"* 103-105; *Havenga "Premiums"* 258.

315 My insertion. Premiums received in respect of a reinsurance policy are exempted from the prohibition contained in s 20bis(1). This section provides that, as a general rule, only registered insurers are entitled to retain or deal with money in respect of premiums received from an insured. See also par 8.5.5 below.

316 See s 20bis(5), as amended by s 5(c) the Financial Institutions Second Amendment Act 104 of 1993.

317 1990 (1) SA 904 (W).

the cheque was cashed, however, it was returned to the broker by an employee of the insurer upon the broker's request. The insurer was subsequently wound-up and the insurer's liquidators claimed payment from the broker.³¹⁸ The action was founded on the fact that the broker, having elected in terms of (the old) section 20bis(3)(a)³¹⁹ to remit premiums to the insurer in terms of section 20bis(2)(a)(iii),³²⁰ and having received payment of the premium from the insured, had become obliged (but failed) to deal with the premium and to pay it to the insurer in accordance with section 20bis(2)(a)(iii).³²¹ It was held that the broker's delivery of the cheque to the insurer constituted the payment contemplated in section 20bis(2)(a)(iii) since, according to the insurer's existing practice, payments were supposed to be made by cheque, and a valid cheque was presented in this case. Any subsequent dealings by or on behalf of the insurer with the premium paid to it by the broker had no bearing upon the issue before the Court. It is to be noted that in terms of the new section 20bis(3)(b),³²² an agent or broker who receives premiums on behalf of an insurer must also "pay the amount of such premiums to the insurer" as specified in the broker's premium records, so that the decision in *Connolly* will continue to apply with the necessary changes in points of detail.³²³

In conclusion then, for purposes of the receipt of the premium, the broker, agent or other intermediary is deemed to be the agent of the insurer. But section 20bis(5), as it currently reads, does not provide sufficient protection for the insured. First, as it only applies to premiums paid by *policyholders*, moneys or "premiums" received by brokers and agents from *applicants for insurance* are not covered by it. Secondly, it does not provide that the broker or agent is also deemed to be the agent of the insurer for purposes of the renewal of the contract of insurance. It is submitted that section 20bis should be amended to provide the maximum protection to the insured or applicant for insurance. First, it should provide that the broker should be regarded as the agent of the insurer also in respect of moneys received from *applicants* for insurance. This would ensure that in the case where the application for insurance, that is, the offer by the insured to the insurer to conclude a contract, is turned down by the insurer, the insured will be entitled to reclaim his money from the insurer where the broker has gone insolvent or has disappeared with the money which accompanied the application for

318 At 905G-906G.

319 Which provided that "[e]very such agent, broker or person [who receives premiums on behalf of an insurer] shall forthwith, upon becoming indebted to any insurer, elect to remit [the premium] in terms of [ss 20bis(2)(a)(i)-(ii)] and in writing advise such insurer of the election made by him, and by any such agent, broker or person who desires to change his election shall give not less than 90 days' written notice of the change to every insurer to whom he has given notice of such election or of any such change" (my insertions).

320 Which provided that "[e]very such agent, broker or person who receives such premiums on behalf of such insurer shall forthwith deposit the amount thereof in a separate trust account, [within 45, 60 or 90 days depending on which date the premiums have been received] of the end of the month during which such premiums were received by such agent, broker or person, transmit to such insurer all moneys so deposited" (my insertion).

321 At 906G-907G.

322 Which provides that "[e]very such agent, broker or person who receives such premiums on behalf of an insurer shall - (b) pay the amount of such premiums to the insurer within 15 days after closing the records [of premium receipts]" (my insertion).

323 At 910F-911D.

insurance. Secondly, the broker, in the receipt of the premium from the insured, should be regarded as the mandatary of the insurer, also for purposes of *renewal* of the contract. Such amendment would eliminate the difficult and anomalous situation in which the insured currently finds himself. Presently the only way an insured can be certain that his application has been accepted or his policy has been renewed, is to deal directly with the insurer. The proposed amendments would ensure that the broker, in receiving moneys from applicants for insurance or premiums for the renewal of the contract from the insured, acts as mandatary of the insurer.

A broker who effects a policy has a lien upon the policy against the insured for any premium not yet paid to him (the broker) by the insured.³²⁴ If the insurer has granted credit for the payment of the premium to the broker, the policy becomes the property of the insured upon the conclusion of the contract, subject to the lien³²⁵ of the insurer or broker.³²⁶

8.5.4 The Relationship Between the Broker and the Insurer³²⁷

The relationship between the broker and the insurer is governed by the principles of the "commission contract".³²⁸ In terms of this contract the broker³²⁹ undertakes to "sell" the offers which he has received from proposers for insurance to the insurer. The insurer in turn pays a "purchase price" (commission) to the broker.³³⁰

324 It would appear that the broker has a lien on the policy in those circumstances only where the broker is liable to the insurer for the payment of the premium.

325 This is a lien *ex contractu*, ie, a debtor and creditor lien: see Van der Merwe *Sakereg* 713n851. The other two types of lien one encounters are salvage liens and improvement liens: see Van der Merwe *Sakereg* 713 et seq.

326 See *Hollet v Nisbet & Dickson supra* at 396-397.

327 On the relationship between the broker and the insurer, see in general Havenga *Versekeringsmakelaars* 110-120.

328 The exact nature and legal ramifications of the "commission contract" are still uncertain. Due to its many similarities with the contract of mandate, it is submitted that the "commission contract" is a type of contract of mandate rather than a contract *sui generis* (ie, a contract which is of a separate or "own" type and which can be classified or distinguished from other types of contract). In passing, something on the concept *sui generis*. It is perhaps a contradiction in terms to refer to a particular contract as a contract *sui generis* because all contracts are to a certain extent *sui generis*. If a contract does not possess one or more essentials or other peculiarities which distinguish it from the next contract, it would not have been a separate contract in the first place. The concept of "sui generis contracts" (apparently) had its origin in the distinction which was drawn in Roman law between nominate contracts, on the one hand, and innominate contracts on the other hand. The nominate contracts, eg, the contracts of sale and lease, were so referred to because each had its specific name, essentials and peculiarities, and was enforceable by a specific form of action which was known by a particular name. The innominate contracts, in contrast, had no specific name and for the enforcement of them no specific form of action was prescribed. Of all the innominate contracts only the contract of exchange or barter is still of relevance today: see Maasdorp 370. The distinction between nominate and innominate contracts is no longer important as the subjective consensual theory postulates that the enforceability of a contract depends on the concurrence of the declared intentions of the parties: see Kerr *Contract* 3 et seq; Christie 1.

329 See again par 8.5.1 above for a description of the concept of "broker".

330 See Havenga "Regsverhouding" 101-102.

The fact that a particular broker is authorised to conclude insurance contracts on behalf of the insured and to forward the premium to the insurer, does not necessarily entail that he possesses the authority to cancel the contract.³³¹ Likewise, the mere fact that the broker who receives a proposal is also empowered to accept the premium in respect of the insurance contemplated by the proposal, does not necessarily extend his authority to conclude the contract of insurance by the acceptance of the proposal. But in certain circumstances the acceptance of the premium by the broker may, depending on the facts of the case, amount to the conclusion of the contract on behalf of the insurer.³³² A broker who is entitled to receive premiums (paid in cash) on behalf of the insurer, is permitted to accept only legal tender³³³ as a method of payment.³³⁴ In the light of commercial needs and usages of modern time, a court will not require very strong evidence to conclude that the parties had contemplated that payment might be effected by means of a method other than cash.³³⁵

But for purposes of the receipt of premiums, an insurance intermediary (including a broker) is regarded as the agent of the insurer.³³⁶ This principle has its origin in South African common law³³⁷ and is also entrenched in the Insurance Act.³³⁸

331 See *Hofmann v Economic Insurance Co Ltd* SA 1956 (4) SA 380 (W) at 382B-383A. However, it is suggested that this decision should be seen against the fact that the insurance policy in the instant case prescribed a particular method of cancellation. Every case must in any event be decided in the light of its own circumstances. In certain circumstances a broker may well be entitled to cancel a contract, eg, where he has been authorised by the insurer to do so.

332 See *Dicks v South African Mutual Fire and General Insurance Co Ltd* 1963 (4) SA 501 (N) at 504G-505B where the agent concerned (who was employed by the insurer) was merely a conduit pipe for the conveyance of proposals and premiums received, to the various departments of the insurer. It was held at 506B-G that an agent (or broker for that matter) must be authorised by the insurer to conclude the contract on its behalf before the mere acceptance of the premium by the agent (or broker) will be construed as an acceptance of the offer by the applicant for insurance. The agent or employee in *Dicks* was therefore not an authorised agent for purposes of the conclusion of insurance contracts on behalf of the insurer.

333 See again par 8.3.3.1 above.

334 See *African Motherhood Endowment Society v Mostert* 1923 CPD 26 at 28. In this decision the agent was entitled to receive premiums on behalf of the insurer. The Court held, however, that an agent to receive money was not entitled to take something else in lieu of money (in the instant case, a promissory note) unless he had special authority to that effect. The agent in this case was neither a broker nor an employee of the insurer. He was an authorised agent who canvassed (apparently exclusively for the insurer concerned) insurance proposals and received premiums on behalf of that insurer: see at 28 30.

335 See *Schneider and London v Chapman* 1917 TPD 497 at 503; Christie 496 et seq; Schulze "Stop Orders" 53.

336 See *Hollet v Nisbet & Dickson* supra at 396. On the legal relationship between insurance brokers and insurers with specific reference to the payment of premiums, see in general, Havenga "Regsverhouding" 102-105. See also the case law discussed in par 8.5.3 above, which also applies to the relationship between the broker and the insurer.

337 The position as to the role of brokers and other insurance intermediaries in the receipt and payment of the premium in terms of the common law was discussed in ch 3 par 3.5 above.

338 This principle forms the basis of s 20*bis* of the Insurance Act. See again par 8.5.3 above.

8.5.5 Statutory Provisions in Respect of the Receipt of Premiums by Insurance Intermediaries

Section 20*bis* of the Insurance Act generally regulates the receipt of premiums³³⁹ by intermediaries. The general rule entails that only registered insurers may retain or deal with money in respect of premiums received from an insured. If any other person is to deal with such moneys, he should comply with the provisions of section 20*bis*(2) to (4). Moneys received in respect of a reinsurance policy are exempt from this prohibition.³⁴⁰

Every agent or broker who is to become indebted to an insurer for premiums received on behalf of the latter, is obliged to provide security beforehand to that particular insurer. Such security must be in the form of a guarantee issued by an insurer registered to carry on guarantee business, the Land and Agricultural Bank of South Africa, or a registered banking institution.³⁴¹ Where the insurer and the broker or agent have concluded an agreement whereby the broker or agent is authorised to receive premiums from policyholders, the failure of the broker or agent to furnish the required security does not detract from the relationship between him and the insurer. The broker or agent will therefore also be liable to the insurer for premiums received on behalf of the insurer even if the broker or agent has not yet furnished the required security.³⁴²

The Insurance Act prescribes certain information and details which must be contained in the guarantee.³⁴³

Every agent or broker must close off his records of premium receipts on the last day of the month during which the premiums were received and must pay the amount of such premiums to the insurer within fifteen days of such last day of the month.³⁴⁴

339 For purposes of s 20*bis* the following definition clause of "premium" is provided: "Premium [in its ordinary meaning] includes a deposit premium" (my insertion). The term "deposit premium", in turn, means "a provisional premium which is agreed upon in the event of it being impossible at the due date of the premium to determine the exact premium, and which represents a reasonable estimate of the premium": see s 20*bis*(6).

340 See s 20*bis*(1).

341 See s 20*bis*(2)(a). For an example of the application of s 20*bis*(2)(a), see the decision in *S v Schraader* 1995 (1) SA 194 (N). Although the capacity of the intermediary (Schraader) is not quite clear from the reported judgment, it would appear that he was an authorised agent. "[The insurer] and the accused entered into an agency agreement ... which ... provided for the accused to perform certain acts on [the insurer's] behalf in regard to the issue of policies and the collection of premiums" (my insertions): see at 196D-F.

342 See *S v Schraader* supra at 198C-G.

343 This guarantee must be made out in favour of the South African Insurance Association or in favour of the Registrar of Insurance or such other person as determined by the Financial Services Board. This guarantee is for the benefit of all insurers and is for an amount equal to 20 percent of the premiums received by the agent or broker or other person concerned in the intermediary's last financial year. The amount may not be less than R10 000 or more than R50 000 000. In the case of an agent or broker who becomes indebted for the first time, the amount shall be based on 20 percent of a reasonable estimate of that which would be received in the agent or broker's first financial year: see s 20*bis*(2)(b).

344 See s 20*bis*(2)(c); s 20*bis*(3).

The intermediary receives his commission from the insurer and not from the insured.³⁴⁵ An agent, broker or other intermediary is permitted to set off any commissions due to him by an insurer against premiums received on behalf of such insurer.³⁴⁶ Likewise, an intermediary is allowed to set off any insurance payments due under the policy to the insured against any premiums due by the insured.

The payment of a premium by a policyholder in terms of the policy to an agent, broker or other intermediary is deemed to be payment to the insurer in terms of the policy.³⁴⁷

Section 20*bis* applies with equal force to Lloyd's underwriters.³⁴⁸

8.6 RETURN OF THE PREMIUM

8.6.1 Introduction

The insurance contract is a reciprocal contract.³⁴⁹ But the principle of reciprocity is sometimes obscured, for instance in the case where the insurer relies on a breach of contract or a culpable misrepresentation by the insured to escape liability under the contract.³⁵⁰ As the law stands, the insured in such cases stands to lose his claim for an indemnity as well as the premiums paid in terms of the contract. This result is not equitable in all circumstances. In the absence of fraud³⁵¹ on the part of the insured, he should be able to recover the premiums paid in terms of the contract.³⁵²

If seen against the reciprocal nature of an insurance contract, it follows that a defence by the insured against a claim by the insurer for the payment of the premium,

345 See again par 8.5.1 above.

346 See s 20*bis*(4). In *R v Van der Walt* 1951 (3) SA 747 (A) at 751E-H it was held that an agent who was entitled by way of commission to 80 percent of premiums received from insured, could not be convicted of theft by conversion where he failed to pay this money over to the insurers. The insurers never became entitled to 80 percent of those premiums. The insurers would merely have a personal claim against the agent for their quota of 20 percent of the premium.

347 Section 20*bis*(5). See again par 8.5.3 and 8.5.4 above.

348 See s 60(1)(k) and reg 10 and 10*bis* of the Insurance Act. See *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 (4) SA 202 (A) at 207A-B for an argument concerning the application in a South African context of the rule from English common law that the broker acts as agent for the insurer as regards the receipt of the premium.

349 See again par 8.2 above.

350 See *Reinecke & Van der Merwe* par 138.

351 I.e. intentional conduct with the aim to deceive the other party.

352 A just alternative would be the adoption of the French "proportionality rule". In terms of this rule the insurer is confined to the remedy of deducting from the proved claim the additional premiums it would have charged throughout the duration of the policy if the true facts had been known to it at the outset (in the case of misrepresentation). In the case of breach of contract (which includes the case of breach of warranty) the insurer must pay the proportion of the proved claim which the actual premium bears to the one it would then have levied, had the breach not occurred: see *Pillay v South African National Life Insurance Co Ltd* 1991 (1) SA 363 (D) at 370I-371D.

and a claim by the insured to recover a premium which has already been paid to the insurer, are based on the same cause.³⁵³

In certain circumstances the insured is entitled to a return of the premium or a part of it. The insured is in principle entitled to the return of a pro rata portion of the premium if the contract is cancelled after its commencement and if it is divisible into periods corresponding to the dates on which the premiums are payable. If the contract is indivisible the insured will generally not be entitled to a return of a pro rata portion of the premium if the risk had already commenced.³⁵⁴

The circumstances in which the insured will be entitled to a return of the premium are generally governed by common-law-principles and the terms of the contract, and they will now be considered in more detail.

8.6.2 In the Case Where the Contract Did Not Come into Operation

If the insurance contract does not come into operation, any premium already paid by the insured must be returned by the insurer. For example, where the policy covers goods of the insured to be shipped to another country, and the goods are never shipped, the insurance contract does not come into operation. The reason for the return of the premium appears to be the fact that an insurance contract is usually concluded subject to an express or implied suspensive condition that the risk will commence.³⁵⁵ If the risk never commenced, the suspensive condition was never fulfilled and the contract did not come into operation. Thus, the premium is in principle returnable if the object of the risk never existed, or if the risk never commenced. The non-fulfilment of a suspensive condition renders the contract void.³⁵⁶ The contract is therefore not void for illegality, but the insurance contract (as envisaged by the parties) does not commence.³⁵⁷

353 See again ch 3 par 3.6.1 above.

354 See again par 8.2 above for a discussion of the divisibility of the insurance contract and the performances in terms of it.

355 A suspensive condition suspends the operation or effect of one or more, of the obligations under a contract until the condition is fulfilled: see Reinecke & Van der Merwe par 156; Kerr *Contract* 339-340; Christie 160-161; Van der Merwe et al 206. Although it could perhaps be argued that the reason for the contract not coming into operation may be the fact that the contract was concluded subject to a resolutive condition, or that it was concluded on the basis of a supposition, it is most likely not the case. A suspensive condition is much more frequently encountered in insurance contracts than a resolutive condition (also known as a condition subsequent). This phenomenon can be ascribed to the nature of an insurance contract. It would serve no purpose to conclude the insurance contract subject to the resolutive condition that the operation of the contract will be terminated upon the commencement of the risk. Such a term will fly in the face of the very nature of an insurance contract which has as its aim the (temporary) passing of the risk from the insured to the insurer. Reinecke & Van der Merwe par 155 are of the opinion that suppositions do not often appear in insurance contracts. See further par 8.6.6 below.

356 See Christie 169.

357 See again ch 3 par 3.6.2 above.

The premium may be recovered by the insured with the *condictio indebiti*. The claim for a return of the premium with the *condictio indebiti* is founded on the fact that the payment of the debt (premium) was undue but that the debtor (insured) paid it, believing in error that it was due.³⁵⁸ An error may be one of fact, that is, a misapprehension as to the existence or non-existence of a fact or set of facts, for example, that the risk has commenced or that it will commence, or an error may be one of law, for example, that a particular type of insurance contract is valid.³⁵⁹ As a conditional debt remains *indebitum* (undue), the function of the *condictio indebiti* is therefore to effect a return of an *indebitum solutum*, that is, an undue debt.³⁶⁰ Hence a *condictio indebiti* also applies to recover a payment made under a suspensive conditioned contract before the condition is fulfilled.³⁶¹ The *condictio indebiti* also applies where the contract was concluded on a supposition which relates to the past or the present.³⁶²

Where the insurance contract was concluded and the premium paid on an assumption (relating to the future) which did not materialise, or subject to a *modus* which was disregarded or frustrated, the premium may also be recovered by the insured with the *condictio causa data causa non secuta*.³⁶³

Finally, and as an alternative appellation for the other *condictiones*, the return of the premium can also be claimed with the *condictio sine causa*.³⁶⁴

8.6.3 In the Case Where the Contract Is Void³⁶⁵

Where any of the general requirements for the formation of a valid contract is absent, any premium paid to the insurer must be returned. First, if the parties did not reach consensus on the essentials of the contract, for example, the undertaking by the

358 See Wille 636.

359 See De Vos *Verryking* 181; Wille 637.

360 See De Vos *Verryking* 171 et seq; Zimmermann *Obligations* 834 848 et seq.

361 See Kerr *Contract* 340.

362 Where the supposition concerns a future event or fact, the relevant enrichment action is the *condictio causa data causa non secuta*: see De Vos *Verryking* 155. See further note 363 below.

363 See De Vos *Verryking* 154 et seq. Although there is some authority for the proposition that the *condictio causa data causa non secuta* is available to recover money, eg, a premium, or property transferred in terms of a valid contract, the weight of opinion seems to be that recovery in those circumstances should rather be in terms of contractual remedies: see Wille 635.

364 This *condictio* has two forms. The first is the *condictio sine causa generalis*, which corresponds with all the other *condictiones*, namely the *condictio causa data causa non secuta*, the *condictio indebiti* (see above) and the *condictio ob turpem vel iniustam causam* (see par 8.6.3 below). In its second form as the *condictio sine causa specialis*, its function is quite distinct from the other *condictiones*: see De Vos *Verryking* 209 et seq; Wille 638. The function of the *condictio sine causa specialis* is not important for present purposes. For examples of the instances where it does apply, see Wille 638-639.

365 Paragraph 8.6.3 differs from par 8.6.2 in that par 8.6.2 deals with those cases where the contract was void due to the non-fulfilment of a suspensive condition and the insurance contract did not come into operation. Paragraph 8.6.3, in contrast, deals with those instances where the contract is void due to the non-fulfilment of one (or more) of the general requirements for the conclusion of a valid insurance contract.

insured to pay a premium, the contract will be void for vagueness.³⁶⁶ Secondly, if one or both of the parties did not have contractual capacity, the contract will be void. Thirdly, the performance of the parties must be possible and ascertainable for the contract to be valid. As a general rule no formalities are required for the insurance contract to come into being.³⁶⁷ As the contract is void in all of these circumstances, it means that neither of the parties could have been held liable in terms of their respective undertakings. Hence the premium must be returned since the insurer could never have been held liable on the ground of its undertaking to bear the risk. The premium may be recovered by the *condictio indebiti*, which is an action to redress a situation of unjustified enrichment.³⁶⁸

The fourth general requirement for the conclusion of a valid contract deserves special attention. This requirement entails that the insurance contract must be lawful, that is, it must not be prohibited by legislation or the common law.³⁶⁹ If the contract is void for illegality, special rules come into operation. The first consequence of the nullity of an illegal agreement is that, as in the case of all void contracts, neither party may institute an action based on the contract. The underlying reason for this consequence is that a court will not lend its aid to the enforcement of an illegal contract as that would mean that the law was approbating and reprobating the same contract.³⁷⁰ As a result of this rule the court will not assist any of the parties to claim a performance in terms of the contract. The insurer will therefore not be successful in its claim for the premium and the insured will not be able to claim his indemnity. This rule is known as *ex turpi vel iniusta causa non oritur actio*.³⁷¹

The second rule flowing from the illegality of a contract is known as *in pari delicto potior est conditio possidentis*. This rule entails that where two parties are both equally guilty,³⁷² the one who is in possession is in the stronger position. This maxim

366 See also *Passaportis v The Guardian Assurance Co Ltd* 1916 SR 14 at 27 for an example where the premium was paid upon application for insurance and the proposal for insurance was only declined at a later stage. This was therefore a case where no contract had come into being due to a lack of consent between the parties.

367 See *Reinecke & Van der Merwe* par 54 et seq for the general requirements of a valid insurance contract.

368 See again par 8.6.2 above.

369 See *Reinecke & Van der Merwe* par 56 et seq.

370 See *Kerr Contract* 467.

371 Ie, "from a base consideration no action arises".

372 Note must be taken of a development in South African law in terms of which the courts claimed the right to exercise a discretion whether or not to apply the *in pari delicto* rule. As a starting point for the courts' argument it is said that the *in pari delicto* rule applies only where the performance is shameful. The courts also consider the fact that it is against public policy to permit the unjust enrichment of one party at the expense of another party. Likewise the courts consider the fact that the law should further the principles of public policy and that participation in unlawful contracts should be discouraged. Where both parties have performed, the courts would in all probability apply the rule. See *Jajbhay v Cassim* 1939 AD 537 at 542; and *Visser v Rosseau NNO* 1990 (1) SA 139 (A) at 154B-D. In the insurance context it would therefore appear that if only the insured has performed in terms of the contract, he will be able to claim a return of the premium provided that his performance was not shameful. Whether a performance is shameful or turpitude, vary according to the convictions of the community at a particular time: see *De Vos Verryking* 163-164; *Joubert Contract* 152-153; *Kerr Contract* 157-161; *Christie* 473 et seq.

applies only to actions based on unjustified enrichment as opposed to actions based on the contract.³⁷³ Suppose that insured A and insurer B conclude a contract of insurance with an illegal aim or in terms of which the performance is illegal. A will be unable to enforce his claim for an indemnity. Likewise B will be unable to claim payment of the premium from A. If A has paid the premium in terms of the contract he will be unable to claim a return of the premium.

Two important principles should be emphasised at this stage. First, the claim by the insurer for the payment of the premium, as well as the claim by the insured for his indemnity are usually based on the contract (provided, of course, that the contract is valid). Secondly, the claim of the insured for a return of the premium, or the claim of the insurer for a return of an indemnity which it has paid to the insured is, by contrast, and as a matter of general principle, never based on the contract itself. This is the case because the insurer usually does not undertake in terms of the insurance contract to return the premium where, for example, the contract is void for mistake. The claim for a return of the premium or a return of the indemnity is, therefore, based on enrichment.

If performance in terms of an illegal contract has been rendered, such performance may be recovered with the *rei vindicatio* where applicable, or the *condictio indebiti*, or the *condictio ob turpem vel iniustam causam*.³⁷⁴ Recovery is, of course, subject to the relaxation of the *in pari delicto* rule in the interests of public policy.³⁷⁵ The action to claim a return of a performance in the case of an illegal contract is never based on the illegal contract because no contract exists.

8.6.4 In the Case Where the Contract Is Voidable for Misrepresentation

Misrepresentation takes two forms: first, misrepresentation by commission, that is, where the applicant for insurance makes an untrue statement of fact; secondly, misrepresentation by omission, that is, where the applicant fails to disclose a fact. The second type of misrepresentation is sometimes referred to as a non-disclosure.³⁷⁶ Not all forms of misrepresentation or non-disclosure will give the innocent party to the insurance contract the right to deny liability under the contract. The party who relies on

373 See Zimmermann *Obligations* 865-866; De Wet & Van Wyk 90-92. See also *Licences and General Insurance Co v Ismay* 1951 (2) SA 456 (E) at 460D-E and 463F-G.

374 I.e. the condictio (suit) for the repayment of a sum of money paid for an illegal consideration. See also De Vos *Verryking* 160 et seq; Zimmermann *Obligations* 844 et seq; Wille 636.

375 See Reinecke & Van der Merwe par 61; Wille 636.

376 The distinction between misrepresentation and non-disclosure is derived from English law and is of unimportant consequence. For purposes of this paragraph (as well as the corresponding paragraphs in the other chapters) reference is made to misrepresentation as well as to non-disclosure not to draw a distinction between these two concepts, but to emphasise that they are merely two sides of the same coin. The non-disclosure of a certain fact is simultaneously a misrepresentation of that fact: see Van Niekerk "Openbaringsplig" 91-92.

the misrepresentation or non-disclosure of a particular fact must show that the fact (in question) was material.³⁷⁷

As a general rule an innocent party is allowed to cancel a contract which has been induced by a fraudulent, negligent or innocent misrepresentation by the other party.³⁷⁸ An innocent party who wants to cancel a contract which has been induced by misrepresentation, must be able to make restitution of whatever he has received from the other (guilty) party.³⁷⁹ As cancellation extinguishes the obligations, it follows that cancellation at the same time creates new obligations relating to restitution. A party who claims restitution must offer to return what he has received.³⁸⁰

An insurance contract which was induced by the insured's misrepresentation,³⁸¹ that is, the incorrect disclosure or the non-disclosure of a material fact, is voidable at the insurer's instance. Although a tender to return the premium is not a prerequisite for a valid repudiation of liability,³⁸² the insured will be entitled to a return of the premium if the insurer decides to cancel the contract.³⁸³

The mere fact that the insurer's notice to rescind the contract does not contain a tender to refund the premiums already paid, will not render rescission ineffectual. But the absence of such a tender is not wholly insignificant. The continued receipt of premiums by the insurer may be in conflict with the insurer's avoidance of the contract.

377 Despite the fact that no distinction should be drawn, as a matter of general principle, between, on the one hand, the situation where the innocent party relies on a misrepresentation by the guilty party, and, on the other hand, the situation where he relies on a non-disclosure, the courts have recently done just that. In the decision in *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality* supra at 435F-G it was decided that "the Court applies the *reasonable man test* by deciding upon a consideration of the relevant facts of the particular case whether or not the undisclosed information or facts are reasonably relative to the risk or the assessment of the premiums". The same test was thought to apply to misrepresentation by omission and by commission. But in the decision in *Qilingile v South African Mutual Life Assurance Society* 1993(1) SA 69 (A) a misrepresentation by omission was distinguished from one by commission. As a result the Appellate Division has restricted the *Oudtshoorn Municipality* test to misrepresentations by omissions. For a discussion of the effect of the decision in *Qilingile* on the law relating to misrepresentations and breach of warranty, see Madhuku 477 et seq; Visser "Misrepresentations" 184-185; and Havenga "Materiality" 90 et seq. For an application of the distinction drawn in *Qilingile*, see *Theron v AA Life Assurance Association Ltd* 1995 (4) SA 361 (A).

378 See Christie 344 et seq.

379 See Christie 349-350; Van der Merwe et al 289.

380 See Van der Merwe et al 290-291.

381 Which may take the form of either an innocent, or a negligent or an intentional misrepresentation.

382 See *Van Schalkwyk v Griesel* 1948 (1) SA 460 (A) at 470-471.

383 See *Stumbles NO v New Zealand Insurance Co Ltd* 1963 (2) SA 44 (SR) at 53G-H. But see *Heydenrich v Colonial Mutual Life Assurance Society Ltd* 1920 CPD 67 at 70-71 where the insured instituted action in terms of a life insurance contract. The insured pleaded in the alternative that if it was held that the contract was void [sic] for misrepresentation, the Court should order the return of the premiums by the insurer. The Court decided that the insured could not approbate and reprobate the same contract. The insured had either to claim the amount due in terms of the policy, or he had to acknowledge that the contract was void for misrepresentation and claim a return of the premiums.

A continued receipt of premiums by the insurer will usually be regarded as a waiver by the insurer of its right to repudiate the policy on the ground of misrepresentation or non-disclosure of a material fact.³⁸⁴ An insurer can repudiate a claim without repudiating the policy, and offering a return of the premium. But the insurer must be willing and able to tender the return of the premium if it claims restitution in terms of the contract.³⁸⁵

In the event of an innocent or negligent misrepresentation by the insured, the insurer may plead the misrepresentation as a defence to an action by the insured, or it may sue the insured for rescission of the contract. In either event the insurer must return the premium.³⁸⁶

In the case of an insurance contract which has been induced by the innocent or negligent misrepresentation of the insured it is accepted that the insurer must return the accumulated premiums to the insured. This is the position irrespective of whether the insurer pleads the misrepresentation as a defence to an action (for an indemnity) by the insured on the contract, or whether it sues for restitution based on rescission.³⁸⁷ In the English law of insurance it is doubtful whether an insurer would have to return the premiums in the case of fraudulent misrepresentation.³⁸⁸ This position in terms of English law has been proposed as acceptable for the South African law.³⁸⁹ In terms of the English construction it has been suggested that an insurer which *defends* an action on the ground of an insured's fraud is under no obligation to return the premium. But if the insurer *avoids* the insurance contract and *seeks relief* by way of restitution, it is bound to return the premium, although the insurer is not deprived of its right of action if it has not tendered the premium.³⁹⁰ In accordance with this rule from English law, it was held in the decision in *Van Schalkwyk v Griesel*³⁹¹ that "there is no doubt that, generally speaking a plaintiff defrauded by misrepresentation must be willing and able to make restitution".³⁹²

The underlying reason for the rule from English law is that the insured cannot be allowed to set up his own fraud in order to obtain a benefit or seek relief. Reinecke and

384 See *Gordon v AA Mutual Insurance Association Ltd* 1988 (1) SA 398 (W) at 408I-409A and the cases cited there. But see the decision in *Steyn's Estate v SA Mutual Life Assurance Society* supra at 373-374: see again par 8.4.3 above.

385 See *Yorkshire Insurance Co Ltd v Ismail* 1957 (1) SA 353 (T) at 361A-E and 365A.

386 Gordon & Getz 199.

387 See Reinecke & Van der Merwe par 138.

388 See again ch 6 par 6.6.3 above.

389 See Gordon & Getz 199-200.

390 See *Yorkshire Insurance Co Ltd v Ismail* supra at 361A-E. See also Reinecke & Van der Merwe par 138n23-27; Gordon & Getz 199-200; and Christie 349 who states that "the restitution or tender does not have to be an integral part of the act of rescission, rather it is a consequence that must necessarily follow from it, and provided restitution or tender follows in due course the contract is terminated with effect from the act of rescission".

391 Supra.

392 At 470. This excerpt was referred to with approval in *Yorkshire Insurance Co Ltd v Ismail* supra at 361B-C.

Van der Merwe are of the opinion that it is not necessary for the South African law to follow the English rule on this point to obtain the same result in South African law. Their reasons are as follows. First, they argue, an insured cannot rely on his own misrepresentation to seek relief by way of restitution of the premium since the contract is voidable at the instance of the misrepresentee only and not at the instance of the misrepresentor.³⁹³ Secondly, it is not necessary to distinguish between a defence of misrepresentation and an action based on misrepresentation in this context since the representee may exercise his right to rescind either by way of defence or by instituting an action. If the premiums are returned to the insured after the contract has been rescinded by the insurer as a result of a misrepresentation by the insured, it can hardly be said to be the result of the setting up by the insured of his own fraud. Such restitution is merely a consequence of rescission. It would therefore appear that, as a matter of general principle, there is no justification for treating rescission based on fraud inducing a contract of insurance in a manner different from rescission on the ground of fraud inducing any other type of contract.³⁹⁴

Reinecke and Van der Merwe are therefore of the opinion that an insured who has fraudulently committed misrepresentation, is not entitled to set up his own fraud to claim a return of the premium. This opinion is based on general principles of the law of contract and not on the distinction recognised in English law referred to above. However, as the South African insurance law stands, the English rule as applied in *Van Schalkwyk v Griese*³⁹⁵ reflects the current law on this point. According to Reinecke and Van der Merwe it is at least settled that an insurer need not tender to return the premium as a prerequisite to its right to rescind. In the decision in *Stumbles NO v New Zealand Insurance Co Ltd*³⁹⁶ it was held that "in insurance law restoration of or a tender to restore the premium is not a prerequisite of a valid repudiation of liability by the insurer, where such repudiation is based upon material misrepresentation and/or non-disclosure by the insured".

It is not clear from the reported judgment in *Stumbles* whether the misrepresentation was committed fraudulently or negligently, but it would appear that it was made fraudulently.

In terms of the general principles of the law of contract a party who has fraudulently committed misrepresentation is entitled to restitution if the innocent party cancels the contract. An insured who has committed fraudulent misrepresentation is therefore entitled to a return of the premium if the insurer cancels the insurance contract as a result of the insured's misrepresentation.³⁹⁷ The current position in the South African law is therefore in stark contrast with the position in Roman-Dutch insurance law where the insured was not entitled to a return of the premium if there was fraud on his part.³⁹⁸

393 See Reinecke & Van der Merwe par 138n3 and the authorities cited there.

394 See Reinecke & Van der Merwe par 138.

395 Supra.

396 Supra at 53G-H.

397 See Reinecke & Van der Merwe par 138.

398 See again ch 3 par 3.6.3 above.

It is suggested that the current position in South African law is unsatisfactory. Although it is conceded that the rule from Roman-Dutch insurance law dates from a period when the private law often fulfilled a punitive function, the need for such a function, especially in the sphere of insurance, may not be totally redundant. It is in the interest of all insured, that is, the community of equally exposed and covered persons,³⁹⁹ to discourage fraudulent conduct as such conduct has a direct bearing on premium rates. It may therefore be argued that an insured must, as a matter of general principle, not be entitled to a return of the premium if there was fraud on his part. This should be the case irrespective of whether the insurer defends an action, or whether it claims avoidance of the contract. As such a suggestion is in conflict with the comparative general principle of the law of contract, it may therefore be necessary to introduce legislation which will provide for the forfeiture of premiums in the case of fraudulent conduct of the insured. Such legislation would not only bring the position in terms of the insurance law in line with the position in terms of Roman-Dutch law, but would also be in step with modern thinking on insurance law as embodied in recent codifications of insurance laws in Europe.⁴⁰⁰ Moreover, as insurers frequently (but not always) insert a term in the contract which provides for the forfeiture of premiums in the case of fraudulent conduct by the insured,⁴⁰¹ the proposed legislation may also ensure uniformity and fairness.

Alternatively, it may be argued that fraudulent conduct should rather be discouraged by the introduction of legislation which will provide that fraudulent conduct by an insured (and for that matter also by the insurer) constitutes a statutory criminal offence, over and above the fact that it may also constitute the common-law crime of fraud. This would mean that the insured who is guilty of fraud will not lose his right to claim a return of the premium, but that he will have to pay a penalty to the State. The amount of the penalty may be fixed with reference to the amount of the premium and/or the amount of the indemnity (or the amount payable in terms of a valued policy or non-indemnity policy) sought to be procured by the insured in terms of the insurance contract. This alternative proposal has a number of advantages if compared with the proposal referred to earlier. First, it would retain the general principle of the law of contract, namely that a party who has acted fraudulently, is, as a matter of general principle, entitled to restitution if the innocent party cancels the contract. Secondly, it would mean that insurance-contract law does not have to fulfil the punitive function of discouraging fraudulent conduct by the insured, but that that is left to criminal law. Thirdly, as there is no logical explanation why the insurer should benefit from the insured forfeiting the premium, the alternative proposal which provides for the payment of a penalty to the State, is more acceptable. Fourthly, this proposal will, although along a different route, further the same aim as the principle provided for in Roman-Dutch law and the codifications of insurance laws in Europe.

399 See again ch 2 par 2.1 above.

400 See again ch 5 par 5.6.4 and 5.6.5 above for a discussion of the relevant legislation in Belgian law.

401 See further par 8.7 below for a discussion of the forfeiture of premiums.

The action to claim a return of the premium in the case of a misrepresentation or non-disclosure is based on enrichment.

8.6.5 In the Case of Breach of Contract⁴⁰²

Insurers frequently insert provisions in insurance contracts in terms of which the insured's right to recover the premium depends either on the existence of a state of affairs or on the insured's (future) conduct. Such provisions are referred to as warranties. Breach of contract by the insured usually involves the breach of a warranty.

The insurance contract is an executory or continuing contract.⁴⁰³ Although existing obligations are extinguished by a cancellation of the contract, those rights which have become due and enforceable before such cancellation and which are independent of any executory part of the contract, will survive the cancellation of the contract. The cancellation of a continuing obligation (such as the performance of the insurer in terms of an insurance contract) will therefore not affect rights which became due and enforceable before the cancellation. A right created by a contract can survive the cancellation of the contract only if it is severable from the obligations under the executory portion of the contract.⁴⁰⁴ With these general principles in mind, the return of the premium in the case of cancellation following breach of contract may now be considered.

The innocent party may decide to cancel either the entire contract, or, if it is divisible into several separate contracts, only some of the contracts following the breach by the other party. The latter situation may be referred to as partial cancellation. First, the position where the innocent party cancels the entire contract. If the innocent party decides to cancel the entire contract, one has to distinguish further whether the contract is divisible or indivisible. The reason for this is as follows. Cancellation brings about reciprocal duties to return what has been received. In such a case the breach may affect the obligations under one or some of the contracts only.⁴⁰⁵ Where a number of related though independent insurance contracts were concluded, cancellation may relate to some of the contracts and not to others.⁴⁰⁶ The test to establish whether an insurance contract is divisible has been described as follows:

"The possibility that several contracts of insurance have been embodied in a single document can only arise if a part of the total premium has been allocated to each alleged individual contract - and, indeed, every such contract must contain all the essentials of the contract of insurance" and "[w]hether a policy embodies more than one contract severable from the other(s) finally depends on the intention of the parties."⁴⁰⁷

402 The distinction between par 8.6.2 and par 8.6.5 lies in the fact that in the case of par 8.6.2, the contract is void due to the non-fulfilment of a suspensive condition and no insurance contract comes into operation. In the case of par 8.6.5 the contract has come into being.

403 See Reinecke & Van der Merwe par 260. See again par 8.2 above.

404 See Van der Merwe et al 292.

405 See Reinecke & Van der Merwe par 50.

406 See Van der Merwe et al 292.

407 See Reinecke & Van der Merwe par 50.

If the contract is divisible, the insured is in principle entitled to the return of that pro-rata portion of the premium which relates to the period(s) or contract(s) of insurance which have not yet commenced and for which the insurer was not at risk. If the contract is divisible and it is cancelled after its commencement, the insured will, of course, not be entitled to claim that portion of the premium which relates to the period of insurance for which the insurer was at risk. If the contract is indivisible the insured will generally not be entitled to a return of any portion of the premium as the entire (indivisible) risk had already commenced.⁴⁰⁸ The reason for this is that it is not possible to divide the insurance cover (that is, the performance of the insurer) into periods corresponding to the dates on which the premiums are payable.

Secondly, the innocent party may decide to cancel only a portion of the contract. The partial cancellation of a contract is, of course, only possible in the case of a divisible contract. In the case of a partial cancellation the cancellation may relate to some of the contracts and not to others. In respect of those contract(s) which are cancelled and for which the insurer was at risk, the premium is not returned. This reasoning here appears to lie in the fact that the cancellation of a continuing obligation does not affect rights which became due and enforceable before the cancellation of the contract. In respect of the remaining contracts which are not cancelled, the obligations of both parties are due and enforceable and the premium is not returned as the insurer will be at risk in return for the premium.

As a starting point it is necessary to note the difference between an affirmative warranty and a continuing warranty. An affirmative warranty relates to an event or fact of the past or present and thus to a determinable fact. It usually arises from answers to questions on the proposal form and signifies that a particular fact or facts are true or that a particular state of affairs exists at the date the warranty is made. A continuing warranty, by contrast, relates to the future and signifies that a particular stated fact or state of affairs will continue to be true or to exist, or that the insured will do or refrain from doing certain things.⁴⁰⁹

Breach of an affirmative warranty means that the risk has never attached and the full premium can therefore usually be recovered.⁴¹⁰ But such a breach does not mean that there never was a contract. The insurer is, for example, entitled to rely on non-compliance with one of the terms of the contract as amounting to a breach of an affirm-

408 See again par 8.2 above for a discussion of the divisibility of the insurance contract and the performances in terms of it.

409 See Reinecke & Van der Merwe par 165; Gordon & Getz 215 et seq.

410 See Reinecke & Van der Merwe par 196. The contract may provide for a forfeiture of the premium in the case of breach of contract by the insured. See also par 8.7 below.

ative warranty.⁴¹¹ But if the breach occurred in respect of a continuing warranty, cancellation takes effect only from the moment when the breach occurs. In such an instance a pro rata return of the premium is equitable. For example, if an annual premium of R12 000 is payable and the breach of contract occurs eleven months after the insurance contract has commenced, R1 000 (that is, one-twelfth of the original premium) must be returned.

Breach of contract by the insurer (at least before the materialisation of the risk) seldom occurs and is rather insignificant. Breach of contract by the insurer after the materialisation of the risk is more likely to occur, for example, if the insurer neglects its duties to investigate the claim by the insured. However, if the insurer commits breach of contract after the materialisation of the risk, the insured will in all probability not rely on the breach of contract to claim a return of the premium but will rather sue the insurer for the amount of the indemnity and damages if he has suffered any.

If the insurer fails to issue a policy to the insured but nevertheless accepts liability in terms of their (oral) agreement, the insured will not be successful in his claim for a return of the premium based on breach of contract. The liability of the insurer in terms of the contract is usually based on consensus between the parties and not on the issuance of the policy. The serious and deliberate intentions of two parties to be bound by their agreement form the basis of contractual liability.⁴¹²

411 See *Venter v Certain Underwriting Agents of Lloyds of London* 1994 (4) SA 657 (W) at 659H-I and 660H. The learned judge correctly pointed out at 661G-I that it is only when the policy is repudiated (in the sense that the validity or existence of the policy, as opposed to the liability of the insurer under the policy, is denied) that an insurer would be precluded from asserting non-compliance with a contractual obligation by the insured. An insurer which denies that a contract of insurance exists, cannot rely on procedural requirements (such as the requirement that the insured is required to commence with legal action within a certain period after repudiation of his claim by the insurer) as the insurer would then be approbating and reprobating the contract.

412 See *Sauermann v English and Scottish Law Life Assurance Association* (1898) 15 SC 84 at 87-88. Although there was no time limit specified in this case for the delivery of the policy, De Villiers CJ at 87 reasoned that since more than a reasonable time had elapsed, breach of contract had occurred. Notwithstanding the breach of contract by the insurer, no return of the premium was ordered since there was consideration by the insurer (by admitting all along its liability in terms of the policy). This decision must, however, be read in view of the subsequent development in the South African law of contract. Before 1919 the English law doctrine of consideration was regarded, at least in the Cape province (where the doctrine was fostered by De Villiers CJ), as part of the South African law. In the Transvaal and the Orange River Colony an opposite view was taken. In *Conradie v Rossouw* 1919 AD 279 the matter arose for decision by the Appellate Division. The Court unanimously rejected the Cape view that the English doctrine of consideration formed part of our law and decided that the serious and deliberate intentions of two parties to be bound by their agreement, and not the presence or absence of consideration, should form the basis of contractual liability in the South African law of contract: see in general, Christie 10-16 and Zimmermann *Obligations* at 554-559 for a critique of the alleged basis of *iusta causa* as requirement for the coming into being of a contract. For another example where the undertaking by the insurer to indemnify the insured was regarded as sufficient to constitute a "consideration" by the insurer, see *Van Straaten v Liebaert* supra at 232.

The action to claim a return of a premium in the case of breach of contract is not an enrichment action or *condictio*; it is a distinct contractual remedy.⁴¹³

8.6.6 In the Case Where No Insurable Interest Exists⁴¹⁴

A distinction must be drawn between, on the one hand, indemnity insurance contracts, and, on the other hand, non-indemnity insurance contracts. First the position under indemnity contracts. If the insured never had an insurable interest during the currency of the policy, the premium must be returned. For example, where the policy covers a still to be erected building, and such building is never erected, the insured never acquired an insurable interest. This is an application of the general principle that if the insurer has never been at risk, the premium must be returned. The same principle will apply where the operation of the contract is subject to a suspensive condition that a certain interest will arise, for example, that the insured will become the owner of a motor vehicle he is insuring. If the insured does not become the owner of the motor vehicle, the premium must be returned. The same holds good for the premium in terms of an insurance contract made subject to an impossible suspensive condition, for example, that the insured becomes owner of something which is not capable of being owned.⁴¹⁵

However, in the absence of an appropriate supposition or condition the position is apparently different. It is argued that in such circumstances all the requirements for a valid contract have been met as it cannot, for example, be said that performance by the

413 See *Baker v Probert* 1985 (3) SA 429 (A) at 439A. For a discussion of the right to restitution following cancellation as a result of breach of the contract, see Van der Merwe et al 293. But see Christie 635 who states that restitution by either or both parties following cancellation as a result of breach of contract should be ordered only to the extent necessary to avoid unjust enrichment.

414 Although the examples referred to in this paragraph show close resemblance to those discussed in par 8.6.2, they are not exactly the same. In the case of par 8.6.2 the insurer has never been at risk because, although the insured had an insurable interest in the object of the risk. In this paragraph the premium is returnable because the insured never acquired an insurable interest in the object of the risk. Both paragraphs therefore entail an application of the general principle that if the insurer has never been at risk, the premium must be returned.

415 See Reinecke & Van der Merwe par 196. Havenga *Life Insurance* 260-261 is apparently of a different opinion. He argues that an insurable interest is required by public policy for the insurance contract to be lawful. In the absence of such interest, so he contends, the contract will be unlawful and void. As a result the insured will not be entitled to claim a return of the premium. Although this argument is correct in so far as life insurance contracts are concerned, it is doubtful whether his argument holds true for indemnity insurance contracts. In the case of life insurance contracts it is true that public policy (still) requires an insurable interest for the contract to be lawful. But it is debatable whether it still requires an insurable interest for an indemnity insurance contract to be lawful. An interest was required in the past to distinguish between, on the one hand, enforceable indemnity insurance contracts, and, on the other hand, unenforceable wagering agreements. This distinction was drawn on the basis of public policy and to discourage wagers. However, concepts such as morality and public policy are not static and something which may have been regarded as improper in the past, may not necessarily be regarded as such today. In *Nichol v Burger* 1990 (1) SA 231 (C) at 236F, eg, it was stated that "[i]t may well be that in the light of changing public policy the question of the enforceability of gambling debts ... may have to be receive reconsideration by our Courts one day". See also Reinecke "Versekerbare belang" 194 et seq.

insurer is impossible.⁴¹⁶ This argument is based on the fact that the performance of an insurer consists of an undertaking to pay a sum of money or to reinstate the object of the risk on the occurrence of the event insured against.⁴¹⁷ In short, it is argued that if the insurer's performance consists of an undertaking to deliver something, that is, to pay a sum of money, that performance can never be or become impossible.⁴¹⁸ In terms of this argument the performance of the insurer remains possible despite the absence of an insurable interest. As a result the insured is, as a matter of general principle, not entitled to a return of the premium in these circumstances, since, where no specific interest has been insured, the insurer runs the risk that the insured will obtain an insurable interest which can be the basis of a claim for compensation.⁴¹⁹

The insurer will usually not deny the "possibility" of future liability in terms of the contract if it becomes aware that the insured will never suffer damage in view of the absence of an insurable interest. By denying prematurely its liability in terms of the contract, the insurer jeopardises its right to claim the full premium. However, it is submitted that the insured will be entitled to a return of the premium even if the insurer does not deny liability in terms of the contract.

Likewise, the legislature envisaged the return of the premium where there is an absence of an insurable interest in the object of the risk.⁴²⁰

416 See Reinecke & Van der Merwe par 196.

417 See Reinecke & Van der Merwe par 24 196. See again par 8.2 above where the question as to the nature of the performance of the insured is discussed. There it is argued that the performance of the insurer consists of an undertaking to bear the risk of the materialisation of an uncertain event, coupled with the undertaking to indemnify the insured should such risk materialise. On the basis of this composite nature of the insurer's performance, it may therefore be argued that the insurer's performance (also) consists of an undertaking to deliver a sum of money.

418 For the same reason the performance of the insurer can never be or become partially impossible and the legal consequences of the partial impossibility of the performance of the insurer may therefore be ignored. It is correctly argued that the general requirement that the performance of the parties must be possible does not play an important role in the insurance context. The reason for this is that the performances of both the insured and the insurer usually consist in the payment of money. An obligation to pay money is a generic obligation which cannot be impossible. However, where the insurer undertook to have the object of the risk reinstated, or where the premium took the form of something other than money, the requirement that performance must be possible can come into operation, since reinstatement or the delivery of the premium may be initially impossible. The effect of such (initial) impossibility is that the debtor will have to render the alternative performance, namely compensation or a premium in money: see Reinecke & Van der Merwe par 62. For a discussion of the concept of possibility of performance, see Joubert *Contract* 124 et seq; Christie 563 et seq; Van der Merwe et al 135 et seq.

419 See Reinecke & Van der Merwe par 196.

420 Section 19 of the (now repealed) Compulsory Motor Vehicle Insurance Act provided for a reimbursement of a proportion of the premium if ownership of the insured vehicle was transferred under certain circumstances. See also *Faleni v Protea Assurance Co Ltd* 1989 (2) SA 572 (E) at 575D-F. Although insurable interest and ownership usually goes hand in hand, it is not necessarily so. A number of persons (other than the owner) may have an insurable interest in a particular object of the risk. Eg, the lessee, the mortgagee of immovable property, or the possessor of a thing: see Reinecke & Van der Merwe par 105 et seq.

If an insurable interest existed at the conclusion of the contract but fell away during the duration of the contract, the insured is in principle entitled to the return of a pro rata portion of the premium if the risk is divisible into periods corresponding to the dates on which the premiums are payable. The insured is not entitled to a return of that portion of the premium which represents the period of the contract when his insurable interest still existed because the insurer was at risk during that period.

In the case of non-indemnity contracts the position appears to be different. Havenga argues that an insurable interest is required for the insurance contract to be lawful. He refers to Gordon and Getz who explain that as an insurable interest is required by public policy, it cannot be waived by the parties. If public policy requires an insurable interest, a life insurance contract without such interest will be against public policy and therefore unlawful.⁴²¹ A contract which is not lawful will be void and the maxims *ex turpi causa non oritur actio* and *in pari delicto potior est conditio defendentis* will apply as a result. This entails that neither party will be able to claim performance from the other party in terms of the contract. Likewise, neither party will be able to recover what has been paid or delivered to the other party.⁴²² From this it follows that if the insured lacks the necessary interest under a life insurance contract, he cannot recover premiums which he paid under such a contract. But the *par delictum* rule applies only if the parties were equally guilty in concluding the illegal contract. The court may relax the application of this rule if simple justice between man and man or public policy so requires.⁴²³ For example, the insured will be entitled to a return of the premium if the insurer or its agent has misrepresented to him that an insurable interest existed and that the contract was therefore legal.⁴²⁴

8.6.7 In the Case Where There Has Been Over-Insurance

If the insured innocently over-insures his property, he is in principle entitled to a pro rata return of the premium. For example, if an insured is covered for an amount in excess of the sum which he can rightfully recover in the event of total destruction of the object of the risk, he is in principle entitled to a pro rata return of the premium. Reinecke and Van der Merwe are of the opinion that the application of the concept of "over-insurance" to claim a return of the premium has limited scope.⁴²⁵ They state, however, that where a mistake has been made in the calculation of the premium, for example, where the premium for liability insurance depends on the number of vehicles used by the insured during the period of insurance and a greater number of vehicles is mistakenly taken into account, the insured is entitled to a pro rata return of the premium.⁴²⁶ The pro rata portion of the premium which must be returned represents

421 See Havenga *Life Insurance* 260.

422 See again par 8.6.3 above where these maxims are explained.

423 See *Jajbhay v Cassim* supra at 542; and *Visser v Rosseau NNO* supra at 154B-D.

424 See Havenga *Life Insurance* 262-263.

425 See Reinecke & Van der Merwe par 196 where they declare that unless a mistake has been made in the calculation of the premium, the proposition that the insured is entitled to a return of the premium in the case of over-insurance is doubtful.

426 See Reinecke & Van der Merwe par 196.

that amount of the (over-)insured value which the insured will not be able to claim in the case of a total destruction of the object of the risk.

If the insured has, however, intentionally over-insured, no return of the premium will in principle take place. This is in accordance with the principle that the insured is not entitled to a return of the premium if there was fraud on his part. Although mere over-insurance does not necessarily (or always) amount to fraud, it is submitted that the insured will not be entitled to a return of the premium where the over-insurance took place with the knowledge of the insurer and the insured. If both parties reached consensus that the insured may over-insure to avoid the possibility of under-insurance, it is difficult to see why the insured should be allowed to claim a return of the premium. The reason for not permitting the recovery of a pro rata return of the premium is the fact that the insured bona fide and with full knowledge over-insured and consequently paid a premium which was higher than necessary. Likewise, where the insured fraudulently over-insures he will not be able to claim a pro rata return of the premium but for a different reason, namely, as a penalty for his fraud.⁴²⁷

8.6.8 In the Case Where the Policy Expressly Provides for the Return of the Premium

Insurance policies frequently provide that the premium will be returned to the insured in certain circumstances. For example, the object of the risk may be destroyed by excepted perils, or the policy may allow one of the parties (most likely the insurer) to cancel the contract.⁴²⁸ If the risk is divisible into periods corresponding to the dates when premiums are payable, and the object of the risk is destroyed during the duration of the contract, the insured will either not be liable for the payment of the premium for the remaining period, or he will be entitled to a return of the premium already paid for that period.

Certain types of non-indemnity⁴²⁹ policy may also provide that the insured will be entitled to a return of the premium in certain circumstances. Most long-term insurance policies provide the insured with the option of taking the cash surrender value of the policy after a certain period of time.⁴³⁰ The exact nature of such a provision is uncertain. Some writers indicate that although insurers generally use the word "loan" in their policies, it may be that what is referred to in this regard is in effect an

427 As to the non-return of the premium in the case of fraud by the insured, see again par 8.6.1 and 8.6.4 above.

428 See *Klempman NO v Law Union and Rock Insurance Co Ltd* 1957 (1) SA 506 (W) at 508D; *Union and National Insurance Co v Buxsons Butchery* 1970 (3) SA 692 (N) at 694E-F.

429 See again par 8.4.1 as to the difference between indemnity insurance and non-indemnity insurance.

430 See, eg, *Calder v South African Mutual Life Insurance Society* 1972 (4) SA 285 (R) where the insurer effected and underwrote a pension scheme for a certain employer. In terms of this scheme, the employee (insured) was entitled to elect to receive a refund of contributions made by himself as well as his employer with interest, less the income tax payable on the amount received by the employee upon the termination of his employment with his employer.

advance.⁴³¹ A second point of view is that whether the payment is in truth a loan or a payment by the insurer in advance, depends upon an interpretation of the terms of the policy.⁴³² Be that as it may, the cash surrender value usually consists of a certain percentage of the premium and is referred to as the policy reserve.⁴³³ Thus, a certain portion of the premium is returned to the insured.

8.7 FORFEITURE OF THE PREMIUM

The policy frequently provides that all premiums paid will be forfeited in certain circumstances. These circumstances include misrepresentation⁴³⁴ (which in turn includes the non-disclosure of material information)⁴³⁵ or the breach of a material term of the contract.⁴³⁶ In *Roome v Southern Life Association of Africa*⁴³⁷ the policy provided that "if any material information has been withheld or any matter not truly and fairly stated, then all sums which shall have been paid to the [insurer] shall be forfeited and the assurance be absolutely null and void".⁴³⁸

A stipulation in terms of which premiums are forfeited to the insurer notwithstanding the cancellation of the contract by it, is regarded as a penalty clause in terms of the Conventional Penalties Act.⁴³⁹ A penalty clause is a valid and enforceable stipulation provided that it is not out of all proportion to the prejudice suffered by the insurer. If it is out of all proportion to the damage suffered by the insurer the Court may reduce the extent of the penalty.⁴⁴⁰

431 See Gordon & Getz 2 ed 336 where they state that generally there is no promise by the insurer to repay and that repayment is voluntarily. This statement does no longer occur in later editions.

432 See Meyerowitz 402-403. This approach was also followed by the Court in *Addison NO V Manufacturers Life Insurers Co* 1982 (3) SA 46 (Z) at 50A G-H as well as on appeal: 1982 (4) SA 614 (ZSC) at 619C. But this decision turned on the interpretation of the specific policy and the Court did not place any emphasis on the intention of the parties: see Gordon & Getz 361-362.

433 See *Havenga Life Insurance* 3.

434 The policy may provide that all forms (ie, innocent, negligent and intentional), or just certain forms (eg, intentional) of misrepresentation will result in the forfeiture of premiums.

435 See again par 8.6.4 above.

436 *Reinecke & Van der Merwe* par 138 196.

437 1959 (3) SA 638 (D).

438 At 639C-D. See also the decision in *Pillay v South African National Life Assurance Co Ltd* supra at 364I where the policy provided that "[the insured] guarantee that the information provided in this form ... is true and complete ... [and] if this guarantee is not complied with [the insurer] can repudiate all liability and that all [premiums] paid shall be forfeited" (my insertions).

439 15 of 1962.

440 See s 3 of the Conventional Penalties Act; Gordon & Getz 198. See also *Pillay v South African National Life Assurance Co Ltd* supra at 371D-F where the possibility that the forfeiture of the premium in that case amounted to a penalty was raised but not discussed since the enforceability of the "forfeiture of all premiums" clause in the policy was not placed in dispute by the insured. Seen against the relative small amount involved (the insured sum in terms of the life insurance policy was a mere R35 000 and the contract was in force for only five months at the time of the death of the insured life), the Court was apparently satisfied that the forfeiture did in any event not constitute an excessive penalty: see at 371F.

8.8 FUNCTION AND INSURANCE OF THE PREMIUM

8.8.1 Function of the Premium

As a starting point it is necessary to note that in *essence* insurance entails an agreement in terms of which the transfer or spreading of the risk is the *primary function* or *intention* of the parties. Each insured in effect bears a portion of the risk which is borne by the community of equally exposed and covered persons. This community is symbolized by the insurer.⁴⁴¹ The premium serves as counter-performance by the insured in return for the undertaking by the insurer to bear the risk of the materialisation of the uncertain event.⁴⁴² Without the undertaking to pay a premium an "insured" cannot belong to the community of equally exposed and covered persons. For this reason "premiumless" or "free insurance" is not legally possible. This construction of the function of the premium also explains why the premium is, as a matter of general principle, payable irrespective of whether or not the risk has materialised. The fact that the insured is entitled to an indemnification by the insurer in the case of the materialisation of the risk is a *consequence* of the conclusion of the insurance contract and *not the counter-performance* of the insurer in return for the premium. The fact that the premium is regarded as the counter-performance by the insured in return for the undertaking by the insurer is in accordance with the general principle that the premium is generally payable in arrears.⁴⁴³ Generally the insurer is therefore not allowed to claim the premium without an offer to pay the amount of the indemnity, if and when the insured has suffered damage. If the risk has not materialised at the end of the period of the insurance, the insurer is, of course, entitled to claim the premium since it has borne the risk during that period.

Because the insurance contract is an aleatory contract, both the insured and the insurer stand to "lose" something, either as a result of the existence of the risk that the uncertain event may materialise,⁴⁴⁴ or as a consequence of the materialisation of the uncertain event.⁴⁴⁵ The insurance contract often provides for the return of a certain portion of the premium if the insured does not submit a claim during the particular period of insurance. This is known as a no-claim bonus. A no-claim bonus is strictly speaking not an actual return of a portion of the premium but rather a discount on the premium for the next periods of insurance.⁴⁴⁶ The insured therefore stands to pay a higher premium for the next period of insurance if the uncertain event realises and he claims. It can be argued that it is not the mere materialisation of the risk which results in the insured's losing his no-claim bonus, but rather the question of whether or not the

441 See again ch 2 par 2.1 above.

442 See again par 8.2 above.

443 See again par 8.3.2 above.

444 I.e., the premium which the insured pays as a result of his attempt to average the possibility of risk, by concluding an insurance contract.

445 I.e., the amount of indemnity which the insurer has to pay in terms of the insurance contract if the uncertain event materialises.

446 In the layperson's language a no-claim bonus can be described as "a reduction on an insurance premium, if no claims have been made within a specified period": see Collins 770.

insured decides to institute a claim as a result of the materialisation of the risk. The purpose of a term which provides for a no-claim bonus is to discourage insured from claiming unnecessarily in terms of the contract. If the insured is allowed to insure and recoup the premium, it may lead to a spate of unnecessary (trivial) insurance claims which would otherwise not have been instituted by insured. If the insured is allowed to insure the premium it may result in his being less disciplined in deciding whether or not to institute trivial claims. An increase in the number of claims will inevitably lead to an increase in the rate of premiums, not only for the individual insured, but also for the community of exposed and covered insured. Thus, allowing the insured to insure the premium will result in a decrease in the effectiveness of a term which provides for a no-claim bonus.

As a result, it is clear that the insured stands to "lose" his no-claim bonus by instituting a claim under the policy. The insurer, by contrast, only indemnifies the insured if and when the uncertain event materialises. If the insured is allowed to insure and recoup the premium, it may affect the aleatory nature of the insurance contract.⁴⁴⁷

8.8.2 Insurance of the Premium

None of the South African legal textbooks on insurance law consulted refers to the practice or possibility, in terms of South African insurance law, of insuring the premium. This practice has not only been acknowledged in the South African common law, albeit not without criticism,⁴⁴⁸ but the South African insurance practice also provides proof that the principle of insuring the premium does in fact occur.

The practice of insuring the premium would appear to be in conflict with the basic object of insurance, namely to form, preserve and develop an estate. The formation, preservation and development of an estate is uncertain because it is exposed to uncertain events (risks or dangers). An important principle in this regard is the requirement that the occurrence of the uncertain event must, generally speaking, be outside the control of the parties.⁴⁴⁹ If the insured wants to insure against the expenditure or cost of the premium,⁴⁵⁰ the insurance of the premium would first of all amount to the insurance of something which lies entirely within the control of the insured (namely the conclusion of the original insurance contract and the subsequent inevitable liability to pay the premium).⁴⁵¹ The conflict in the case of the insurance of the premium lies in the fact that the particular object (the premium) is not exposed to any risk (or uncertain

447 See also par 8.8.2 below.

448 See again ch 3 par 3.8.2 above.

449 See the decision in *Sydmore Engineering Works (Pty) Ltd v Fidelity Guards (Pty) Ltd* supra at 481A. See also Reinecke & Van der Merwe par 171 173 186; Gordon & Getz 186-187. As to the realisation of the risk by one of the parties, see Van der Merwe "Helping Hand" 466 et seq.

450 In English law the concept of "charges of insurance" is used when referring to the cost of insurance (the premium): see s 13 of the English Marine Insurance Act 1906. See again ch 6 par 6.8.2 above.

451 See *Sydmore Engineering Works v Fidelity Guards* supra at 481A for a discussion of the principle that the risk in terms of an insurance contract must be wholly outside the control of the insurer.

event) because the liability to pay the premium in terms of the original insurance contract has already been undertaken and there is no uncertain event present. The undertaking to pay the premium is given in return for the undertaking by the insurer to bear the risk.⁴⁵² To insure the premium is tantamount, for example, to insuring the purchase price in terms of a contract of sale or to insure a risk object while both parties are aware that the risk object has already been lost or damaged. Generally the liability of the insured to pay the premium is not subject to the materialisation of an uncertain event, because the liability to pay the premium in terms of the original contract is not conditional but absolute. The conclusion of the insurance contract and the subsequent liability to pay the premium in terms of the contract, is the result of intentional and calculated conduct by the insured. Thus, the "loss" or liability against which the insured wishes to obtain insurance cover, namely the liability to pay the premium, is caused by his own intentional conduct. It is a general principle that an insured is not allowed to procure insurance cover against damage or liability caused by his own intentional conduct.⁴⁵³

It would appear then that the contract in terms of which the insured purports to insure the premium should not be regarded as an insurance contract, but perhaps as some other type of indemnity contract, for example, a contract in terms of which a person is indemnified for necessary expenses (namely, the payment of premiums) incurred in the course of his business.

Finally, it is possible to argue that if the premium is insured and consequently returned to the insured, it would amount to an example of "premiumless" insurance, which, it has been argued, is not legally possible.⁴⁵⁴

8.9 CONCLUSION

In general most of the legal problems concerning the premium in the South African law of insurance can be solved by the application of either the general principles of contract, or the specific principles applicable to insurance contracts. But a few unsolved problems or grey areas have nonetheless been identified. They are the following.

A well-formulated and inclusive definition of the concept of a "premium" is still lacking in South African insurance law. In particular such definition should provide for the payment of premium in money and in kind, so as to include those insurance contracts where the premium take the form of something other than money.⁴⁵⁵

The question of whether an agreement to insure at a "reasonable premium" constitutes a valid agreement has not yet been settled. One can but hope that the

452 See again ch 3 par 3.1, as well as par 8.8.1 above.

453 See Reinecke & Van der Merwe par 186.

454 See again par 8.2 above.

455 See par 8.2 above.

opportunity presents itself soon for our courts to consider the correctness of the decision in *Zava Trading*.⁴⁵⁶

At the same time it is to be hoped that our courts will in future take cognisance of the general principles of our law of contract when interpreting an insurance policy or seeking a solution to "an insurance-law problem". To a large extent there is, strictly speaking, no such a thing as "an insurance-law problem". Most, if not all, of the problems faced by the courts when confronted with an insurance contract can and must be solved by the application of the general principles of the law of contract and the general rules of the interpretation of contracts. The contract of insurance is, after all, but another type of contract and all the general principles of the law of contract are, in so far as they are not irreconcilable with the principles of insurance law, also applicable to the insurance contract.⁴⁵⁷ The law of contract is one of the best elaborated branches of the South African legal system and the courts should make use of it.⁴⁵⁸

It has been argued that South African law does not provide sufficient protection to the insured in the case of non-payment of the premium. A number of amendments to the Insurance Act are proposed to prevent the arbitrary cancellation of the insurance contract by the insurer for the mere non-payment of the premium.⁴⁵⁹

Two recent decisions⁴⁶⁰ concerning the receipt of the premium by a broker on behalf of the insurer, illustrate another shortcoming in the general approach of South African courts when they are confronted with insurance matters. The courts generally tend to restrict themselves to the interpretation of the terms of the policy which in itself is not wrong, except if in so doing they absolve from an investigation into the general principles of the law of contract, which include the common-law rules. In both these decisions the Courts concerned could have reached the same verdict by applying an acknowledged and clear-cut common-law rule.⁴⁶¹ By restricting themselves to a mechanical interpretation of the terms of the policy, the impact of these decisions is considerably lessened.

Although section 20*bis*(5) of the Insurance Act does provide some protection to the insured in that payment of the *premium* by a *policyholder* to a broker is regarded as payment to the insurer, it has been argued that the protection provided to the insured should be extended to include the payment of moneys by applicants for insurance, as well as the payment of renewal premiums.⁴⁶²

456 Supra. See also par 8.3.7 above.

457 For a discussion of some of the peculiarities of the insurance contract, see Van Niekerk "Reform" 90-91.

458 See again par 8.3.2 above and the discussion of the decision in *Steyn* supra.

459 See again par 8.4.2 above.

460 I.e. the decisions in *Premier Milling v Van der Merwe* supra; *Connolly v National Aviation Insurance Brokers* supra. See par 8.5.3 above.

461 See par 2.5.4 above.

462 See again par 8.4.3 above.

The fact that the South African law protect the insured against the unlimited forfeiture of premiums is laudable. However, it is highly likely that very few insured are aware of the protection provided in terms of the Conventional Penalties Act. It is submitted that legislation should be promulgated to bring this protection to the attention of the general public, perhaps by way of a reference to the relevant provisions of the Conventional Penalties Act which has to be printed in bold on insurance policies.⁴⁶³

A penultimate important point is the return of the premium in the case of fraud by the insured. It has been shown that in terms of our case law the insured is in principle entitled to a return of the premium *if the insurer cancels the contract* because of fraudulent conduct⁴⁶⁴ by the insured.⁴⁶⁵ This rule of the South African law militates not only against the principles of equity, but is also in stark contrast with the South African common-law rule which prevented the insured from recovering the premium if there was fraud on his part.⁴⁶⁶ The position in the South African law is also in contrast with the position in some other legal systems⁴⁶⁷ and is patently in need of judicial if not legislative reform. Different proposals for legislative reform in this regard have been made.⁴⁶⁸

Finally, the practice of insuring the premium may exist, but it does not conform to the principles underlying the contract of insurance.⁴⁶⁹ This aspect also deserves further careful judicial and theoretical scrutiny.

463 See par 8.6.8 above.

464 Eg, fraudulent misrepresentation or fraudulent over-insurance.

465 See par 8.6.3, 8.6.4, 8.6.5, 8.6.6, and 8.6.7 above.

466 See again ch 3 par 3.6 above.

467 See, eg, again ch 4 par 4.6 and ch 5 par 5.6 above.

468 See par 8.6.4 above.

469 See par 8.8.2 above.

CHAPTER 9

EXCURSUS: SOUTH AFRICAN INDIGENOUS LAW¹

9.1 INTRODUCTION

South Africa's past and present are marked by the wounds of the inequalities of the past. The economic sphere, too, has not escaped the effects of a political system which enriched the rich and impoverished the poor.² In an indirect but very definite way, the principle of economic discrimination and exploitation made South African financial markets the exclusive playground of a privileged few.³ One of these financial markets is the insurance sector. Although it cannot be denied that a relatively large number of black South Africans did in fact participate in formal insurance schemes in the past, the vast majority of them were, and still are, excluded from the formal insurance sector. Although blacks are not formally excluded from participation in insurance schemes, that is, they are permitted to conclude insurance contracts, most of them simply cannot afford to pay the premiums.

Being deprived of the opportunity to participate in the mainstream insurance sector has led to the development of self-help organisations by blacks to meet their expectations and needs in this regard.⁴ History has shown that self-help organisations such as burial societies and friendly societies,⁵ are created mostly amongst those belonging to an economically deprived class in a society where institutions for the alleviation of their condition are either non-existent, or inaccessible to them, or

1 Although a study of the legal nature of certain concepts of the South African indigenous law does, strictly speaking, not fall within the ambit of this thesis, such study is nevertheless necessary and is included in this chapter for the following reason. The research and findings contained in par 9.1 are original and it is, as far as it could be established, the first comparative study between, on the one hand, concepts of the "formal" South African commercial law, and, on the other hand, concepts of the South African indigenous law. The discussion in par 9.2 below which is directly relevant to the topic of this thesis, is based on the research conducted and conclusions drawn in par 9.1. For the purposes of cross-reference and understanding of the principles which will be discussed and applied in par 9.2, the inclusion of the materials contained in par 9.1 is therefore indispensable.

2 For an overview of the economic plight of black South Africans, see Kiernan 31 et seq; Manona 95 et seq.

3 See Kramer 1 et seq.

4 For a discussion of the formal but non-governmental organisations (NGOs) which were formed during the apartheid years to address needs in the black community, see Anon "Money" 16-17. The areas of operation of these NGOs included education, health, worker and community mobilisation as well as land claims. Most of these organisations depended entirely on grants from local companies and foreign governments or foundations. The largest of these NGOs was and still is the Kagiso Trust.

5 The earliest examples of mutual aid societies which are known to us date, of course, from the Roman period, when people formed societies for religious, military and entertainment purposes: see Van der Merwe *Versekeringsbegrip* 130 et seq. For a discussion of the development of mutual insurance from these mutual assistance contracts, see again ch 2 par 2.2.2 above.

inadequate and ineffectual.⁶ Deficient salaries were (and are) not the least of the factors which led to the exclusion of many from the privilege and right of belonging to a community of equally exposed and covered persons.⁷

Black South Africans have developed certain informal financial structures to overcome the inaccessibility of formal structures.⁸ Some of these indigenous financial structures⁹ closely resemble the concept of insurance as it is known to the First World.¹⁰ Two structures in particular will be highlighted in this chapter, namely the "stokvel"¹¹ and the "burial society", the latter being a special type of stokvel.¹² Attention will specifically be given to the possibility of drawing parallels (and distinguishing) between the payment of a contribution in terms of these indigenous schemes and the payment of a premium in terms of an insurance contract.¹³

6 This statement is illustrated, eg, by the fact that when the British Government instituted an "all in" scheme of National Insurance in Great Britain in 1946, membership of friendly societies fell by nearly 2 million members in the period 1947 to 1952: see Kramer 11. As to the role and development of self-help organisations in England, see Gosden 3 et seq.

7 Lukhele 55 correctly remarks that very few blacks have money to live on, let alone to save. As to the role of insurance in society in general, see again ch 2 par 2.1 above.

8 However, most of these informal financial structures which resemble saving, insurance and other financial techniques are not unique to the black community or to Southern Africa. In South Africa credit-rotating associations are found among Indian people living in Kwazulu-Natal. They are known as "chita" or "chitu". Membership is restricted to a few relatives or friends or both. Generally a "chitu" has no officials and no special sociability, and it has a single specific monetary fund. A similar system is also to be found among some European factory workers in South Africa. Depending on the rules of the particular system, each worker receives a fixed part of the wages of his fellow workers in turn: see Ardener 207. Rotating credit associations are also common in Asia, West-Africa, Central and East Africa, Sudan, Egypt, Europe, the West Indies, and the Americas: see Geertz 243 et seq; Ardener 202-208; Lukhele 44-45. For a discussion of the co-existence of indigenous law and formal South African law in a heterogenous society, see Van Niekerk *Indigenous Law* 137 et seq.

9 The term "indigenous law" is used to connote the unwritten, ie, uncodified customary law of blacks in South Africa. The concept "indigenous structures", eg, refers therefore to those practices and concepts peculiar to and developed by blacks in South Africa: see again ch 1 par 1.2.2.7 note 46 above.

10 These structures are indeed regarded by blacks as a type of insurance: see Lukhele 19. Insurance companies are showing a keen interest in the stokvel movement, and during 1990 the National Stokvels Association of South Africa (NASASA), in a joint venture with a group of black insurers and financial brokers, launched a funeral insurance scheme for its members. The cost of the scheme is R8 per month and it is open to all NASASA members up to the age of 65. There is a limit of R5 000 payable on the total benefit. The aim of this scheme is not to replace burial societies, but to supplement them: see Lukhele 57-58; Anon NASASA 17.

11 As to the meaning of the term "stokvel", see par 9.1.1.1 below. Currently NASASA serves as the umbrella body and mouthpiece for all stokvels affiliated to it. For an exposition of the history and aims of NASASA, see Lukhele 46-53; Thomas 303; Anon NASASA 5. At this stage, affiliation to NASASA appears to be limited to stokvel groups operating in the province previously known as "Transvaal": see Thomas 290. It has been said that stokvels are similar to cooperative movements used by Afrikaners during the earlier part of the century to create institutions like Volkskas Bank and Uniewinkels: see Koekemoer par 4.1.2.

12 As to the meaning of the concept of a "burial society", see par 9.1.1.2.1 below.

13 See par 9.1.2.1 below for a comparison between stokvels and the insurance contract.

9.1.1 The Concepts of Stokvels and Burial Societies

9.1.1.1 Stokvels

9.1.1.1.1 The Nature of a Stokvel

The term "stokvel" apparently derives from a corruption of the cattle auctions or "stock fairs" of the English settlers in the Eastern Cape during the early nineteenth century. These stock fairs were attended by black farmers and labourers who used these functions as economic and social get-togethers to exchange products and news.¹⁴ Gradually these get-togethers were organised on a regular basis, independently from cattle auctions. Stokvels originally took the form of a tea party attended by women with each member taking a turn to host the party.¹⁵ Other members who attended the party were supposed to bring gifts for the hostess. Later stokvels developed to serve as vehicle for saving clubs, buy-aids, burial societies and money-lending organisations.¹⁶ With the migration of whites from the Western and Eastern Cape to the area known today as Gauteng, blacks who accompanied these whites brought the idea of stokvels with them. From Gauteng the concept of stokvels spread to the rest of the country.¹⁷

Stokvels¹⁸ are, depending on their aims and on the part of the country in which the particular stokvel operates,¹⁹ also known as "gooi-goois",²⁰ "pooling clubs", "eStokini", "stokies",²¹ "umgalelos",²² "mahodisana",²³ "mogodisô",²⁴ or "kuholisana".²⁵

14 See Lukhele 4-6; Thomas 291-294. But see Dikeni 15 who is of the opinion that the origin of the term "stokvel" is uncertain.

15 This origin is still visible in the modern-day composition of stokvels. About 60 percent of all members of stokvels are women: see Scott-Wilson 11.

16 See Thomas 292-293.

17 See Lukhele 4-5; Thomas 291-294. One exception appears to be the burial society, which developed in the Free State from the basic concept of a stokvel, from where it spread to the rest of the country: see further par 9.1.1.2.1 below.

18 Sometimes spelt "stokfel" or "stockfair": see Thomas 291.

19 See Kramer 35 et seq; Lukhele 4 27; Thomas 290. Although in some areas the term "mahodisana" is reserved for credit-rotating associations and the term "stokvel" is used when referring to associations which, in addition to running a "mahodisana", also sell food and drink, these are generally not hard and fast rules: see Kramer 36.

20 The term "gooi-gooi" is derived from the word "oorgooi" in Afrikaans (in English, "throw over"), which means, in the context of stokvels, to lump (money) together.

21 Both "eStokini" and "stokies" are corruptions of the word "stokvel".

22 This term, which is unique to the Western Cape, is apparently no longer much in use: see Thomas 292. It refers to a type of stokvel which operated on a religious basis. Their meetings were usually started with prayer: see Collair 11.

23 Which means to "pay", in its causative reciprocal form "make pay back to each other": see Kuper & Kaplan 179.

24 Which is derived from the Sotho word "go godiso" which means "to grow". This is the most common reference to stokvels in Pretoria: see Koekemoer par 4.1.2.

25 Which is derived from "to cause to grow" or "to draw wages": see Thomas 291.

A stokvel is in essence a type of informal credit-rotating association²⁶ in which a group of people enter into an agreement to contribute a fixed amount of money to a common pool on a weekly or monthly basis or as frequently as the members agree upon.²⁷ The contributions or a portion of them are paid out by the association in rotation or in a time of need, depending on the rules of the particular stokvel. The essence of a stokvel is the mutual financial assistance which underpins it. Stokvels are sometimes referred to as an example of a voluntary association.²⁸

From this description of the basic form of stokvel, it is clear that through the creation of a stokvel, an obligation is created between the members who belong to it. This obligation takes the form of an agreement between the members. The rights and duties of the members of the stokvel are usually determined with reference to this agreement.

Because a stokvel is first and foremost an *agreement* (contract) between the individual members, it follows that the nature and rules of a stokvel may resemble a number of possible legal figures from the common law.²⁹

An important point which must be made at this stage is that a stokvel, as a matter of general principle, does not have legal personality.³⁰ Except if a stokvel is registered, for example, as a company, closed corporation or a friendly society, it cannot sue or be sued in its own name. Generally, any legal action on behalf of or against a stokvel must therefore be conducted in the name of an individual member of the stokvel.

26 See also par 9.1.1.1.2 below.

27 See Anon *NASASA 14*. For a list of characteristics of a stokvel, see the definition of the concept of a "stokvel" which is provided in par 1(b)(i)-(vi) of GN 2173 in GG 16167 of 14 December 1994. See also par 9.1.2.2 below where this Notice is discussed.

28 See Kuper & Kaplan 178 et seq; Koekemoer par 4.

29 Although a comparison between the agreement in terms of stokvel and other types of contract is, for purposes of this thesis, restricted to the examples which are discussed in par 9.1.2 below, the resemblance between a contract of stokvel and the contract of partnership nevertheless merits a mention here. A partnership is defined as "a legal relationship between two or more persons, who carry on a lawful business or undertaking, to which each contributes something, with the object of making a profit, and of sharing it between them": see Wille 609. It is submitted that in general most stokvels satisfy all the essentials of a contract of partnership. Although there is usually not an intention to make "a profit" in the ordinary sense of the word, the fund which each member receives constitutes an advantage (namely a lump sum of money) which is a consequence flowing from the members' affiliation and contributions to the stokvel. In some types of stokvel the contributions of the individual members are lumped together to buy a business concern or an asset, eg a minibus taxi. The profits which are made from the business concern (the taxi) are then distributed among the members. In this type of stokvel the resemblance to a partnership is quite clear. As a result, and in the absence of a contradicting contractual term, all the natural consequences of a contract of partnership apply in principle to the agreement of a stokvel. As to the legal requirements of a partnership, see Wille 611 et seq.

30 This point is illustrated by the fact that for a group (stokvel) to be excluded from the operation of the Banks Act 94 of 1990, the stokvel must consist of natural persons (only): see the definition of "group" in par 1 of GN 2173 in GG 16167 of 14 December 1994. Although this Notice does not intend to determine the requirements for stokvels in general, it is nevertheless a strong indication of the legal nature of a stokvel as seen by the legislature.

Most if not all stokvels have elected officials to take care of records,³¹ bank the funds generated by way of contributions by members, and to perform other administrative functions.³² In general, office bearers are elected by fellow-members³³ and tend to hold office for long periods.³⁴ This means that the members of a stokvel usually participate in the management of its affairs.

Stokvels are found in urban as well as rural areas, and people from all walks of life participate in them.³⁵ Given the informal structure of most stokvels, it is difficult to provide accurate figures on the number of stokvels active in South Africa and on the extent of their membership. A recent census has revealed an estimate of 24 000 stokvels in major metropolitan areas attracting members' contributions of around R52 million a month.³⁶ On a national scale the amount in contributions is likely to be in the region of R200 million every month.³⁷

Stokvels entail more than just the circulation of money. They involve comprehensive support for members in times of hardship. For example, when a member of a stokvel is arrested, the others might help with the caring for the detainee's household and children until he is released from jail.³⁸ Support for members who are in jail is apparently restricted to cases where the offence was of a trivial or politically associated

31 Written records are usually kept by the treasurer of the stokvel of transactions such as the payment of contributions by members, items which are sold to members, loans to members and non-members, items which are bought from suppliers, and the payment of the amount of indemnification or the pool to a member.

32 See Thomas 295.

33 See par 1(b)(v) of GN 2173 in GG 16167 of 14 December 1994 which acknowledges the right of members of a stokvel to nominate the management of the particular stokvel as a distinctive feature of stokvels in general. See also par 9.1.2.2 below.

34 See Stanford 35.

35 One may suspect a tendency among young urban blacks to regard stokvels as something outdated. This is best illustrated by the answer given by an urban shop assistant when asked if she knew what a stokvel is. "No" she replied, "only my Grandmother does that, it's for the old ladies": see Stanford 35. But according to other sources stokvels are becoming increasingly popular among young upper-income blacks, whose clubs are often fashion oriented. Members of these fashion clubs select, as their models, shops in Johannesburg's northern suburbs. Thus there are clubs called Benetton, Palazzo Pitti, Lacoste, Bear and the like. Members of these clubs often wear clothes from these shops, and occasionally invest in a kind of uniform of T-shirts and caps with the logo: Lukhele 32. This increase in the popularity of stokvels will, without doubt, continue as more and more young black people join the ranks of a broad South African financial middle and upper class.

36 See Lukhele 2-3; Stanford 37. These figures apparently represent just the tip of the iceberg. Approximately 60 percent of the total black population still lives in the rural areas: see Lukhele 3. It is more likely that there are as many as 800 000 active stokvels thriving in South Africa at any time: see Anon NASASA 14.

37 See Lukhele 2. A census which was held in 1992 revealed an estimate of eight million members of stokvels nationwide: see Henning et al 100 and the authorities referred to there.

38 See Lukhele 8.

nature. For example, if a member is jailed for running a shebeen,³⁹ which is not regarded as a crime in the black community, his or her affairs will be managed while he or she is in jail.⁴⁰

Stokvels have secondary social and entertainment functions as well.⁴¹ In passing, one or two comments about the role of the "shebeen" in the stokvel subculture. In the past stokvels which sold liquor (sometimes collectively referred to as "shebeens") were harassed by the police, irrespective of whether or not they were in possession of a licence to sell liquor. This type of harassment is apparently something of the past. There have been indications from the current government and other formal structures that "shebeeners and taverners are just as much part of the informal sector and they will not be harassed".⁴²

Social interaction is an important mechanism in the stokvel subculture, as the handing over of the contributions by the members to the host, that is, the recipient of the pool, usually coincides with a party. The recipient of the contributions is expected to host a party and the other members (guests) are expected to attend the party at which the contributions are handed over. The host is also expected (and allowed) to have food and drinks for sale, usually at inflated prices. The profits on the food and drinks are for the account of the host of the party.⁴³

9.1.1.1.2 The Stokvel as a Credit-Rotating Association

A stokvel is by definition a credit-rotating association.⁴⁴ Credit-rotating associations have been in existence for hundreds of years in all parts of the world.⁴⁵ They have survived into modern times and continue to grow in spite of the influence of modern financial systems. The primary function of a credit-rotating association is to channel

39 The term "shebeen" describes an informal (and often unlicensed) pub or bar for the sale of alcoholic drink. Often the premises of a shebeen is situated in the owner of the shebeen's backyard, or in an extra room in the house, or in the garage. But the term "shebeen" also connotes a licensed pub or bar, usually situated in the townships. Although stokvels and shebeens are often related, it is not necessarily so. Not all stokvel parties are accompanied by the sale of liquor and not all shebeens are part of a stokvel.

40 Shebeens and stokvels have always been closely linked. Stokvels are often used to finance shebeens if the owners of such shebeens do not have access to formal financial institutions to borrow money to start a business: see Kramer 48; Lukhele 9. See again par 9.1 above.

41 For a discussion of the role of socialising and partying within the stokvel subculture, a topic which falls mainly outside the ambit of this thesis, see Ardener 222; Lukhele 1 27-34; Thomas 290. As to the relative disadvantages of stokvels resulting from the socialising and partying which accompany some stokvels, see Lukhele 37-39.

42 See Koekemoer par 4.9.4 and the authorities cited there. On the development and role of "that noble institution, the shebeen" in South African townships, see in general Hart 76 et seq. For a history of the development of shebeens and their statutory prohibition, see Lukhele 9 et seq.

43 See Collair 8.

44 See Kramer 10; Thomas 290. See also par 1(b)(i) of GN 2173 in GG 16167 of 14 December 1994, where a stokvel is described as "a *formal or informal rotating credit scheme* with entertainment, social and economic functions" (my italics). See also par 9.1.2.2 below.

45 See Geertz 241 et seq; Ardener 202 et seq; Jerome 115-116.

and mobilise community savings and to make loans available to members of the association.⁴⁶

A satisfactory all-inclusive definition of the concept of a credit-rotating association is still lacking. The following description may, however, serve as a point of departure:

"[A credit-rotating association is] formed upon a core of participants who agree to make regular contributions to a fund which is given, in whole or in part, to each contributor in rotation."⁴⁷

The important features which emerge from this definition are those of regularity and rotation.⁴⁸

The members of a credit-rotating association are simultaneously one another's debtor and creditor. The first member to receive the fund becomes a debtor who has to pay his future contributions to all the other members and remains one until his last contribution has been made. The last member to receive the fund becomes a creditor in respect of the future contributions of all the other members and remains one until the last contribution has been paid. The other members move in turn from being creditors to debtors or vice versa. Each member remains a creditor until he has received the fund. Thereafter he becomes a debtor.⁴⁹

Seen from the point of view of a contract of loan, all the members but the last to receive the fund get interest-free loans of decreasing magnitude for decreasing periods. All but the first member, in contrast, give interest-free loans of increasing magnitude for increasing periods. The order in which the contributions are received and paid is therefore of great importance.⁵⁰ In South Africa the order is often determined by lot, which adds an element of luck and excitement to the scheme.⁵¹

Credit-rotating associations have certain rudimentary advantages. Some of these include the following. They assist in small-scale capital formation, that is, they create savings. They are physically more accessible than ordinary saving institutions such as banks and post offices and their procedures are more user-friendly.⁵² They are able to provide credit on a smallness of scale in which banks are not normally inter-

46 See Jerome 117. This is, of course, the essence which underpins the economic (or monetary) basis of insurance companies and banks, namely to act as administrator of community funds.

47 See Ardener 201. However, the contributions are not necessarily used in rotation. The use of the money may be restricted to, say, times of need as in the case of burial societies: see par 9.1.1.2 below.

48 See Thomas 290; Collair 1.

49 See Ardener 201.

50 See Ardener 211. As to the different methods of determining the order in different credit-rotating schemes around the globe, see Ardener 211 et seq.

51 See Ardener 212; Anon NASASA 16.

52 See Jerome 118 who reports that a large number of illiterates reside in rural areas, and that they find it difficult to make use of the services provided by the formal financial institutions as the details of these services are usually explained in writing.

ested. The interest rate payable to a credit-rotating association is usually lower than that which is charged by some other money-lenders.⁵³ On a socio-economic level the following advantages offered by credit rotating associations have been identified. First, they serve as socialising mechanisms for converting peasants into "traders" as far as their attitudes towards the use of money are concerned. Secondly, because these associations provide institutions for saving, they accelerate and facilitate economic development.⁵⁴

9.1.1.1.3 Different Types of Stokvel

In the context of the informal economic sector, stokvels have two characteristics. First, they are generally small in size, and secondly, they avoid official regulation and taxes to a greater or lesser extent. These two criteria, rather than sound financial management, are responsible for the success of stokvels.⁵⁵

There are a large number of different types of stokvel. A stokvel is usually formed with a specific aim in mind. Burial societies,⁵⁶ investment syndicates or clubs, "umgalelo" clubs,⁵⁷ and youth stokvels are just some of the more common schemes taking on the form of a stokvel.⁵⁸

Four main types of stokvel may be identified.⁵⁹ First, the "gooi-gooi", which is a small-scale savings club which exists for only a relatively short period of time. Contribu-

53 See Ardener 217 et seq. But this is not always the case. It has been reported that due to the inaccessibility of formal lending structures, blacks are sometimes exploited by informal black lending institutions. Interest rates of up to 80 percent are not unknown in the informal black money market: see Cross 87 et seq; Jerome 119-120.

54 See Kramer 158-159. But see Kramer 159 et seq for a criticism of these two socio-economic advantages.

55 See Collair 2.

56 See further par 9.1.1.2 below.

57 An "umgalelo" club is typical of the Western Cape and financially speaking operates on a bigger scale than other types of stokvel. A typical "umgalelo" meeting lasts two days. The first day is set aside for slaughtering and a free braai. On the second day the host, ie, the member who is awarded the opportunity to host the meeting, receives the contributions of the other members, whose number may be in excess of 100. The contribution received by a particular member depends to a large extent on his own contribution to other members. Eg, if he contributed R200 to the party of a fellow member, he is usually entitled to expect R200 plus 20 percent interest from the fellow member. In this way large amounts of money are generated at a single party and it has been recorded that one member (host) once received R149 000 from a single party, with which he bought himself six buses and nine small businesses: see Lukhele 21-22; Collair 16-17.

58 See Lukhele 16-24; Thomas 294. The fact that these are the more common types of stokvel are reflected in the application form of NASASA. Prospective members of NASASA have to indicate the main purpose of their stokvel on their application form. The categories provided for on the form are savings/banking; capital generation; "legotla"; social meetings; burial societies; and other. For a discussion of the meaning of the concept of "legotla", see note 68 below.

59 Although this classification is based on research done in respect of stokvels active in the Western Cape, it would appear that this classification holds good for the rest of South Africa as well. From the composition of stokvels in general, it appears that 41 percent are small savings clubs, 29 percent are burial societies while the remainder (30 percent) consist of "umgalelos", investment syndicates and high-budget associations (also known as high-budget credit-rotating associations) (HBCRA): see Collair 28.

tions are made in cash and vary from R15 per month to R70 per week. The order of rotation is usually determined either by agreement (vote) or by chance. These small saving-clubs do not usually provide loans to their members.⁶⁰ Membership is usually limited to ensure that each member receives the "oorgooi", that is, the pool at least twice a year.⁶¹

Secondly, there are investment clubs, which are more in the nature of a co-operative society than a savings club in that the entire pool is banked after each rotational sitting. The goal of these clubs is to buy an asset like a plot of land or a taxi for investment purposes.⁶² Contributions of members are often invested in formal financial institutions like banks, building societies and life insurance companies.⁶³ If the contributions of the members are reinvested with an insurance company in the form of, say, an endowment policy, the stokvel can be regarded as the (mutual) insurer and the insurance company as the reinsurer.⁶⁴ The stokvel acts in these circumstances simply as a conduit and reinvestor of the members' contributions.

Thirdly, there are high-budget associations which consist of 100 members or more whose background and status are important factors in gaining entrance to the association. Contributions vary from R200 to R2 000 per month. Pay-outs vary from R7 000 to R150 000. The most distinctive feature of these associations is the fact that the officials are no longer mere members but they are referred to as the "board" and enjoy special privileges.⁶⁵

The fourth type of stokvel which is generally encountered is the burial society. It requires separate consideration.

9.1.1.2 *Burial Societies*

9.1.1.2.1 The Nature of a Burial Society

Stokvels are formed with various aims in mind.⁶⁶ A burial society is a type of stokvel in terms of which financial assistance is provided for the funerals of members and their families.⁶⁷

60 See Thomas 296-297; Collair 11.

61 See Stanford 36.

62 See Thomas 298; Collair 11.

63 See Collair 15.

64 See further par 9.1.2.1 below.

65 See Thomas 299-301; Collair 11 17-18.

66 See again par 9.1.1.1 above.

67 See Kramer 10. See also Kramer 59 et seq for examples of burial societies active in Soweto. Like credit-rotating associations (stokvels) in general, burial societies are neither unique to South Africa (see Gosden 115 et seq; Boeder 340) nor is the concept of recent origin: see Morris 46 et seq for a discussion of burial rights in ancient Greece. For a description of the activities of a burial society as seen by the legislature, see par 2(c)(ii)-(iv) of GN 2173 in GG 16167 of 14 December 1994, which is discussed in par 9.1.2.2 below.

A burial society is sometimes referred to as a "lekgotla". The Tswana word "lekgotla" is used to describe any social meeting with a good moral purpose, for example, a birthday or burial society gathering.⁶⁸ As a type of stokvel, burial societies had their origin in the financial problems faced by blacks when they were expected to provide decent funerals where the deceased died destitute. The surviving family of the deceased was usually financially crippled by the high costs accompanying the traditional indigenous funeral.⁶⁹ The concept of a burial society for Blacks had its origin in the Free State during the early 1930s. It rapidly spread to the rest of the country as it provided a solution to the financial burden faced by blacks in honouring traditional requirements in respect of funerals.⁷⁰

Burial societies are, strictly speaking, not a different form of financial investment but simply a special type of stokvel.⁷¹ Due to the important role which burial societies play in the black stokvel culture,⁷² they will, however, be treated as a separate financial mechanism in their own right. Of the approximate 24 000 stokvels operating in the major metropolitan areas, 29 percent are burial societies. On average 80 people belong to a single burial society.⁷³ Coverage in the case of death depends on the provisions of the constitution of the particular burial society or, in the absence of any constitution, on

68 Lukhele 16 et seq. More specifically the term "lekgotla" refers to traditional court proceedings. In a general sense the term "lekgotla" refers to any public meeting which has two important features, namely that it is of a structured nature, and that it is open to the general public.

69 Eg, during the 1980s a funeral in the traditional black urban areas cost at least R1 500 if one includes the cost of the coffin, food for the wake and the hire of buses: see Stanford 35.

70 The arrangements and festivities which accompany traditional funerals in the black culture could easily be mistaken for those of a wedding or other feast. It is customary to slaughter an ox and prepare food and large quantities of beer. All the family and friends who attend the funeral are expected to go to the bereaved's house after the funeral and to participate in the rituals as well as the feast. All the expenses are borne by the bereaved family, which could easily leave a poor family destitute: see Kramer 135 et seq; Ferreira 1; Lukhele 17; Collair 11.

71 Amongst the coloured people of the Western Cape burial societies are also known as "doodsgenootskappe": see Ferreira 3. The term "doodsgenootskap" is sometimes also used when referring to funeral insurance, which is regulated by the Insurance Act 27 of 1943. A "doodsgenootskap" in terms of the Insurance Act should not be confused with a "doodsgenootskap" which is a type of stokvel. In terms of s 3 of the Insurance Act every insurer, including an insurer who assumes "funeral business", must be registered in terms of the Act. Section 1 of the Insurance Act describes "funeral business" as "the business of assuming the obligations of an insurer under funeral policies". A "funeral policy" is described as "a policy ... whereby the insurer assumes an obligation, in return for a premium or the promise of a premium, to provide, on the death of any person, benefits which involve amounts not exceeding in the aggregate five hundred rand and which consist principally of - (a) provision for the funeral of that person; or (b) the grant of some other non-monetary benefit to any person ...". A stokvel does not have to be registered to receive contributions (premiums) (lawfully) in return for the promise to pay an amount on the death of a person.

72 And in the black community as a whole: see Kramer 55 et seq. Afro-American societies in America place a similar importance on the aspect of "a proper burial". "Who buried him or her?" is an important question which is often asked there, eliciting information about who has provided for the funeral of a family member. Public-aid burial is seen as a disgrace and family members will pool funds to bury a kinsman who dies without burial insurance: see Holloman & Lewis 217-218. The main aim of the local burial societies which operated in the English counties during the nineteenth century was also to prevent the disgrace of a pauper funeral: see Gosden 115.

73 In the case of other types of stokvel, the average number of members is sixteen: see Lukhele 2.

the agreement between the members of the burial society. Usually an entire family is covered.⁷⁴ Members who belong to a burial society sometimes also have an ordinary funeral insurance policy⁷⁵ which provides for additional financial assistance in the case of a funeral.⁷⁶

In its common form the agreement between the members of a burial society provides that the members will assist one another in the case of the death of a fellow-member or one of his relatives. Members of a burial society usually regard the promised assistance by the other members of the society as a type of insurance.⁷⁷ However, it is interesting to note that members of a burial society often prefer it to an ordinary funeral policy. Ordinary funeral policies have certain disadvantages. First, most blacks consider them too expensive. Secondly, most ordinary funeral policies require that a separate insurance policy be taken out for each individual member of the family.⁷⁸ In the case of a burial society, by contrast, the whole family⁷⁹ is covered by the payment of a single (relatively) low contribution.⁸⁰ The smallness of the premium or contribution may be ascribed to the fact that burial societies, being in the nature of a mutual insurance society,⁸¹ are not usually formed with the intention of making a profit from the contributions paid by the members. A further advantage of a burial society, compared with a funeral policy, is that the member is often not required to pay regular premiums or contributions to be covered. The member promises to contribute towards the funeral expenses of other members should they pass away before him. In effect the members receive burial-insurance cover on credit.⁸²

Burial societies not only fulfil an important financial support function but provide the bereaved family with important moral and social support as well.⁸³

74 In terms of the burial scheme administered by NASASA for its members, there is no limit on the number of spouses of a member who will be covered in terms of the scheme. Thus, this scheme acknowledges marriages by common law and tribal custom. All children of the member, irrespective of the number and from which type of marriage, including a still-born child, a stepchild, a child born outside marriage and an adopted child are included in the scheme: Anon NASASA 11. This arrangement apparently applies to burial societies in general.

75 See again s 1 of the Insurance Act for the definitions of "funeral business" and "funeral policy".

76 See Kuper & Kaplan 185.

77 See Kramer 54; Ferreira 1.

78 This is a problem which is also faced by extended Afro-American families in America as the insurance laws of certain States do not allow for the extended family. Eg, family members who are not immediate family are often excluded from cover by these laws: see Frate & Logan 168. The concept of "family" is generally understood to mean parents and children and both sets of parents-in-law. If parents are absent (or already deceased at the time when the member joins the burial society) other relatives can be substituted: see Stanford 35. This phenomenon is referred to as the concept of "the extended family".

79 See again note 78 above as to the concept of the "extended family". As to the role and function of the "clan funeral" in the extended family in Afro-American Societies in America, see Holloman & Lewis 217-218.

80 See Stanford 35-36.

81 See par 9.1.2.1 below.

82 See Kramer 149.

83 See Lukhele 19.

9.1.1.2.2 Different Types of Burial Society

Two main types of burial scheme exist. In terms of the first type a group of people enter into an unwritten agreement. This scheme is very informal and usually operates without a constitution. The members commit themselves to pay a specified amount of money should a member or anyone in his immediately family pass away. The contributions are brought to the family of the deceased. This type of scheme is usually small and no bank accounts are opened in the name of the society.⁸⁴

In terms of the second type of scheme, which is more formal and structured, members contribute a fixed amount of money either weekly, monthly or annually. Members enter into a written agreement and the society is governed by a detailed constitution which provides for the operation of the scheme. Bank accounts are opened in the name of the scheme.⁸⁵ To overcome the possibility of fraud, many stokvels and burial societies have joint instead of individual control, and the accounts of the burial society are read to all members at meetings.⁸⁶ Members in general have a say in the running of the society.⁸⁷

9.1.2 A Comparison Between Stokvels and Some Formal Financial Structures

9.1.2.1 *Stokvels versus Insurance*

The financial arrangements of burial societies and certain other types of stokvel closely resemble the manner in which ordinary insurance companies operate. It is submitted that the activities of at least certain types of stokvel, satisfy the definition of insurance. It will be shown that those types of stokvel in terms of which the members' contribution depend on the materialisation of an uncertain event resemble the concept of "insurance" in particular. Stokvels in terms of which the contributions (pool) are received at a fixed time, irrespective of the existence or not of an uncertain event, are possibly more in the nature of banking (in the sense of an investment account) than insurance.⁸⁸ Any reference to the concept of "stokvel" in this paragraph is therefore a reference to those stokvels in terms of which the payment of the contribution by the members or the actual payment of the pool to the members⁸⁹ is subject to the materialisation of an uncertain event.

For the sake of completeness, the definitions of the concepts of "insurance" and "premium" as formulated earlier are repeated here.

⁸⁴ See Kramer 70-71; Lukhele 17; Collair 14.

⁸⁵ See Lukhele 18; Collair 14. It would appear that most of these more formal type of burial schemes operate as voluntary associations.

⁸⁶ See Kramer 72 for an exposition of the different official capacities one encounters in the executive committee of a burial society.

⁸⁷ See Lukhele 19.

⁸⁸ See par 9.1.2.2 below.

⁸⁹ Eg, in the case of the death of the member or one of his relatives.

"[An insurance contract is a] contract between an insurer and an insured whereby the insurer undertakes in return for the payment of a price or a premium to render to the insured a sum of money, or its equivalent, on the happening of a specified uncertain event in which the insured has some interest."⁹⁰

"The premium, which may take the form of money or something else, is the counter-performance of the insured in return for the insurer's undertaking to bear the risk of the materialisation of a specified uncertain event."⁹¹

It will be shown that the legal concept of a "stokvel" does contain all the elements of the definition of insurance, and that a stokvel (or at least certain types) is in essence a mutual insurance contract. A mutual insurer is defined in s 1 of the Insurance Act as

"an insurer" --

(a) of whom all members --

(i) qualify as such by virtue only of their being owners of policies issued by the insurer; and

(ii) are entitled to participate in the exercise of control in general meeting[s] of that insurer; and

(b) whose profits are distributable only to owners of policies issued by the insurer".

It will be shown that the stokvel usually satisfies all the requirements for a mutual insurer listed in this definition.

The essentials of an insurance contract are the following. First, an undertaking by one party to pay a price, that is, the premium or contribution, as counter-performance for the undertaking by the other party. Secondly, the party who is entitled to the premium promised by the first party, undertakes to bear the risk of the materialisation of an uncertain event and to indemnify the first party should the risk materialise. Thirdly, the party (insurer) who undertakes to indemnify the other party (insured), gives this undertaking subject to the materialisation of the risk through an *uncertain event*, which is usually (but not necessarily) outside the insurer's control. The uncertainty of the event may refer either to the question of *whether or not* the risk will materialise,⁹² or to the question of *when* it will materialise.⁹³

In the case of burial societies, certain other types of stokvel and voluntary associations where the payment of the contribution is subject to the materialisation of an uncertain event,⁹⁴ the requirement of the existence of an uncertain event is satisfied.⁹⁵

90 See again ch 8 par 8.2 above.

91 See again ch 8 par 8.2 above.

92 Eg, in the case of property insurance.

93 Eg, in the case of the death of the insured life in terms of a life insurance policy.

94 Eg, if a member's house is damaged or destroyed or, in the case of the death of a member or one of his relatives.

95 In the case of those stokvels where the payment of a contribution does not depend on the materialisation of an uncertain event, eg the "gooi-gooi" (which is in essence a saving device), the activity may amount to another type of insurance, eg an endowment policy or an annuity insurance.

The risk of the materialisation of the uncertain event is borne mutually by the members of the *stokvel*. Other than in the case of a *stokvel* or mutual insurance society, the risk of the materialisation of the uncertain event in the case of insurance for profit is borne by a separate legal entity (the insurer) and not by the members (the insured).⁹⁶ A member of a mutual insurance society is simultaneously insured and insurer. In the case of a *stokvel* there is usually not a legal entity with legal personality. The members of a *stokvel* are usually personally liable to one another in the case of the materialisation of the risk. But each member is liable only to the amount or extent (in the case where the contribution is in kind⁹⁷) of his own contribution. This principle of reciprocity is further illustrated by the fact that the members of a credit-rotating association, being the underlying nature of a *stokvel*, are simultaneously debtor and creditor of one another.⁹⁸

The contribution in terms of a *stokvel* is the counterpart of the premium in terms of an ordinary insurance contract. The fact that the contribution in terms of a *stokvel* may take the form of money or something else does not militate against it being in the nature of a premium in terms of an insurance contract since such premiums may take the form of something other than money.⁹⁹

The fact that the contribution in terms of a *stokvel* is not always paid in advance but sometimes only upon the materialisation of the uncertain event,¹⁰⁰ is comparable with the time of the payment of the premium in the case of an insurance contract. Although the premium is usually paid in advance, that is, upon the conclusion of the contract which, in turn, usually happens before the materialisation of the uncertain event,¹⁰¹ it is, however, sometimes paid only after the materialisation of the uncertain event. Consider, for example, the case where the parties agree that the premium is not payable upon the conclusion of the contract but at some later stage, or in the case of *mutual insurance* where the premium or contribution is often paid (and the final amount of it determined) only after the materialisation of the risk. Payment of the premium or contribution in arrears is in accordance with the general principle regarding the time of payment of the premium in terms of Roman-Dutch insurance law.¹⁰²

The insured's undertaking to pay the premium in terms of an ordinary insurance for profit contract serves as counter-performance for the insurer's undertaking to bear

96 As to the difference between mutual insurance and insurance for profit, see again, eg, ch 2 par 2.1 and 2.2.1; ch 4 par 4.2 above.

97 See par 9.2 below.

98 See again par 9.1.1.1.2 above.

99 See again, eg, ch 3 par 3.2; ch 8 par 8.2 above.

100 Eg, those types of burial society in terms of which the members undertake to pay their contributions only on the death of a fellow-member or one of his relatives. See again par 9.1.1.2.1 above.

101 In the case of a contract which is concluded on the basis of "lost or not lost" it may happen that the uncertain event has already materialised at the time of the conclusion of the contract: see Reinecke & Van der Merwe par 172.

102 See again ch 3 par 3.3.2 above.

the risk. In the case of mutual insurance the member's undertaking (in his capacity as an insured) to contribute or to assist a fellow member who has suffered a loss serves as counter-performance for the undertaking by the other members (in their capacity as insurers) to contribute or to assist the first member if and when he suffers a loss. Likewise, in the case of stokvels, the member undertakes to make a contribution either in advance or on the materialisation of the uncertain event.¹⁰³ This undertaking by a member is given in return for the undertaking by the other members to make good the loss of the first member in the case of the materialisation of the uncertain event.

As in the case of a mutual insurance society, the aim of a stokvel is not usually to make a profit from the contributions paid by the members. If there is a residue at the conclusion of a rotation, it is usually divided among the members of the stokvel. The activities of stokvels are therefore more in the nature of mutual insurance than insurance for profit.¹⁰⁴ Although it is true that a certain percentage of a member's contribution is sometimes kept in a separate fund and does not form part of the pool which is allocated to the members, the proceeds of this fund are distributed to the members at a later stage.¹⁰⁵ This is in accordance with the principle which applies to mutual insurance, namely that a member of a mutual insurance society is simultaneously insured and insurer.

The principle that the members of a mutual insurance society are simultaneously insured and insurer also serves as basis for another common factor between mutual insurance and stokvels. In both of these legal concepts it is the members and not the organisation, that is, the mutual insurance society or the stokvel which bear the risk of the materialisation of the uncertain event. This fact is best explained by the dual capacity of the members of a mutual insurance society and a stokvel.¹⁰⁶

The frequency of the payment of the contribution in certain types of stokvel, especially in the case of certain types of burial society, shows a strong similarity with its counterpart in the case of mutual insurance. The premium or contribution in the case of mutual insurance is usually calculated and paid only *after* the period of insurance has expired, or, alternatively, *after* one or more of the members has suffered a loss. In the case of those stokvels where the contribution consists of labour, for example, assisting the other members to clear their fields¹⁰⁷ or helping to repair the damaged house of a

103 Eg, the death of a member or one of his relatives in the case of a burial society.

104 As regards the differences between mutual insurance and insurance for profit, see again, eg, ch 2 par 2.1 and 2.2.1; ch 4 par 4.2; and ch 8 par 8.2 above.

105 See Thomas 297 who refers to the phenomenon that in the case of some stokvels the recipient of the pool receives only a percentage of the input, ie the contributions by the other members. In some cases the recipient receives up to 66 percent, but the most common figure appears to be 50 percent, the balance of the pool being paid into a bank or building society savings account. At the conclusion of the rotation, eg, six to twelve months, the residual, including accumulated interest, is divided equally among members of the group. At times this splitting of the savings is arranged to coincide with a particular occasion, eg, Christmas.

106 As regards the principle that members of a stokvel (credit-rotating association) are simultaneously debtor and creditor of each other, see again par 9.1.1.1.2 above.

107 See also par 9.2 below.

fellow-member, the extent of the contribution (labour) is only calculated (and rendered) *after* the risk has materialised. In some types of burial society the contribution is only determined¹⁰⁸ and rendered *after* one of the members or one of his relatives has passed away.

Although stokvels and burial societies operate almost without exception without regard to any actuarial principles, one example was encountered of a burial society which makes use of an actuary in order to determine the amount and the frequency of its members' contributions.¹⁰⁹ The contribution in the case of some large burial societies is regarded and referred to by the members as the "premium".¹¹⁰ In the case of some stokvels, members are only expected to make a contribution if and when another member suffers a loss. These agreements are actually referred to by the members as an "insurance system" or an "insurance arrangement".¹¹¹

Stokvels which provide for contributions to members who are unable to work due to illness and who receive no pay when unable to work, are referred to by their members as "health insurance".¹¹² In other types of stokvel, again, the members are entitled to legal assistance and the stokvel is then simply a type of legal assistance insurance.¹¹³ Amongst young unemployed black men, networks of informal interest-free lending have over the years provided a very effective and long-term form of unemployment insurance.¹¹⁴

In the case of the stokvel in its most rudimentary form, namely the "gooi-gooi"¹¹⁵ which is but a type of saving mechanism, the activity of the stokvel resembles that of an annuity insurance policy. Such a policy provides for the payment of periodical sums during a certain period or until the death of the life insured or another person.¹¹⁶ In the case of a "gooi-gooi", the agreement between the members of the stokvel usually provides that a member (or his estate where he passed away before he had received the pool) will be entitled to a sum periodical (the pool) during a certain period, that is, as long as a particular member continues to make a contribution.

108 Eg, some burial societies not only give a fixed amount to the bereaved family, but provide a complete funeral, which includes the hire of one or more buses, a coffin and food. As the prices of these items fluctuate, members are expected to contribute (usually equally) to the final account. The amount of expenses will, because of inflation, increase from time to time.

109 This burial society is the "Great North Burial Society". It is well known for its large number of members and it had to register itself as a friendly society in terms of the Friendly Societies Act 25 of 1965. (As regards the requirements for registration under the Friendly Societies Act, see par 9.1.2.3 below.) Although the majority of its members reside in Soweto, some of its members live as far afield as Lesotho and Botswana: see Kramer 76 et seq.

110 See Kramer 80.

111 See Kiernan 35.

112 See Boeder 341.

113 See Boeder 342.

114 See Cross 88. Paragraph 2(j) of GN 2173 in GG 16167 of 14 December 1994 provides that the object of certain stokvels may be "the relief or maintenance of members, or any group of members, when *unemployed* or in distressed circumstances". See par 9.1.2.2.1 below.

115 See again par 9.1.1.1.1 and par 9.1.1.1.3 above.

116 See Havenga *Life Insurance* 2.

It is clear that the activities of a number of different types of stokvel do qualify as (mutual) insurance in the practical sense of the word. However, it would appear that the activities of stokvels in general are excluded from the definition of "insurance business" as provided for in section 1 of the Insurance Act. In terms of this definition the activities of friendly societies are deemed not to be "insurance business". But the Insurance Act provides for certain exceptions to this general exclusion from the scope of the Act. If a friendly society grants any annuity exceeding R144 per year to a member, the activities of the society are no longer excluded from the operation of the Act. It is submitted that most of the pools (annuities) which are received by members of a stokvel exceed the amount of R144 per year. However, it is further submitted that although most of the pools (annuities) which are rotated in terms of stokvels do exceed this amount, the business of these stokvels are not governed by the provisions of the Insurance Act since most stokvels do not have to be (and are not) registered as friendly societies. In terms of section 3(1)(b) of the Friendly Societies Act,¹¹⁷ any society whose annual income is less than R100 000 a year is exempt from registration in terms of the Friendly Societies Act.¹¹⁸

The Registrar of Insurance has a general discretion to decide whether or not a particular type of transaction amounts to "insurance business as ordinarily understood". If he is of the opinion that the activities of stokvels do not amount to insurance business, it will not be necessary for the stokvel to register as an insurance company in terms of the Act.¹¹⁹

But the mere fact that a particular stokvel is not registered as an insurer should not rule out the application of the principles of insurance law to the activities of stokvels. If the agreement between the members of a stokvel amounts to a (mutual) insurance contract, the agreement must be governed by the general principles of the law of insurance, except in so far as the parties have expressly or impliedly excluded them from their contract. This further entails that although a stokvel may not be registered as a (mutual) insurance company in terms of the Insurance Act, the provisions of the Act may nevertheless apply to the stokvel. Section 68 of the Insurance Act provides that an insurance contract is not invalid merely because a legislative provision has not been complied with. This entails, amongst other things, that the mere fact that an "insurer" is not registered as such in terms of the Insurance Act will not invalidate the contract. A contract which is concluded between an unregistered insurer and an insured is, as a matter of general principle, an insurance contract and the Insurance Act, as well as the general principles of insurance law, will apply to such contract.¹²⁰

117 25 of 1956 as amended.

118 See also par 9.1.2.3 below.

119 See s 1 "insurance business" (i) of the Insurance Act.

120 See also Reinecke & Van der Merwe par 57n13.

9.1.2.2 *Stokvels versus Banking*

9.1.2.2.1 Ordinary Commercial Banks

There is a definite resemblance between the activities of some types of stokvel and the services and products offered by some formal financial institutions in general, and banking institutions in particular. Most stokvels are in the nature of credit-rotating associations.¹²¹ If the receipt of the pool does not depend on the existence or materialisation of an uncertain event, the activities of the particular stokvel are probably more in the nature of investment than insurance. For example, the "gooi-gooi" is but a type of savings mechanism, similar to saving accounts run by banks.¹²² This resemblance is further enhanced, albeit it in an indirect way, by the fact that stokvels are expressly exempted from the operation of the Banks Act 94 of 1990.¹²³ Under paragraph (cc) of the definition of "the business of a bank" in section 1 of the Banks Act, the Minister of Finance is entitled to designate certain activities as activities which do not fall within the meaning of "the business of a bank". The Minister has indicated that "the activities of a *group of persons* between the members of which exists a *common bond*", do not fall within the meaning of "the business of a bank".¹²⁴ From the wording of the regulation it is clear that the exclusion of the activities of stokvels, amongst other groups, from the operation of the Banks Act is intended. As references in legal materials (let alone legislation) concerning stokvels are few and far between, a complete exposition of the provisions of this Ministerial Regulation (Notice) is called for.

The Notice provides first of all for four different types of "group" to which it applies.¹²⁵ Secondly, it lists certain activities performed by the groups which are excluded from the operation from the Banks Act.¹²⁶ Finally, it provides for certain requirements with which the different groups must comply to in order to enjoy exclusion from the operation of the Banks Act.¹²⁷

In paragraph 1(a) of the Schedule to the Notice it is provided that a *common bond* shall exist between the members (who are employees of the same employer) of a savings and credit scheme that is operated and administered on behalf of such employees in accordance with set rules agreed upon between the employees and their employer. Paragraph 1(b) provides that a *common bond* shall also exist between members of a group of people¹²⁸ that may be described by the term or concept of "stokvel". A detailed description is given of the concept of "stokvel". A stokvel is described as a group which -

121 See again par 9.1.1.1.2 above.

122 See again par 9.1.1.1.3 above.

123 The mere fact that the Minister of Finance has excluded the activities of stokvels from the meaning of "the business of a bank" is already a strong indication of the possibility of an overlapping between the activities of stokvels and banks.

124 See GN 2173 in GG 16167 of 14 December 1994.

125 See par 1 of the Schedule.

126 See par 2 of the Schedule.

127 See par 3 of the Schedule.

128 The concept of a "group" is defined as "a number of natural persons": see par 1 of the Schedule.

- "(i) is a formal or informal rotating credit scheme with entertainment, social and economic functions;¹²⁹
- (ii) fundamentally consists of members who have pledged mutual support to each other towards the attainment of specific objectives;¹³⁰
- (iii) establishes a continuous pool of capital by raising funds by means of the subscriptions of members;
- (iv) grants credit to and on behalf of members;
- (v) provides for members to share in profits¹³¹ and to nominate management;¹³² and
- (vi) relies on self-imposed regulation to protect the interest of its members".

Paragraph 1(c)-(d) describes two other groups of person between which a common bond exists. Paragraph 1(c) provides that a common bond exists between members of a specific group which is established for the purpose of raising funds for housing advances to the members. In terms of paragraph 1(d) a common bond exists between the members of a Credit Union or Savings and Credit Cooperative, which group receives funds from members against the issue of stock or by means of the subscriptions of the members. The provisions of paragraph 1(c) and (d) are not important for present purposes.

It is important to note that "a member" is defined as "a person who contributes towards the funding of the group in order to obtain a benefit in terms thereof".¹³³ The question remains as to whether the contribution must be made by the member himself to qualify as a member of the "group", or whether it will suffice if the contribution is

129 As to the concept of a "credit-rotating scheme", see again par 9.1.1.1.2 above.

130 This characteristic of a stokvel resembles the essence of a mutual insurance society: see again par 9.1.2.1 above.

131 This characteristic is the primary distinguishable feature of a mutual insurance contract when compared with an insurance contract for profit. It is important to note that the distinction is not to be based on the mere presence or absence of profit, because mutual insurance too sometimes shows a profit. The distinction between insurance for profit, on the one hand, and mutual insurance on the other hand, is based rather on the fact that the mutual insurance contract is usually concluded without any intention on the part of the society to make a profit. If a mutual insurance society does make a profit, it is usually distributed amongst the members or appropriated to the benefit of the members, eg, it can be reinvested on behalf of the members or a communal asset may be bought for use by the members. In the case of an insurance contract for profit, it is usually concluded with the motive on the part of the insurer of making a profit. If a profit is made, it is usually not distributed amongst the insured, as any profit or loss in the books of the insurer is usually for its account and is not shared with the insured. For a discussion of the differences and similarities between an insurance contract for profit, and a mutual insurance contract, see again, eg, ch 2 par 2.1 and 2.2.1; ch 4 par 4.2; and par 9.1.2.1 above.

132 This characteristic illustrates another important distinction between an insurance for profit contract and a mutual insurance contract. The insured in terms of an insurance for profit contract are not usually involved in the management of the insurance company. In short, there is usually a strict distinction between the capacities of insurer and insured respectively. In the case of mutual insurance, by contrast, the insured usually have the power either to nominate management or to take part in the actual management of the society. This is the case as the members of a mutual insurance society are simultaneously insurer and insured: see again ch 2 par 2.2.1 above.

133 See par 1 of the Schedule.

made by a third party on behalf of the member. It is submitted that someone will also qualify as a member of a group (stokvel) where the contribution is paid not by himself but by someone on his behalf. Such a construction is in accordance with the notion that the contribution can be paid by a third party provided that it is done in the name of the debtor and with the intention of discharging the debt of the member.¹³⁴ Such a construction is also in line with the principle that "contribution-less" membership of a stokvel is not possible.¹³⁵

Paragraph 2 of the Schedule deals with the different types of activity which are regarded as *not* falling within the meaning of "the business of a bank". The following activities (which are listed in paragraph 2) and which are performed by any of the "groups" (which include stokvels) described in paragraph 1 are, subject to the conditions provided for in paragraph 3 of the Schedule, excluded from the operation of the Banks Act.

"[T]he acceptance by or on behalf of a group ... of money from such members, the pooling of such money, and the utilization thereof for one or more of the following objectives:

- (a) [t]he relief or maintenance during minority, old age, widowhood, sickness or other infirmity ... of members or their husbands, wives, widows, widowers, children or other relatives or dependants;
- (b) the granting of annuities, whether immediate or deferred, to members or to nominees of members, or the endowment of members or nominees of members;
- (c) the provision of a sum of money to be paid or other benefit to be provided -
 - (i) on the birth of a member's child;
 - (ii) on the death of a member or any other person mentioned in paragraph (a) in the form of an endowment insurance on the life of a member or such a person;
 - (iii) towards the expenses in connection with the death or funeral of any member ... ; or
 - (iv) during a period of confined mourning by a member or such a person;
- (d) the acquisition of movable goods by a member;
- (e) the acquisition of any land by a member;
- (f) ...
- (g) the insurance against fire or other contingencies of the implements of the trade or calling of any member;
- (h) towards expenses in connection with any recreational or social event of a member;
- (i) the provision of a sum of money to a member on a member's leaving the services of his employer owing to dismissal, resignation or otherwise;
- (j) the relief or maintenance of members, or any group of members, when unemployed or in distressed circumstances;
- (k) the provision of money for the advancement of the education or training of members or of the children of members;
- (l) the establishment of any business by a member;
- (m) ...

¹³⁴ As to who must pay the contribution in terms of a stokvel, see par 9.3.5 below.

¹³⁵ See par 9.2 below.

(n) the provisions of means whereby members may receive interest or a dividend on their respective contributions."

Paragraph 3 of the Schedule stipulates for certain conditions with which the activities listed in paragraph 2 must comply for them to be excluded from the operation of the Banks Act. In terms of paragraph 3(a) the activities of a group (stokvel) which fall within the objectives of a pension fund organisation¹³⁶ will not be excluded from the operation of the Act. The activities of a group (stokvel) whose rules entitle a member to withdraw the full amount of his contributions at any time, are also not excluded from the operation of the Act.¹³⁷ For a group to qualify as a stokvel in terms of paragraph 1(b), it must be a member of (or be affiliated to) either the National Stokvels Association of South Africa,¹³⁸ or of any such similar representative self-regulatory body approved by the Registrar of Banks in writing.¹³⁹ If the only activity of a group (stokvel) comprises the granting of loans to its members which must be repaid, it will not be excluded from the operation of the Act.¹⁴⁰

Paragraph 3 also indicates some administrative requirements with which a "group" (a stokvel) must comply for it to be treated as such in terms of the Notice under discussion. These requirements include the following. The group (stokvel) must keep such accounting records in one of the eleven official languages as are necessary to fairly reflect the state of affairs and business of the group (stokvel). Each group (stokvel) must fix a date to indicate the end of its financial year, and it must, within 120 days of such date, issue financial statements.¹⁴¹

Likewise, a group (stokvel) must comply with certain financial requirements in order to qualify as "a group" which is excluded by the Notice from the operation of the Act. To be excluded, a group (stokvel) must not hold subscriptions from members which at any time amount in the aggregate to more than R9,99 million.¹⁴² If a stokvel holds subscriptions from its members which amount in the aggregate to more than R9,99 million it must register as a commercial bank or as a community bank.¹⁴³ If a

136 As defined in s 1 of the Pension Funds Act 24 of 1956.

137 See par 3(b) of the Schedule.

138 See again par 9.1 above.

139 See par 3(c) of the Schedule.

140 See par 3(e) of the Schedule.

141 See par 3(f)-(h) of the Schedule.

142 See par 3(i)(i)-(ii) of the Schedule. If the aggregate amount of subscriptions exceed R1 million, the financial statements of the group (stokvel) must be presented to a person who is registered as an accountant and auditor in terms of the Public Accountants and Auditors Act 80 of 1991, for purposes of the drawing up and presentation of a report: see par 3(j) of the Schedule.

143 During the latter part of 1995, "Sun Multiserve", a pyramid scheme which refers to itself as a stokvel, was formed with the aim of taking deposits from the general public while promising dividends of up to 100 percent on investments within two to three weeks. In the light of the fact that this "stokvel" is simply another pyramid scheme, as well as the fact that it held subscriptions from members of the general public in excess of R50 million, the Registrar of Banks requested audited reports of its financial affairs. After it failed to furnish these reports, the Registrar decided to "freeze" the bank accounts of "Sun Multiserve" as well as the personal bank accounts of its officials. "Sun Multiserve", defending its "secret formula", claimed that the order to freeze its assets was an act of racism. But a similar crackdown by the Ghanaian government on the "Pyramid Business Consulting Services" pyramid scheme which operated there and offered monthly

stokvel holds subscriptions from its members which at any time exceed R1 million, an audited report of the stokvel's financial affairs must be presented to its members as well as to NASASA or any such similar representative self-regulatory body approved by the Registrar of Banks in writing.¹⁴⁴

The promulgation of the Notice under discussion is important for a number of reasons. First, it is, as far as it could be established, the first time that recognition has been given to the concept of a "stokvel" in an instrument of legislation.

Secondly, although this Notice does not intend to formulate a general definition of the concept of a "stokvel", it does provide that the activities of a group which shows all (or most of) the characteristics of a stokvel, do not amount to "the business of a bank". But it can be taken that if it should become necessary in the future for the legislature to define the concept of "a stokvel" for purposes of legislation aimed at regulating stokvels on their own, the characteristics of a stokvel which are listed in the Notice will be taken into account as a point of departure.¹⁴⁵

Thirdly, it is significant to note that legislative acknowledgement is given in this Notice to the fact that some types of stokvel closely resemble the concept of insurance.¹⁴⁶ Some of the activities which are referred to in paragraph 2 of the Schedule are *insurance*-related. These *insurance*-related activities are typical of the stokvel, being one of the types of group mentioned in paragraph 1. Two types of insurance policy are mentioned in particular, namely an endowment policy¹⁴⁷ and a fire policy,¹⁴⁸ while reference is also made to indemnity insurance in general.¹⁴⁹

Fourthly, the fact that stokvels are excluded from the scope of the Banks Act¹⁵⁰ means that the provisions of the Act do not apply to stokvels. But the fact that stokvels are excluded from the scope of the Banks Act does not detract from the fact that the activities of certain types of stokvel, for example, the "gooi-gooi", resemble the activities

returns of up to 30 percent, showed that the issue is not racial. A pyramid scheme is, of course, not necessarily a stokvel merely because it takes money from black depositants. The fact that "Sun Multiserve" is big does not necessarily prove that it is a pyramid scheme. However, it does prove that with assets exceeding R50 million, and with 29 branches and 50 000 investors, it is too big for a stokvel. "Sun Multiserve" argued that it has had no complaints and that investors appeared to have been paid out as promised. This does not prove that "Sun Multiserve" is not a pyramid. It merely proves that "Sun Multiserve" has not yet run out of new investors: see Anon "Secret Formulas" 32. For a discussion of the legitimacy crisis of the present formal South African legal system, see Van Niekerk *Indigenous Law* 138 et seq.

144 See par 3(l)(ii) of the Schedule.

145 If seen against the debacle which has resulted from the activities of the "Sun Multiserve" stokvel at the end of 1995, the need for separate legislation with regard to stokvels is obvious. See again note 143 above.

146 See again par 9.1.2.1 above.

147 See again par 2(a) and 2(c)(ii) of the Schedule.

148 See again par 2(g) of the Schedule.

149 See again par 2(g) of the Schedule.

150 That is, of course, those stokvels which fall within the parameters laid down in the Notice in order to be excluded from the operation of the Banks Act.

performed and products offered by ordinary commercial banks.¹⁵¹ This means that the rules which apply to the banker-customer relationship may be relevant and applicable to certain types of *stokvel*.¹⁵² Thus, in the event of a legal dispute in the case of, say, a "gooi-gooi", the general principles regarding contract law and banking law should, except if proven inapplicable, apply to the dispute. For example, in terms of the principles of banking law it can be argued that the officials of a *stokvel* stand in a fiduciary relationship to the members of the *stokvel* of which they are officials.¹⁵³

The contract between a bank and its customer is sometimes referred to as a contract *sui generis*, as its basis is a mixture of the contracts of deposit, loan for consumption and mandate.¹⁵⁴ Although a *stokvel*, for example a "gooi-gooi", an investment club, or a high budget credit-rotating association, does not necessarily represent a mixture of all of these contracts, it does resemble some of the elements of one or more of the contracts of deposit, loan for consumption and mandate. For example, if members pay their contributions to the club or association, that is, the *stokvel*, with the mandate to (re-)invest these contributions, the contract between the club or association and its members will be one of mandate.¹⁵⁵

Contributions of members are often (re-)invested in formal financial institutions like banks and building societies. The investments are usually made in the name of the club or association (*stokvel*) if it is registered as a company, close corporation or friendly society. If the *stokvel* is not a legal entity, the investment will be made in the name of one of the members, usually an office-bearer of the *stokvel*. If the *stokvel* is registered as such, it can, of course, sue and be sued in its own name.

The *stokvel*, through its officials, bears a responsibility to ensure the sound financial handling of the funds of the *stokvel*. A duty of care also rests on the officials of high-budget credit-rotating associations or clubs. An important feature of these clubs is the fact that the officials are no longer mere members but are referred to as the "board" and enjoy special privileges and responsibilities.¹⁵⁶

151 The activities of a "gooi-gooi" resemble, eg, a savings account.

152 As to the rules applicable to the banker-client relationship, see Willis 24 et seq; Malan, Pretorius & De Beer par 203 et seq.

153 See also, eg, the fiduciary relationship which exists between a director of a mutual bank and the mutual bank of which he is a director: s 37(2) of the Mutual Banks Act 124 of 1993; see further par 9.1.2.2.2 below. See also on the fiduciary relationship between directors and their banks in general, Willis 42-43.

154 See Malan, Pretorius & De Beer par 203.

155 Mandate is a contract in terms of which one person, the mandatary, undertakes to perform some lawful task for another, the mandator. In Roman-Dutch law the contract was said to be essentially gratuitous. If the parties agreed on a payment for the execution of the mandate, the contract was regarded as one of letting and hiring (*locatio conductio operarum*). Today there is no objection to the remuneration of the mandatary. As to the contract of mandate, see Wille 593. As to the contents of the contract of mandate which exists between a banker and its client, see Malan, Pretorius & De Beer par 203n7 and the authorities referred to there.

156 See Thomas 299-301; Collair 11 17-18. See again par 9.1.1.1.3 above.

Although stokvels have developed to accommodate those who could not gain access to formal financial structures, they should no longer be seen as mere substitutes for formal banking institutions.¹⁵⁷ They should rather be seen as supplementary financial mechanisms and not as direct competitors for banking institutions. But the stokvel nevertheless offers certain advantages over a normal banking institution. For example, a member of a stokvel does not have to undertake long and expensive journeys to the bank; an illiterate person may experience difficulty in reading and interpreting documentation at banks; and stokvels have less rigid rules and regulations than banks.¹⁵⁸ Another advantage of the stokvel is that it assists its members in emergency situations when money is needed quickly by making capital available to people who would not qualify for loans from financial institutions which operate in the mainstream.¹⁵⁹

9.1.2.2.2 Community Banks

Ordinary commercial banks (or equity/public company banks as they are also referred to) tend to focus on "high-value business". As the products, systems, and service outlets of these banks are geared to cater for an "up-market clientele", their cost structure is inappropriate and unaffordable for the lower-income communities. Until 1994 there was little focus on the mobilisation of the savings of these communities along legislatively structured lines.¹⁶⁰

During 1994 legislation came into effect which provides for community banking. The concept of "community banking" and its activities is governed by the Mutual Banks Act 124 of 1993.¹⁶¹ In the case of a mutual bank, the members, that is, the clients, are simultaneously shareholders in the bank.¹⁶² This entails that the clients or members participate in the day-to-day management of the affairs of the bank. The management of credit risks of a mutual bank is unique in that the recoverability of loans made to clients or members depends on community pressure applied by members on those who have borrowed money from the mutual bank. Thus, community banks are owned by the participants themselves.¹⁶³ The characteristic of control by the members of a

157 See Thomas 301-302.

158 See Collair 20.

159 See Lukhele 37-39.

160 See Itzikowitz 493.

161 "The main object of the Act is to create a statutory framework for the regulation and supervision of the activities of juristic persons, established on the basis of mutual membership, and doing business as mutual banks. The services to be offered by mutual banks correspond to those offered by the existing equity banks. The same standard of management, expertise, and prudential requirements maintained by the equity banks will apply to mutual banks": see Itzikowitz 493-494. The first mutual bank, namely "The Community Bank", commenced operations in April 1994. It started with an initial capitalisation of R20 million with branches in the Western Cape and on the East Rand: see Itzikowitz 499.

162 Section 1 of the Mutual Banks Act states that the concept of a "mutual bank" means "a juristic person - (a) the members of which - (i) qualify as such by virtue of their being shareholders in that juristic person; and (ii) are entitled to participate in the exercising of control in a general meeting of that juristic person; and (b) that is ... registered as a mutual bank".

163 See also Itzikowitz 494.

community bank corresponds with the internal administration and day-to-day conduct of its business by a stokvel.

The activities of informal organisations such as stokvels, credit unions, and community savings clubs are excluded from the scope of the Mutual Banks Act, provided that the subscription fees of the members do not exceed R9,99 million. If a stokvel's membership fees exceed this limit, it must register as an ordinary commercial bank or as a mutual bank.¹⁶⁴ If seen against this relatively high limit, it is submitted that very few stokvels will, at least in the foreseeable future, need to register as a mutual bank. But it would appear that a stokvel which has subscription fees, that is, contributions, of less than R9,99 million is, as a matter of general principle, entitled to register as a mutual bank if it so wishes. It is submitted that the activities and the "corporate constitution" of stokvels (that is, those rules which determine the participation of members in the control of the stokvel) closely resemble the activities and corporate constitution of a mutual bank. The fact that a monetary level (R9,99 million) and not some material characteristic, for example, the type of activity performed by a stokvel, is used to exclude most stokvels from the need to register as a mutual bank (or ordinary commercial bank¹⁶⁵), is a good indication of the degree of possible overlapping which exists between the activities of mutual banks and stokvels.

The different types of business of mutual banks which are expressly provided for in the Mutual Banks Act show a remarkable resemblance with the activities of stokvels. In terms of section 54 of the Act a mutual bank may accept deposits and grant loans, advances, or other credit on a national level. These are the activities typically performed by stokvels. The Act also sets out a number of activities which would amount to undesirable practices.¹⁶⁶ A stokvel which plans to register as a mutual bank should therefore ensure that its activities are not in conflict with practices prohibited by the Act, as some of the activities which are deemed to be undesirable for a mutual bank are at times performed by some stokvels.¹⁶⁷ If one or more of these undesirable practices constitute a major activity of a stokvel, it may have to reconsider its decision to register as a mutual bank.

An important distinction between stokvels in general, on the one hand, and mutual banks, on the other hand, is the fact that a stokvel may have any number of members, while the Act provides that a mutual bank must have at least seven members who have subscribed their names to the proposed articles of association agreed to by them for the government of the mutual bank.¹⁶⁸

164 See Itzikowitz 499; Anon "Gemeenskapsbanke" 8.

165 See again par 9.1.2.2.1 above.

166 See the activities which are listed in s 59.

167 Eg, a mutual bank is not allowed to effect a transaction as an undisclosed principal or in any other manner than in its own name (s 59(1)(a)); or perform any act in the capacity of an agent for the purpose of effecting a money lending transaction directly between a lender and a borrower (s 59(1)(e)).

168 See s 10(2)(a). As to the other requirements for the registration of a mutual bank, see Itzikowitz 494 et seq.

A mutual bank must comply with prescribed financial requirements. By and large these requirements conform to those applying to ordinary commercial banks. The Registrar may exempt a mutual bank from these requirements provided that it has obtained an undertaking from a guardian bank.¹⁶⁹ These requirements are imposed to safeguard the depositors' funds while the bank is undercapitalised.¹⁷⁰

A stokvel which has registered as a mutual bank will be regarded as a "juristic personality".¹⁷¹ This entails that, amongst other things, such stokvel can sue and be sued in its own name.

9.1.2.3 *Stokvels versus Friendly Societies*

The Friendly Societies Act 25 of 1956 was promulgated to safeguard the interests of the members belonging to certain associations providing benefits such as medical aid, sick pay and death and funeral assistance, by ensuring that these societies are properly administered.¹⁷² Section 2(1)¹⁷³ provides that a friendly society may be established for one or more of the following objects, namely -

- "1 (a) the relief or maintenance during minority, old age, widowhood, sickness or other infirmity ... of members or their husbands, wives, widows, widowers, children or other relatives or dependants;
- (b) the granting of annuities, whether immediate or deferred, to members or to nominees of members, or the endowment of members or nominees of members;
- (c) ...
- (d) the *insurance*¹⁷⁴ of a sum of money to be paid or other benefit to be provided -
 - (i) on the birth of a member's child;
 - (ii) on the death of a member or any other person mentioned in paragraph (a) in the form of an endowment insurance on the life of a member or such a person;
 - (iii) towards the expenses in connection with the death or funeral of any member ... ; or

169 See s 48(2) and 48(7).

170 See Itzikowitz 496.

171 See s 19 of the Act.

172 See s 2(1) of the Act. Section 3(2)(b) provides that insurers which are registered as such in terms of the Insurance Act, are exempted from registration in terms of the Friendly Societies Act.

173 Although par 2 of GN 2173 in GG 16167 of 14 December 1994, promulgated under s 1 "the business of a bank" par (cc) of the Banks Act (which is discussed in par 9.1.2.2 above) corresponds to a large extent with s 2(1) of the Friendly Societies Act, there are a few differences, which will be indicated where relevant.

174 Whereas s 2(1)(d) of the Friendly Societies Act refers to "*the insurance* of a sum of money", par 2(c) of GN 2173 in GG 16167 of 14 December 1994 refers to "*the provision* of a sum of money" (my italics). It is submitted that this difference is not of any major significance, except that it is technically more correct to refer to "*the provision* of a sum of money". The phrase "*the insurance* of a sum of money" suggests that the sum of money is the object of the risk in terms of an insurance contract, which is, of course, incorrect. By way of a broad generalisation it may be stated that *the sum of money*, ie, the indemnity, which an insured receives from the insurer is usually the result of the materialisation of an uncertain event. This materialisation of the uncertain event is usually then the cause of the damage to the object of the risk.

- (iv) during a period of confined mourning by a member or such a person;¹⁷⁵
- (e) the insurance against fire or other contingencies of the implements of the trade or calling of any member;
- (f) the provision of a sum of money to a member on a member's leaving the service of his employer owing to dismissal, resignation or otherwise ... ;
- (g) the relief or maintenance of members, or any group of members, when unemployed or in distressed circumstances otherwise than in consequence of the existence of a strike or lockout as defined in section 1 of the Labour Relations Act 28 of 1956;¹⁷⁶
- (h) the provision of sums of money for the advancement of the education or training of members or of the children of members;
- (i) such other business as the Minister¹⁷⁷ may by proclamation in the *Gazette* declare to be business in respect of which a friendly society may be established".

Section 2(2)¹⁷⁸ of the Friendly Societies Act provides that an association or business will not be regarded as a friendly society -

- "(a) if none of the persons entitled to the benefits specified in [section 2(1)] contributes to such association or business;¹⁷⁹ or
- (b) if any of its activities fall within the objects of a pension fund organization as set out in ... the definition of "pension fund organization" in section one of the Pension Funds Act, 1956; or
- (c) if in terms of its rules each member is entitled at all times to withdraw the full amount of his contributions, subject to such notice as may be prescribed in its rules; or
- (d) if the benefits mentioned in [section 2(1)] are provided exclusively by way of loans which in terms of its rules must be repaid".

Thus, if a *stokvel* is engaged in an activity which is governed by the provisions of section 2(2) of the Friendly Societies Act, it will not be allowed to register as a friendly society in terms of the Act. It is clear that the legislature intended to exclude activities

175 Items (ii)-(iv) are the standard benefits provided by burial societies, while item (i) is often encountered in the more social type of *stokvels* where the receipt of the pool usually coincides with a commemoration day, eg, a birthday or wedding anniversary of a member or one of his relatives.

176 Paragraph 2(j) of GN 2173 in GG 16167 of 14 December 1994 does not contain a similar reference to circumstances resulting from a strike or lockout. The effect of this divergence is that "a group" in terms of the Notice is allowed to grant relief to a member as a result of a strike or lockout, whereas a friendly society is not allowed to make a payment in such circumstances.

177 ie, the Minister of Finance.

178 Although par 3 of GN 2173 in GG 16167 of 14 December 1994, promulgated under s 1 "the business of a bank" par (cc) of the Banks Act (which is discussed in par 9.1.2.2 above) corresponds to a large extent with s 2(2) of the Friendly Societies Act, there are a few differences, which will be indicated where relevant.

179 Section 2(2)(a) does not specifically address the question of whether the requirement will be met if the contribution is not paid by the member himself, but by someone on his behalf. It is submitted that the payment of the contribution on behalf of a member by a third party will satisfy the requirement, and that the subsection aims to ensure a *contribution*, and not necessarily a contribution by a specific party. Thus, it is clear that "contribution-less" membership of a *stokvel* which is registered as a friendly society, is not possible. As to the aspect of "contribution-less" membership of *stokvels* in general, see also par 9.2 below.

which fall within the objects of a pension fund,¹⁸⁰ or which amount to activities which are usually performed by commercial banks.¹⁸¹

All societies (stokvels) which have an annual income of less than R100 000 are exempt from registration.¹⁸² The majority of stokvels are therefore apparently exempt from registration in terms of the Friendly Societies Act.

If a stokvel's annual income does exceed R100 000, it must register as a friendly society in terms of the Act, provided it is not engaged in an activity which disqualifies it as a friendly society.¹⁸³ A friendly society's constitution must be drawn up in accordance with certain set standards and requirements, and be registered with the Registrar of Friendly Societies.¹⁸⁴ Certain legal consequences result from the registration of a stokvel as a friendly society. First, it becomes a legal entity which can sue or be sued in its own name.¹⁸⁵ Secondly, the assets of the stokvel (friendly society) are deemed to be the assets of the society and it will be excluded from any claim by a third party except if the claim by the third party arises in connection with transactions relating to the business of the society.¹⁸⁶ Thirdly, certain administrative requirements have to be met by the society.¹⁸⁷

Section 19 of the Friendly Societies Act provides for an important limitation on the amount of the benefits payable by a society (which includes a stokvel in the nature of a burial society) which is registered as a friendly society. Such a burial society is not allowed to pay benefits in excess of R250 on the life of a child who is under the age of six years. If the child is six years old or older but under the age of fourteen years, the amount is limited to R500. These limitations do not apply, of course, to stokvels which are not registered in terms of the Act.

Finally, section 38A provides for the conversion of a friendly society into an insurance company if the society plans to carry on a particular class of insurance business.¹⁸⁸

180 See s 2(2)(b).

181 See s 2(2)(c)-(d).

182 See s 3(1)(b).

183 See s 5(1) read with s 3(1)(b).

184 Section 5(2).

185 Section 7(1)(a).

186 Section 7(1)(b).

187 Eg, it must have a registered office in South Africa (s 9); appoint a principal executive officer (s 10) and an auditor to audit the society's accounts (s 11); and compile a set of rules which provides for the day-to-day running of the society (s 13). See in general ss 9-21.

188 See s 38A(2) for the administrative steps prescribed by the Act for such conversion.

9.2 THE CONTRIBUTION AS AN ESSENTIAL FEATURE OF THE CONTRACT WHICH UNDERLIES THE STOKVEL OR BURIAL SOCIETY

Most stokvels do not have written agreements between the members. The agreement is usually reached orally. Honesty and mutual trust between the members, as are characteristic of most mutual insurance schemes, are therefore of the utmost importance.¹⁸⁹ The stokvel entails a reciprocal agreement between the members.¹⁹⁰ Membership of a stokvel is usually voluntary and the introduction of a new member is made on personal recommendation.¹⁹¹

The duration of the contract of stokvel depends entirely on the agreement between the parties. Some stokvels have been in existence for as long as ten years while others are formed for a specific short-term purpose and are dissolved as soon as their aim is reached.¹⁹²

The parties to a stokvel must reach agreement on the fact that a contribution will be paid. The following definition of the contribution is offered as a point of departure. The contribution in terms of a stokvel, which may take the form of money or something else, is the counter-performance by a member in return for the undertaking by the other members either to indemnify the first member in the case of the materialisation of a specified uncertain event, for example, the undertaking in terms of a burial society, or to contribute to the pool at regular intervals, for example, the undertaking in terms of an ordinary stokvel, which takes the form of a credit rotating association.

Although it is an essential element of the stokvel contract that the member must undertake to pay a contribution, it is not a requirement for a valid agreement that the exact amount of the contribution be determined upon the conclusion of the contract. In the case of certain stokvels and burial societies, the exact amount or extent (where the contribution consists of something other than money) of the contribution can be determined only once the risk has materialised. For example, where the members undertake to contribute to the funeral costs of a fellow-member, the amount of the contribution will depend on the cost of the coffin, the hire of buses to transport the mourners, the food and the like.

Although the contribution almost invariably consists of money, it may also take the form of something else.¹⁹³ For example, if a particular member has a contract to buy food at a cheap price, it would be regarded as part of his contribution if he shares this

189 See Lukhele 1; Collair 8.

190 Originally there were no enforceable reciprocal rights and obligations amongst members and they were free to decide whether they wanted to support a specific member's party. At a later stage the reciprocal nature of the agreement was accentuated and enforced: see Lukhele 6. As to the sanctions which come into effect in the case of the non-payment of the contribution by a member, see par 9.4 below.

191 See Kuper & Kaplan 180.

192 See Kuper & Kaplan 180.

193 See Geertz 243.

contact with the other members.¹⁹⁴ In many stokvels members circulate groceries amongst themselves. For example, the members meet every Saturday and the hostess receives sugar and soap to the value of, say, R20 from each of the other members. "Balancing" is allowed, and this is also done with groceries. All balancing is recorded in a book, and when her chance comes around, a member (the hostess) can ask for particular groceries in return to the value of what she herself gave.¹⁹⁵

The contribution may also consist of an exchange of labour.¹⁹⁶ The two major types of cooperative labour are "group work" and "exchange work". In the case of "group work", all the members apply their labour to certain labour-intensive tasks, for example, clearing a member's fields or erecting his house. In such a pattern all the members are obliged to participate, and the host provides a large feast on completion of the work. In the case of "exchange work", several members work on each other's land in turn. Reciprocity is exact and specific, and usually the work is returned within a short period of time.¹⁹⁷

In the case of burial societies the member's contribution often takes the form of money *and* something else. For example, apart from being expected to attend the funeral as well as the all-night vigil the night before the funeral, members are expected to assist the bereaved family with the preparation and serving of food.¹⁹⁸ Members are also expected to give mental support to the bereaved family apart from assisting them with household duties, for example, cleansing the house of the bereaved.¹⁹⁹

As with the insurance contract, there can be no "premiumless" or "contributionless" membership of a stokvel. The contribution of the members of a stokvel has been described as "the heart of the stokvel".²⁰⁰ Each member must make a contribution. A member who does not contribute to the stokvel is not entitled to share in the benefits of the stokvel.²⁰¹

In terms of some types of burial society it is possible to convert the "policy" into a "paid-up" policy. In one example the members had to pay an initial membership fee and premium of R50, followed by monthly premiums (contributions) of R30. If a member reaches the age of 65, or if he is permanently disabled and unable to work, he is exempted from the further payment of premiums.²⁰²

194 Research has shown that contributions in credit-rotating associations which consist of something other than money are treated in the same way as contributions made in cash. Eg, in Japan, rice is sometimes given as a contribution instead of money. In some countries the contribution of the organiser of the association consists of his organising the feasts: see Ardener 211. See also Thomas 295 who describes this practice as "a mixture of contributions in kind and in cash".

195 See Kramer 41. "Balancing" is apparently the practice in terms of which a member gives a bigger contribution than that which is actually required.

196 See Geertz 244.

197 See Geertz 244.

198 See Kramer 71.

199 See Manona 106.

200 See Anon NASASA 16.

201 See Anon NASASA 15.

202 See Koekemoer par 5.2.

9.3 THE PAYMENT OF THE CONTRIBUTION

9.3.1 Introduction

As the payment of the individual members' contributions usually coincides with the receipt of the pool by the recipient (member), the actual payment of the contribution as well as the time of payment is of the utmost importance for the viability of the stokvel.

9.3.2 The Time of Payment of the Contribution

Almost all stokvel transactions, including the payment of the contribution, are on a cash basis and takes place at the time agreed upon beforehand by the members of the stokvel.²⁰³ Generally, members receive no extension or credit for the payment of the contribution. The fact that the pool is rotated and that there has to be a sequence for the receipt of it means that those members who receive the pool early on in the rotation receive credit. But the credit is not received for the payment of their contribution but for the benefit of receiving the full pool or loan before they have actually rendered their full part of the bargain.

In terms of most types of stokvel the contribution is paid in advance of the maturity date for the particular member. Since the majority of stokvels (other than burial societies) are in the nature of credit-rotating associations, contributions to other members have to be made in advance to fulfil the function of credit giving.²⁰⁴

In terms of the more informally structured burial schemes, the contributions are not paid in advance of the uncertain event, namely the death of a member or his close relative. Contributions are made only on materialisation of the risk, that is, the death of the member or one of his relatives. If seen against the fact that the contribution is due only on the death of a member or one of his relatives, it may be stated that the payment of the contribution in terms of this type of burial society is usually made in arrears. For this reason it can be argued that no credit is given for the payment of the contribution, as payment in arrears is the rule and not a special concession. However, the contribution is not promised or paid in return for the actual indemnification but for the undertaking by the insurer, that is, the other members, to bear the risk of the materialisation of the uncertain event. In effect the members enjoys cover while the contribution is still unpaid. In this sense credit is given for the payment of the contribution as the insured (member) enjoys cover from his fellow members.

In terms of the more structured types of burial scheme, members are expected to pay their contributions in advance on a weekly, monthly or annual basis.²⁰⁵ No credit is therefore given for the cover which a member enjoys in terms of this type of scheme.

203 See Collair 36.

204 See Ardener 201. See again par 9.1.1.1.2 above as to the function of a credit-rotating association of giving credit to members of the association.

205 See Lukhele 18. See again par 9.1.1.2.2 above as to the different types of burial society.

9.3.3 The Mode of Payment

The majority of transactions of a stokvel are on a cash only basis.²⁰⁶ In the smaller types of stokvel, and where the contribution consists of money, payment is invariably made in cash.²⁰⁷ If the contributions (in money) to a stokvel are made by a method other than cash, the member must usually have a current account with a banking institution. It has recently been reported that 60 percent of the adult population of South Africa do not have a bank account of any sort and that they conduct all their business in cash.²⁰⁸ This confirms the practical reality that the majority of transactions in respect of stokvels are in cash.

In some of the more advanced types of stokvels, in particular the advanced credit-rotating association, for example, the high budget credit rotating associations, payment is sometimes made by way of one or more of the modern types of payment, for example, by cheque.²⁰⁹

One example was encountered from which it appeared that the (relatively small) contribution to the stokvel was not paid in cash, but probably by postal order. In the case of the particular burial society some of its members were not living in Johannesburg where the majority of members resided and where the monthly meetings were held. Those members living outside Johannesburg were expected to send their contributions by post.²¹⁰

9.3.4 The Place of Payment of the Contribution

The place of the payment of the contribution depends to a large extent on the agreement between the members of a particular stokvel.²¹¹ Different places of payment are possible in terms of a stokvel (credit-rotating association). First, payment may take place at a special venue, for example, the clubhouse of the stokvel. Secondly, payment may take place at a member's house, usually that of the member who receives the fund. Thirdly, contributions may be collected by one of the organisers, or taken to the organiser's house or office. Fourthly, contributions can be made elsewhere, for example, in the market-place, at a beer-hall, or at the member's place of work.²¹²

In the case of those stokvels where the contribution is paid directly by the contributing members to the member who is hosting the party, payment takes place at the

206 These transactions include, eg, the payment of contributions, items which are sold to members, loans to members and non-members, items bought from suppliers, and the payment of the amount of indemnification or the pool: see Collair 36-38.

207 This is especially true of the "gooi-gooi": see Thomas 296. See again par 9.1.1.1 above.

208 See Von Keyserlingk S1.

209 See Ardener 218.

210 See Kramer 75.

211 See Ardener 211.

212 See Ardener 211.

house of the host at the time of the party.²¹³ Likewise, in the case of those less structured burial societies where the contribution is made only after the death of a member or his relative, the contribution is paid or made (that is, where it takes the form of something else than money) at the house of the bereaved family.²¹⁴ In the case of those stokvels where the contributions are made in advance to a central fund, payment usually takes place at the house of the treasurer²¹⁵ or at another convenient place. The same holds true for those more structured burial societies where the contributions are made in advance.

In those cases where the cover provided by the burial society is backed by an insurance company, that is, where the burial society "reinsures" the risk with an ordinary insurance company, the contribution or premium is paid either directly by the member at the office of the company, or an agent of the company may visit members at their homes to collect the contribution.²¹⁶

9.3.5 By Whom the Contribution Is to Be Paid

Generally it is possible in terms of a credit-rotating association (stokvel) for a member to transfer his right to receive the fund in the future to a third party. Whether it is possible for a member to divest himself of his liability to pay the contribution is uncertain. In some overseas examples of credit-rotating associations, the member is regarded as the debtor for the continuance of the payment of the contribution.²¹⁷

If it is not possible for a member to attend the stokvel party where the contributions are supposed to be handed over to the host, he is entitled to send someone (an "agent") to pay the contribution on his behalf.²¹⁸

The materials available on the topic of credit-rotating associations do not suggest that the general principle regarding the payment of debts on behalf of a third party would not apply here. In terms of the general principle of the law of contract, a third

213 See again par 9.1.1.2 above as to the debtor-creditor relationship which exists between the members of a credit-rotating association.

214 See again par 9.1.1.2 above.

215 The treasurer is usually responsible for drawing up the financial statements of the stokvel. Only 30 percent of all stokvels use some form of financial statements. It is mostly the investment clubs which make use of financial statements and an outside auditor to audit these statements: see Collair 30. The remainder of the stokvels make use of "other methods" of accounting than the compilation of formal financial statements. These alternative methods include: detailed record keeping of all transactions, ie, contributions, pay outs, banked funds etc, and meticulous records of all pay outs to members including amounts received versus amounts contributed. The treasurer usually draws up these records which are countersigned by members: see Collair 31-32.

216 See Ferreira 5.

217 See Ardener 215-216.

218 But this "agent" is usually not allowed to participate in the party as a member. Whereas the members are usually entitled to a certain amount of free food and drinks, the "agent" must pay for all his food and drink: see Lukhele 28. Thus, if a member fails to pay his contribution personally, he forfeits certain of the benefits of the party.

party is allowed to pay a debt on behalf of the debtor provided that it is done in the name of the debtor and with the intention of discharging his debt.²¹⁹ Thus, in principle, it would appear that a third party is allowed to pay the contribution on behalf of a member of a stokvel.

9.3.6 To Whom the Contribution Is to Be Paid

The answer to the question as to whom the contribution is to be paid generally depends on the rules of the stokvel as contained in the agreement between the members. In some types of stokvel, contributions are paid directly to the member whose turn it is to receive the pool or to host the party. In other, more formally structured stokvels, payment is made to the secretary or another official of the stokvel who is responsible for the collection and distribution of the contributions.²²⁰

Likewise, in the case of burial societies, the rules of the particular society will usually indicate the person to whom the contribution in terms of the burial society must be paid. In the case of an informal burial society the contribution is made directly to the eventual recipient, that is, the bereaved family. In the case of a more formal burial society the contribution is made to an official of the society, who is responsible for the disbursements to the bereaved family, if and when a member passes away.

9.3.7 The Amount of the Contribution

The amount of the contribution depends on the agreement between the members of the stokvel or burial society. A study conducted in October 1989²²¹ revealed that the average monthly amount contributed by a member is R39 in the case of burial societies,²²² and R106 in the case of other types of stokvel. The contributions by members of burial societies amount to 43 percent of the total amount of R52 million generated by stokvels each month.²²³ Approximately R17,5 million per month is contributed to savings clubs while other types of stokvels collect about R12 million per month.²²⁴

219 See again, eg, ch 8 par 8.3.5 above.

220 See Collair 12-15.

221 This study was conducted by Markinor, which is South Africa's largest independent market research group: see Lukhele 2.

222 In the case of registered formal burial societies ("doodsgenootskappe"), ie, funeral insurers which are registered as such in terms of the Insurance Act, the number of members is higher than in other types of stokvel or informal burial societies, but the contributions are sometimes much lower. For example, some of the longstanding members of these formal burial societies in the Western Cape have paid as little as 25 cents to R1 per month over the past few decades. Members who have joined more recently contribute from R1 to R10 per month: see Ferreira 4.

223 This is the approximate amount generated by the 24 000 stokvels in the major metropolitan areas: see Lukhele 2. On a nationwide scale the aggregate in monthly contributions is probably closer to R200 million.

224 See Lukhele 3. See again par 9.1.1.1.3 above as to the different types of stokvel.

From a study conducted during 1992 in the Western Cape, it appears that individual monthly contributions in terms of stokvel agreements range from R80 to R2 500, with an average of around R200.²²⁵

In the case of burial societies (in contrast with ordinary funeral insurance) it is unheard of for a member to pay a higher contribution on the grounds of high age or bad health.²²⁶ Neither is the amount of the contribution subject to an inflation clause.²²⁷ But in extreme cases an adjustment to the amount of the contribution may be necessary. For example, if seen against the rising number of deaths which are HIV²²⁸ related, it has been suggested recently that burial societies should be pro-active and start increasing the amount of their member's contributions to be able to cover a possible increase in claims in the future.²²⁹

It sometimes happens that an individual member decides to double his contribution, thereby giving the recipient of the fund a bonus. When the roles of the two members are reversed, the member who received the enlarged contribution must, if possible, double this amount when giving his contribution. This phenomenon is known as "doubling".²³⁰

The amount of the contribution or the fund is not always fixed. Sometimes the allocation of the fund is made by auction. For example, if the group consists of ten members who each contribute R10, the fund may nominally be R100, but a member who urgently requires the fund may offer to accept R90 instead. Another member may bid against the first offeror and offer to accept R80. Usually the member who offers to take the lowest fund (amount) is the recipient. Thus, at the beginning of the rotation, when many members are competing for the fund, it tends to be relatively small. As the number of members who are waiting (and are entitled) to receive the fund grows smaller, and their chance of receiving approaches, the minimum acceptable amount tends to rise as the competition for the fund decreases. The last member to receive the fund does not need to bid at all but automatically receives the full fund. The members who receive low funds made up of pro rata low contributions must continue to pay the higher contributions required towards the end of the rotation. This difference in the

225 See Collair 26 28.

226 See Stanford 36.

227 See Ferreira 5.

228 HIV is the abbreviation for "human immunodeficiency virus", which is the cause of AIDS (which, in turn, is the acronym for "acquired immune (or *immuno-*) deficiency syndrome"). AIDS is a condition caused by a virus, in which the body loses its ability to resist infection. AIDS is transmitted by sexual intercourse, through infected blood and blood products, and through the placenta: see Collins 25. For a list of the spate of literature published on the topic of AIDS and the law, see Visser "AIDS" 622n13. As to the topic of AIDS-based tariff-discrimination in insurance law, see Visser "AIDS" 632 et seq.

229 See Koekemoer par 4.6 and the authorities referred to there.

230 See Ardener 211.

amounts paid by different members may be regarded as the "interest" charge on the loans²³¹ which they have received at the beginning of the rotation.²³²

"Interest" can also be paid by fixing a sliding scale in advance in such a way that members at the head of the rotation consistently contribute larger amounts than those at the end. Where sliding scales are employed, the order of rotation is of great importance and must be determined, for example, by lot.²³³

In some associations, the contributions which a member makes when he is a debtor (that is, in his capacity *after* he has received the fund) are different from those which he makes when he is a creditor (that is, his capacity *before* he has received the fund). In the case of these associations, the contributions of the debtors are constant, and are at a higher rate than those of the creditors. The contributions of the creditors are determined in one of three ways: they may be at a constant, fixed rate; they may be at a predetermined but declining rate; or they may be determined by auction among the creditors.²³⁴

It is obvious from the above that there is a close relationship between the amount or size of the individual contributions which constitute the pool or fund, the method by which they are determined, the method by which the fund is allocated, whether or not interest is paid, and whether or not the contributions are fixed in advance.²³⁵

In terms of the constitution of the *stokvel* or burial society it is sometimes stipulated that the society "has the authority to raise the funds at any time if it suits the members of the society".²³⁶ It is not clear from existing materials on the topic whether all the members must consent to an increase in the contribution or whether it is sufficient if a majority of them agree to a increase.

In exceptional circumstances where the amount of the contribution is determined by actuarial principles, the amount is calculated to include, amongst other things, the risk that some members may not pay their contribution.²³⁷

231 See again par 9.1.1.1.2 above as to the construction of the credit-rotation association as a contract of loan.

232 See Ardener 212.

233 See Ardener 213.

234 See Ardener 213.

235 See Ardener 213. For diagrammatic models illustrating the different variables, see Ardener 213-215.

236 See the rules of the particular burial society referred to by Kramer 74-75.

237 As in the case of the "Great North Burial Society", which has over 400 members: see Kramer 106.

9.4 NON-PAYMENT OF THE CONTRIBUTION

9.4.1 Introduction

The late payment or non-payment of the contribution in terms of a stokvel is a problem which seldom occurs.²³⁸ The pressure of public opinion within the membership of the stokvel is usually enough to ensure punctual payment of the contribution.²³⁹ For example, resignations (which is a way of avoiding further contributions) from "umgalelo" clubs, are not allowed. However, illness and retrenchment are regarded as justifiable reasons for a member's resigning.²⁴⁰ The reason for this phenomenon lies in the fact that trust plays an important role in a stokvel. New members are therefore carefully screened before being allowed to join a stokvel.²⁴¹

However, although default in the payment of contributions seldom occurs, the rules of a stokvel must provide for the legal and social consequences of default.

9.4.2 Non-Payment of the Contribution in Terms of Stokvels

Most stokvels adopt a policy regarding the non-payment of the contribution which is appropriate to the particular case. For example, members who do not maintain regular contributions are fined at a rate of 20 percent per month on outstanding contributions. A committee appointed by the stokvel may visit a member whose contribution or loan repayment is overdue to "persuade" him to honour his obligation towards the other members of the stokvel.²⁴²

Late payment of the contribution in the "Mutual Aid Society", a stokvel which operates in the Western Cape and consists of six secretarial workers, could result in expulsion of the member from the stokvel and forfeiture of her benefits. Members who are more than fifteen days late with their contribution of R50 per month must pay an extra R25; if the contribution is one month late the penalty rises to R50. Failure to pay the contribution for three months results in automatic expulsion of the member from the stokvel.²⁴³

238 It has been recorded that it is "unheard" of for a member of a stokvel to refuse to pay his contribution. The member regards his payment to the stokvel as "the priority payment, before all else" and the reporter knew of no cases which came to court: see Ardener 216n12 who refers to field research done in respect of stokvels in Bulawayo, Zimbabwe.

239 Extreme cases are known where members stole, or sold their daughters as prostitutes, all in order to honour their obligation towards the group: see Ardener 216.

240 See Lukhele 22.

241 See Lukhele 35; Thomas 294-295. One exception to this rule appears to be the pooling clubs formed among *schoolteachers* in the Western Cape where members apparently often abscond after they have received their share!: see Thomas 295.

242 Default or fraud is, in severe circumstances apparently followed by coercion, which may take the form of bodily harm inflicted on the perpetrator: see Lukhele 35-36; Thomas 295-296.

243 See Collair 13.

In general stokvel members are sympathetic towards defaults which are the result of unemployment, illness and death. For example, stokvel groups usually pay out what is owed to a member who resigns for an acceptable reason, or to the estate of a member who dies. Legal action against members who are in default is apparently rare.²⁴⁴

There are several other ways in which a stokvel may minimise or prevent default by a member on his contribution. For example, a member whose reliability is suspect may be relegated to the end of the rotation, or half of his share may be given when it is due, while the other half is held back and given at a later stage. Sometimes a new member is expected to sign a contract or give some sort of security, or find someone who is prepared to act as surety, for his contribution towards the association.²⁴⁵

Another consequence of a member's non-payment of his contribution to a stokvel is his "listing" in terms of an informal social credit rating.²⁴⁶ Being "listed" holds serious drawbacks for the member's future prospects of joining another stokvel in the particular community or area.

9.4.3 Non-Payment of the Contribution in Terms of Burial Societies

Burial societies have strict rules as regards the late or non-payment of the contribution by members. The late or non-payment of the contribution may result in the forfeiture of all benefits.²⁴⁷ For example, in the case of the "Etoga Burial Society", any member who defaults three times in a row forfeits all benefits.²⁴⁸

Thus, it would appear that the intentional non-payment of the contribution is generally penalised with expulsion from the society or stokvel, while the non-payment as a result of vis maior, for example, illness or retrenchment is excused.

9.5 THE ROLE OF BROKERS AND OTHER INTERMEDIARIES IN THE PAYMENT OF THE CONTRIBUTION

9.5.1 Introduction

In view of the informal circumstances which surround the conclusion of a stokvel agreement as well as the important function which the actual payment of the contribu-

244 See Lukhele 36.

245 See Ardener 216-217.

246 See Lukhele 35.

247 See Ferreira 5; Lukhele 19.

248 The "Etoga Burial Society" has the following rules for non-payment or late payment of the contribution: "If somebody dies [the members] all put in R20 and anyone who can't pay must explain why not to the members. If someone pays late, they must pay a ten [percent] fine. If someone fails to pay for three bodies in a row then we will not bury him if he dies" (my insertions): see Stanford 35; Collair 14. Kramer 168 refers to the constitution of "The Young Womens Helping Hand Association" (a burial society) which provides in terms of one of its clauses that "[m]embers should be cancelled if she is absent from three successive meetings". Absence is usually an indication of an inability or unwillingness to pay the contribution.

tion fulfils, the role of brokers and other intermediaries in the context of stokvels can for all practical purposes be ignored. The absence of brokers and other intermediaries in the stokvel subculture can be ascribed to a number of factors. First, if seen against the fact that a new member is introduced to a stokvel on the basis of a personal recommendation by another member,²⁴⁹ it is obvious that brokers and intermediaries have virtually no role to play in the conclusion of the agreement between the new member and the existing members of a stokvel. Secondly, the social aspect of a stokvel, which is an important catalisator for the success of any stokvel, hinges to a large extent on the party or feast where the members make their individual contributions personally to the host of the party, that is, the recipient of the pool. Members are generally not allowed to excuse themselves from attending these parties. The contribution is therefore, as a matter of general principle, personally handed over by the member to the host. The possibility of an intermediary or broker who receives the contribution on behalf of the stokvel is remote.²⁵⁰

9.5.2 Payment of the Contribution by a Member to an Official of the Stokvel

In the case of those stokvels and burial societies where the members' contributions are not paid directly to the recipient of the pool but to an official of the stokvel or burial society, either to distribute it to the recipient or to bank the contributions in a bank account, the possibility exists that the official acts as intermediary in the receipt of the contribution.

It is submitted that the general rules regarding the receipt of the premium by an agent or broker on behalf of the insurer in terms of an ordinary insurance contract will also apply to the receipt of the contribution by an official of the stokvel on behalf of it. In terms of the general rule payment of the premium by an insured to the broker is tantamount to payment to the insurer.²⁵¹ Likewise, it is submitted, payment of the contribution in terms of a stokvel or burial society to an official, who is authorised to receive the contribution, will be tantamount to payment of the contribution to the stokvel (pool) or to the recipient of the pool. Thus, it is submitted that if a member (in his capacity as insured) has paid the contribution to the official but the latter has failed to bank the contribution, the other member(s) would not be entitled to claim a double contribution from the particular member. This would be the case because the official has received the

249 See again par 9.2 above.

250 Only one example was encountered in the relevant materials where agents are involved in the collection and receipt of the contributions. In the case of a burial society which has "reinsured" the risk with an ordinary funeral insurer, the insurer usually sends an agent to collect the contribution at the house of the member. Generally the agent is regarded as the agent of the member in the receipt and collection of the premium. Hence, should an agent fail to turn up to collect the contribution from the member for three consecutive months, they are taken as missed payments, and the contract is consequently cancelled and all contributions forfeited: see Ferreira 6. But it is submitted that this is not a true example of an intermediary or broker who collects the premium from the members of a stokvel on behalf of it. The agent here collects the contribution on behalf of the funeral insurer and not on behalf of the other members of the stokvel.

251 See again ch 8 par 8.5 above.

contribution from the member on behalf of the body of (other) members or the recipient, in their or its capacity as insurer.²⁵²

9.6 RETURN OF THE CONTRIBUTION

9.6.1 Introduction

Because of the fact that most stokvels are in the nature of a credit-rotating association, the contribution is returned, that is, rotated to the member at some time or other. No examples were encountered of stokvels in terms of which the contribution is not returned in some form. In the case of those stokvels which are in the nature of a credit-rotating association or a savings club, either the date of the return of the contributions, that is, the date on which the particular member will receive the pool, is fixed or the period within which the pool will be received is fixed.²⁵³ In the case of a burial society the contributions paid by a member are returned in the case of his or one of his relatives' deaths. In the case of a burial society the exact time of the return of the contribution, that is, the time of death, is therefore uncertain.

Due to the fact that the contribution is usually handed over directly to the member who receives the pool, there is, as a matter of general principle, seldom the possibility of (successfully) claiming a return of the contribution.

The only case in which the member will usually be entitled to a return of the contribution is where the agreement, that is, the contract, provides for a return, even if only by implication, for example, if the stokvel is dissolved before all the members have had a turn to receive the pool, or where a member resigns after he has received the pool but before the completion of the cycle.

9.6.2 In the Case Where the Contract Expressly Provides for the Return of the Contribution

Most stokvels, being in the nature of a credit-rotating association, provide for a return of the contribution with interest. From this point of view the average stokvel contract is more in the nature of a non-indemnity insurance policy (for example, an endowment policy) than an indemnity insurance policy.²⁵⁴ In the case of a non-indemnity insurance policy the premium as well as the interest on it are returned at some future date. In the case of an indemnity insurance policy the premiums are usually paid, and therefore "parted with" by the insured, irrespective of whether or not the uncertain event has materialised.

252 See again par 9.1.2.1 above as to the dual capacity of a member of a stokvel.

253 That is, if the pool is rotated once a month and the stokvel has twelve members, each member will receive the pool annually.

254 See again par 9.1.2.1 above as to the resemblance between a stokvel and an insurance contract.

In the case of those burial societies where the contributions are paid in advance, the contract between the members often provides for a return of a portion of the parties' contributions depending on the expenses of the society within a particular year. The number of members or their relatives who perished during a particular year obviously play a vital role in determining the residue which is available for distribution between the members. Often members do not receive their part of the residue in cash but in some other form, for example, a party or weekend trip to a place of entertainment organised on behalf of the group by its officials.

9.7 FORFEITURE OF THE CONTRIBUTION

The oral (or written) agreement often provides for the forfeiture of the contributions paid by a member. For example, certain burial societies have strict rules regarding the late or non-payment of the contribution by members. The late or non-payment of a contribution may result in the forfeiture of all benefits and contributions already paid by the member concerned.²⁵⁵

9.8 FUNCTION AND INSURANCE OF THE CONTRIBUTION

9.8.1 Function of the Contribution

The contribution by the members of certain types of stokvel serves as the counter-performance in return for the undertaking by the other members of the stokvel to contribute to the rotating pool. In the case of burial societies, the undertaking by a member to pay a contribution is given in return for the undertaking by the other members to bear the risk of the materialisation of the uncertain event, namely the death of the (first) promisor or one of his relatives.

9.8.2 Insurance of the Contribution

As the contribution in terms of a stokvel is usually returned to the members in the form of a rotating pool²⁵⁶, the possibility of insuring the contribution in terms of a stokvel is not mentioned in the materials on stokvels. It would appear that there is no need for the insurance of the contribution in terms of a stokvel.

It would be possible, of course, to insure against the risk that the other members might not contribute to pool whenever necessary, but such insurance would be more in the nature of a guarantee policy²⁵⁷ than the insurance of the actual contribution. A

255 See Ferreira 5; Lukhele 19; Collair 12-15. See again par 9.4.3 above.

256 See again par 9.6.1 above.

257 A "guarantee policy" is defined in s 1 of the Insurance Act as "any contract whereby any person assumes an obligation (in return for the payment or the promise of the payment of a sum or sums of money, and otherwise than incidentally to an insurance effected by means of some other class of policy) to discharge the debts or other obligations of any other person in the event of the failure of that person to do so, and includes any statutory form of bond, guarantee or undertaking issued by any person in return for payment".

guarantee policy would be appropriate in the case of a high budget credit-rotating association, for example, where the amount of the contribution may be substantial.

9.9 CONCLUSION

A number of important principles regarding stokvels have been identified. They are the following:

The agreement between the members of a stokvel comes into being as soon as the parties reach consensus on the essentials of the agreement of stokvel. No formalities are required for the coming into being of the contract.²⁵⁸

The essentials of the contract which underpin the stokvel coincide with the essentials of a mutual insurance contract. Due to the fact that the essentials of the agreement between the members of a stokvel fit the definition of an insurance contract, all the general principles of the insurance law should, therefore, as a matter of general principle, apply to stokvels. This fact further entails that although a stokvel is not registered as an insurance company in terms of the Insurance Act, the provisions of the Act may nevertheless apply to the stokvel. As a result, meaningful parallels can be drawn between, on the one hand, the contribution in terms of a stokvel, and, on the other hand, the premium in terms of a mutual insurance contract.²⁵⁹

Because of the strong resemblance between the activities of certain types of stokvel and some of the services provided by commercial banks, the common-law principles applicable to the banker-client relationship must, as a matter of general principle, be applied to stokvels whenever necessary.²⁶⁰

Because of the overlapping of the concepts of, on the one hand, stokvel, and, on the other hand, those of insurance and banking, it paves the way for interesting and necessary comparisons between these concepts. Such a comparison and cross-application of relevant principles will not only result in a fruitful supplement of the lacunas present in these respective concepts, but will also enhance the acceptability and legitimacy of the "official" South African insurance and banking law. The "official" South African banking law has recently been under attack as being racist and out of step with the needs of the masses.²⁶¹

A number of principles regarding the contribution in terms of a stokvel merit a mention. First, the undertaking to pay or make a contribution is given in return for the undertaking (by the other members) to bear the risk of the materialisation of the uncertain event which may cause loss to the promisor.²⁶²

258 See par 9.2 above.

259 See par 9.1.2.1 above.

260 See par 9.1.2.2 above.

261 See again par 9.1.2.2.1 note 143 above. See also ch 1 par 1.2.2.7 above.

262 See par 9.2 above.

Secondly, the contribution may take the form of something other than money.²⁶³

Thirdly, there is not something like "contribution-less" or free membership of a stokvel.²⁶⁴

Fourthly, it is apparently not a requirement for a valid agreement that the exact amount of the contribution be determined at the conclusion of the contract.²⁶⁵

Since the contribution is destined to be returned (rotated) in the normal course of events, stokvels do not usually provide for any other special circumstances in which the contribution will be returned.²⁶⁶ For the same reason the contribution in terms of a stokvel is not insured.²⁶⁷

263 See par 9.2 above.

264 See par 9.2 above.

265 See par 9.2 above.

266 See par 9.6 above.

267 See again par 9.8.2 above.

CHAPTER 10

CONCLUSIONS AND RECOMMENDATIONS

10.1 INTRODUCTION

In this final chapter a number of unsolved problems or grey areas concerning the premium in terms of South African insurance law are identified and addressed. These emanated from the preceding chapters. It must be emphasised from the outset that the topics which have been selected for perusal and comment in this chapter, are not an all-encompassing collection of potentially problem-posing issues in the insurance law, but merely represent a snap-survey of some which merit consideration here. First, the current position in South African law regarding these problem-areas is stated. Then, the possible solutions to these problem-areas as appeared from the research which has been done in respect of the historical and comparative materials are stated. Finally, on the basis of the possible solutions which featured in the historical, analogous and comparative materials, recommendations are made to solve the problem-areas and promote legal certainty in South African insurance law.

10.2 THE NATURE OF THE PREMIUM IN TERMS OF AN INSURANCE CONTRACT

10.2.1 The Current Position in South African Law

There is no directly applicable case law on the question of whether the premium may consist of something other than money. There is a divergence of opinion amongst the South African legal writers on the nature of the premium. Reinecke and Van der Merwe are of the opinion that the premium denotes an obligation to pay money. Gordon and Getz, by contrast, argue that the premium may also consist in the liability of members of a mutual society to contribute to the losses of others. According to Reinecke and Van der Merwe such liability still sounds in money. If Reinecke and Van der Merwe's argument entails that all premiums, whether in money or in kind, have a monetary value, they are, of course, correct. But if they imply that the premium can never consist of something other than the payment of a sum of money, it is submitted the parameters of the nature of the premium are unnecessarily defined too narrowly. By restricting the nature of the premium to money only, it excludes a number of contracts which, were it not for the absence of a premium in the nature of a contribution or "price" *in money*, would have satisfied all the essentials of a contract of insurance.¹ Thus, as the law stands, it is uncertain whether the premium may consist of something other than money.

¹ See again ch 8 par 8.2 above.

10.2.2 The Historical and Comparative Materials

The study of the historical development of the concepts of "insurance" and "premium" has disclosed certain concepts which resembled early examples of mutual assistance and which contained the germ of insurance. These early forerunners of mutual insurance were in the nature of societies and guilds which already existed amongst the Romans and other ancients, and they aimed at providing mutual assistance to members of the societies and guilds. This historical review revealed that the contribution or liability of members of the different societies and guilds sometimes consisted of something other than money, for example, the liability to assist each other in times of need. Although these contributions did not qualify as a genuine insurance premium for a number of reasons, they nevertheless provide proof that those early concepts which were premium-like sometimes did consist of something other than the payment of a sum of money.²

Although Roman-Dutch legislation generally referred to the premium as a monetary payment, there are indications that this was not necessarily the case. Van der Keessel argued that the premium could consist of something other than money, for example, processed gold or silver or other merchandise, since a premium in that nature was not prohibited by legislation.³ In the case of mutual marine insurance this was an important consideration because the performance of the insured in terms of such contract often consisted of something other than money, for example, the obligation to assist in the repair of the damage to the ship of a co-insured, or the obligation to share a portion of his undamaged load of goods with a co-insured whose goods had been destroyed.⁴

All the different modern legal systems which were investigated in the comparative part of the research, provided indications that the premium in those systems may consist of something other than money. For example, in Dutch law a number of legal writers advocate that the definition of the concept of "premium" as provided for in the Dutch *Wetboek van Koophandel (WvK)* should be extended to include other commodities than money.⁵ The statutory definition of the premium provided for in Belgian law confirms that the premium in that jurisdiction may consist of something other than money.⁶ In English law the question as to the nature of the premium has been considered by the courts. It has been decided that the premium in the case of non-marine insurance may consist of something other than the payment of money. Likewise, in the case of marine insurance, the English Marine Insurance Act 1906 provides that the premium in the case of mutual marine insurance may consist of something other than the payment of money.⁷ In Australian law the possibility that the premium in the case of

2 See again ch 2 par 2.2.2 above.

3 See again ch 3 par 3.2 above.

4 See again ch 3 par 3.2 note 64 above and the examples of mutual marine insurance in Roman-Dutch law referred to there.

5 See again ch 4 par 4.2 above.

6 See again ch 5 par 5.2 above.

7 See again ch 6 par 6.2.2 above.

mutual insurance could consist of the liability which a member of a mutual insurance society assumes to contribute to the losses of the other members, is acknowledged in their Marine Insurance Act 1909.⁸

Avowedly these indications are based on scant examples, but it may be ascribed to the fact that money,⁹ as a form of commodity, has in modern times all but replaced other mediums of exchange. However, this does not mean that it is not possible for the premium to consist of something other than money. In the case of mutual insurance, in particular, the premium is likely to consist of something other than money. It has been indicated that the premium in terms of an insurance for profit contract may also consist of something other than money. For example, the employee of an insurance company may agree with his employer, that is the insurer, that his services or some part of them, will be regarded as the premium in terms of an insurance contract between them, in return for the undertaking by the employer-insurer to bear the risk of the materialisation of the uncertain event.

10.2.3 Recommendation

It is submitted that the concept of a "premium" should be given a wide, rather than a narrow meaning when the opportunity presents itself to our courts or the legislature to define it. Such "broadening" of the definition of "premium" is also supported by authority from Roman-Dutch law. This is therefore an instance where Roman-Dutch law provides an indirect or adaptable answer to a modern-day insurance problem.¹⁰ It would further appear that a broad definition of the concept of a "premium" is in accordance with the position in other modern legal systems.

The following definition may perhaps serve as point of departure in describing the concept of a "premium": "The premium, which may consist of money or something else, is the counter-performance by the insured in return for the insurer's undertaking to bear the risk of the materialisation of a specified uncertain event."¹¹ By accepting this definition of "premium", South African insurance law would provide for a much wider range of contracts to be treated as contracts of insurance, provided, of course, that the other essentials of the insurance contract are present. In essence the problem of classifying a particular type of contract, and in the present case the insurance contract, lies

⁸ See again ch 7 par 7.2.2 above.

⁹ The term "money" is used here in the broad sense of the word and includes all instruments of payment, and not only "cash" in the sense of coins and notes. As to the difference between the terms "money", "cash", and "currency", see again ch 8 par 8.3.3.1 note 103 above.

¹⁰ See again ch 1 par 1.2.1.2 above for an explanation of the different results which Roman-Dutch law may provide in different circumstances for modern South African insurance law.

¹¹ See again ch 8 par 8.2 where this definition of the concept "premium" is analysed. Although the definition of the concept "premium" which is proposed in s 1(xxvi) of the new Draft Bill on Long-Term Insurance is a step in the direction to give a wider meaning to the term "premium", it is still not an express acknowledgement of the fact that the premium may consist of something other than money. It is submitted that the legislature must go all the way and expressly provide that the premium may consist of money or something other than money: see again ch 8 par 8.2 note 14 above.

in defining the different essentials of such contract. If the premium-like contribution which is present in certain types of contract, for example, certain mutual assistance schemes, is not regarded by law as an insurance premium, the contract will, of course, not qualify as an insurance contract. The advantages of treating an insurance-like contract as such are obvious. For example, if a contract is treated by the law as an insurance contract, the parties will enjoy the rights and protection afforded to the parties to an insurance contract as embodied in the Insurance Act 27 of 1943 and the general principles of the law of insurance. Such a broad construction of the nature of the premium would, for example, also include the contribution in terms of those concepts of South African indigenous law (*stokvels*) which are insurance-like,¹² with the result that the members of a *stokvel* would be able to rely on the principles of an insurance contract to enforce their rights.¹³

10.3 THE LEGAL TENABILITY OF THE CONCEPT OF "PREMIUMLESS" OR "FREE" INSURANCE

10.3.1 The Current Position in South African Law

The question of whether a contract in terms of which the insured has not given an undertaking to pay a premium qualifies as an insurance contract, has not yet pertinently come before our courts. In an unreported decision it was hinted, albeit obiter and by implication, that the absence of an undertaking to pay a premium will not necessarily prevent the contract from being classified as a contract of insurance.¹⁴ But South African legal writers are of the opinion that the undertaking to pay a premium is an essential of the contract of insurance, and that it will therefore not be insurance if an insurer extends cover free of charge. It has been suggested that a contract in terms of which an insurance company provides insurance cover free of charge, is, provided that the other essentials are present, a valid and enforceable contract of donation.¹⁵

An important point which is raised in South African insurance-law materials is that the absence of an undertaking to pay a premium will not cause the contract to be invalid or unenforceable, but that it will merely not be regarded as a contract of insurance. This is so because the undertaking to pay a premium is an *essential* of the contract of insurance and not a requirement for the validity of the contract.¹⁶ This is in stark contrast with the position, for example, in English and Australian law. In those two legal systems, as well as in all the other legal systems with their roots in English law of

12 See again ch 9 par 9.2 above.

13 See further par 10.9 below for a discussion and recommendation of why it is necessary to create, if and when possible, a fusion between the "formal" South African insurance law, on the one hand, and those concepts of South African indigenous law which are insurance-like, on the other hand.

14 See again ch 8 par 8.2 note 23 above and the decision in *Aegis Insurance Co Ltd v Smith & 'n ander* (unreported case no 12380/89 (C) 22 September 1993) referred to there.

15 See again ch 8 par 8.2 above.

16 See again ch 8 par 8.2 above.

contract, the requirement of a valuable consideration¹⁷ is a requirement for the *validity* of a contract in general.¹⁸

10.3.2 The Historical and Comparative Materials

Roman-Dutch law materials did not shed any light on the question of whether it was possible to conclude a "premiumless" or "free" insurance contract. But what did emerge was the fact that the insurance contract was regarded as a reciprocal contract. This meant that the undertaking to pay the premium was given in return for the undertaking by the insurer to bear the risk of the materialisation of the uncertain event. By implication, therefore, it was not possible in Roman-Dutch law to conclude an insurance contract in terms of which no premium was payable.¹⁹

In Dutch law a lively debate has developed over whether "premiumless" or "free" insurance is acknowledged. A number of examples of so-called "premiumless" insurance are referred to in Dutch textbooks, but the majority of writers agree that none of these examples is in fact of "premiumless" insurance. The argument which is sometimes advanced to propagate the possibility of "premiumless" insurance turns on the fact that the actual payment of the premium is not required for the insured to claim an indemnity in terms of the contract. But the fact that the premium is still unpaid at the time when the indemnity takes place, or is sometimes never paid, does not detract from the fact that an *undertaking* to pay a premium was given upon the conclusion of the contract.²⁰

In Belgian law the question concerning the possibility of "premiumless" insurance has escaped the attention of the legal writers who were consulted. A single reference to "premiumless life insurance" was encountered. But this reference to the practice where the insured in terms of a life insurance contract refrains from claiming the surrender value of his policy is not a true example of "premiumless" insurance. It is clear the insurance is not free but that the premium is paid from the reserve fund.²¹

Both English and Australian law rapidly dispose of the question concerning the legal tenability of a "premiumless" insurance contract. In those systems the requirement of a valuable consideration, which is the equivalent of, for example, the price or the premium in terms of a contract of sale or an insurance contract respectively, is a *general requirement for the validity* of a contract. In the absence of an undertaking to pay or perform such consideration, price or premium, the particular contract is invalid and unenforceable.²² However, section 58(3)(b) of the Australian Insurance Contracts Act 80 of 1984 provides for an interesting example of statutory "premiumless" insurance.

17 See again ch 6 par 6.2.1 and ch 7 par 7.2.1 above for a discussion of the concept of "valuable consideration".

18 See again ch 6 par 6.2.2 and ch 7 par 7.2.2 above.

19 See again ch 3 par 3.2 above.

20 See again ch 4 par 4.2 above.

21 See again ch 5 par 5.2 above.

22 See again ch 6 par 6.2.2 and ch 7 par 7.2.2 above.

This section provides that if the insurer fails to comply with its statutory duty to notify the insured in writing of the expiry of his "renewable insurance cover" under the contract, the contract is renewed by operation of the law. Section 58(4)(a) provides that no premium is payable in terms of this statutorily renewed contract.²³

An analysis of those concepts from South African indigenous law which are insurance-like, that is, some types of *stokvel*, has revealed that the concept of "free" membership of a *stokvel* is unknown.²⁴

10.3.3 Recommendation

It has been argued that in *essence* insurance entails an agreement in terms of which the transfer or spreading of the risk is the *primary function* or *intention* of the parties. Each insured in effect bears a portion of the risk which is borne by the community of equally exposed and covered persons. This community is symbolized by the insurer.²⁵ Without the undertaking by the "insured" to pay a premium to the insurer, he cannot belong to the community of equally exposed and covered persons. For this reason "premiumless" or "free insurance" is not legally possible.

The undertaking by the insured to pay a premium is one of the *essentials* of the insurance contract in terms of South African insurance law. As an essential of a contract is a requirement *under the law* which distinguishes one type of contract from another, the parties to an insurance contract are not allowed to contract out of it without the contract being disqualified as one of insurance. It is submitted that a contract which does not contain an undertaking to pay a premium is, as a matter of general principle, not an insurance contract. Thus, if the parties to a purported "insurance contract" agree that no premium will be payable in terms of the contract, or if they fail to agree that a premium will be payable, the contract will not be invalid or unenforceable, but it will not qualify as a contract of insurance. As a result the natural consequences of an insurance contract will not apply to such a contract.²⁶ This construction is in accordance with the general principles of our law of contract.²⁷ The method of finding an answer to an "insurance-law problem" in the analogous application of the general principles of the law of contract is therefore an example of where neither Roman-Dutch law nor modern South African insurance law provides a direct answer or principle, and of where one has to turn to the other sources of our insurance law to find an appropriate solution to the problem at hand.²⁸

23 See again ch 7 par 7.2.2 and 7.4.2 above.

24 See again ch 9 par 9.2 above.

25 See again ch 2 par 2.1 and ch 8 par 8.8.1 above.

26 See again ch 8 par 8.2 above.

27 See again ch 2 par 2.3.1 above for a discussion of the application of analogous principles from other types of contract to the insurance contract.

28 See again ch 1 par 1.1 notes 1 and 2 above for a discussion of the concepts "external" and "internal sources" of our insurance law.

However, it is submitted that the legislature may well provide that a particular type of contract in terms of which no premium is payable will nevertheless be regarded as an insurance contract.²⁹

10.4 THE CONCEPT OF A "REASONABLE PREMIUM"

10.4.1 The Current Position in South African Law

The South African position as regards the validity of an insurance contract in terms of which a "reasonable premium" will be paid is not yet settled. This situation may arise either where the parties failed to agree on a fixed premium or where they expressly agreed to insure at a "reasonable premium". One rather obscure reference to the concept of a "reasonable estimate of the premium" is encountered in the Insurance Act. But this reference does not deal directly with the concept of a "reasonable premium".³⁰ Only one decision which dealt with the point under discussion could be traced in our insurance law. In *Zava Trading (Prop) Ltd v Santam Insurance Ltd*³¹ it was held that apart from the fact that no premium or rate of premium had specifically been agreed upon, the policy "laid down no method whereby the premiums ... could be determined independently from the will of the parties". The Court noted also that there was no provision "in our insurance laws" which merited an application of the principle of a "reasonable premium" in the absence of an arrangement as to the amount of the premium.³²

Thus, as our law stands, the validity of an agreement by the parties to an insurance contract to insure at a "reasonable premium", or the possibility of the Court implying such agreement in the absence of an express agreement by the parties on the amount of the premium, has yet to be acknowledged by the law.

10.4.2 The Historical and Comparative Materials

Roman-Dutch authors were not agreed on the validity of a contract in terms of which the parties failed to fix a price or premium, or on the validity of an agreement to sell at a "reasonable price" or to insure at a "reasonable premium". The majority of writers were of the opinion that an agreement to sell at a "reasonable price" or to lease at a "reasonable rent" was not sufficient to rescue a contract of sale or a contract of lease from being incomplete on an essential matter such as the amount of the price or rent. Such contract was therefore, according to them, void for vagueness.³³ But there was also authority to the contrary.³⁴ There was also a general presumption in the interpretation of contracts that the parties intended their contract to be valid and enforce-

29 See, eg, ch 7 par 7.2.2 above for an example in Australian law in terms of which the concept of "premiumless" insurance is acknowledged in a particular case by legislation.

30 See again ch 8 par 8.3.7 above.

31 Unreported case no 4108/89 (D) 29 November 1989.

32 See again ch 8 par 8.3.7 above.

33 See again ch 3 par 3.3.7 above.

34 See again ch 3 par 3.3.7 note 148 above.

able, rather than invalid or unenforceable. This presumption could be construed to mean that the parties to an insurance contract agreed impliedly to insure at a "reasonable premium" where they failed to agree on a fixed premium and that this implied agreement was sufficient to constitute a valid contract.³⁵

The position in the legal systems of the comparative materials which have been investigated is in stark contrast with the current position in South African insurance law³⁶ and Roman-Dutch law. Without exception the concept of a "reasonable price" or a "reasonable premium" is expressly acknowledged and entrenched in legislation. The provisions in the different legislative instruments are often also explained and expounded by the courts in those jurisdictions. The legal writers in those legal systems do not question the validity and commercial need of this concept.

In Dutch law, article 7.1.1.4 of the *Nieuw Burgerlijk Wetboek (NBW)* provides that if a contract of sale is concluded without a price having been determined, the buyer must pay a reasonable price. The *NBW* provides guidelines to determine what constitutes a reasonable price. The validity of an insurance contract in terms of which the parties agreed to insure at a "reasonable premium" has also been acknowledged in a Dutch judicial decision.³⁷

In Belgian law the validity of the concept of a "premium to be arranged" is acknowledged in section 10(2)(7) of the Law of 1992. Guidelines are suggested by Belgian legal authors on how to determine the amount of the premium if the parties failed to agree on an exact amount or rate of the premium.³⁸

In English law a failure by the parties to agree on the amount of the premium is remedied by statute. Section 31(1) of the English Marine Insurance Act 1906 provides that when a marine insurance contract is concluded "at a premium to be arranged", and no arrangement is made, a reasonable premium is payable. Likewise, where the parties agreed that an "additional premium" is to be arranged in a given event, and that event happens but no arrangement is made, then a reasonable premium is payable. Section 88 of the English Marine Insurance Act 1906 provides that it is a question of fact of what a "reasonable premium" is. The concept of a "reasonable premium" is also acknowledged and applied by the courts in England. Although it has not yet been decided expressly by the English courts that section 31 also applies to non-marine insurance contracts, there is authority, albeit obiter, that it does.³⁹ In Australian law section 37(1) of the Australian Marine Insurance Act 1909 provides for the same legal rules as those which apply in English law.⁴⁰

35 See again ch 3 par 3.3.7 note 149 above.

36 See again par 10.4.1 above.

37 See again ch 4 par 4.3.7 above.

38 See again ch 5 par 5.3.7 above.

39 See again ch 6 par 6.3.7 above.

40 See again ch 7 par 7.3.7 above.

Finally, and by way of the analogous method of legal research, it has been shown that the concepts of a "reasonable price" and a "reasonable rent" in the case of the contracts of sale and lease respectively are acknowledged and applied in South African law. In a recent decision the Appellate Division has confirmed that an agreement to lease at a "reasonable rent" is in principle valid. In the same decision it was remarked, by way of an obiter dictum, that an agreement to sell "at a reasonable price" would in principle also be valid. In each case the court has to consider what the intentions of the parties are and then whether evidence is available to establish the amount of the price or rent in the circumstances of the case in question.⁴¹ It is argued by South African legal writers that the fact that a reasonable price or rent is acknowledged as a valid agreement should, by way of the analogous method, be extended to the insurance contract with the effect that an agreement to insure at a reasonable premium could be regarded as valid.⁴²

10.4.3 Recommendation

It is submitted that neither Roman-Dutch law nor modern South African insurance law provides a clear or acceptable solution to the question of whether an agreement to insure at a reasonable premium is valid. As a result the legal position in other jurisdictions as well the general principles of the law of contract have to be considered in making a recommendation which will keep the South African insurance law in step with the commercial needs of our time.

It has been shown that the concept of a "reasonable premium" is well established in other legal systems. Likewise, an agreement to sell at a reasonable price or lease at a reasonable rent is regarded as valid in terms of the general principles of South African law of contract. By way of the analogous method these general principles could and should be extended to the insurance contract.⁴³

Such a development in South African insurance law would not only be in step with similar tested and proven principles in other jurisdictions but would also meet the need to give business efficacy to the insurance contract. The law is, after all, a viable social instrument, capable of adaptation and of meeting the needs of the community. In this case the commercial needs of insurers and insured alike require that the validity of an agreement to insure at a reasonable premium be acknowledged.⁴⁴

10.5 THE FORFEITURE OF PREMIUMS AND OTHER BENEFITS IN THE CASE OF THE NON-PAYMENT OF THE PREMIUM BY THE INSURED

10.5.1 The Current Position in South African Law

A distinction is drawn between the effects of the non-payment of the premium in the case of an indemnity insurance contract on the one hand, and the effects of the

41 See again ch 2 par 2.3.2.2 above.

42 See again ch 8 par 8.3.7 above.

43 See again par 10.4.2 above.

44 See again ch 8 par 8.3.7 above.

non-payment of the premium in the case of a non-indemnity insurance contract on the other hand.⁴⁵ In the case of an indemnity insurance contract our law does not provide any specific protection to the insured should he fail to pay the premium. Indemnity insurance contracts do not normally allow for any period of grace. Likewise, the Insurance Act does not provide for a period of grace in the case of indemnity insurance contracts. Although the insurer usually sends the insured a renewal notice to remind him that the premium for the next period is due, it is, in the absence of a contractual undertaking to that effect, not under any obligation to do so. This practical reality also accords with the nature of an indemnity insurance contract, namely that it is generally terminated at the end of each period of insurance. The payment of the premium by the insured is in effect an offer to conclude a new insurance contract for the next period of insurance. The payment and acceptance of each premium therefore constitutes a "new insurance contract". However, in practice the insurer simply renews the cover under the contract by accepting the premium and it does not issue a new policy each time the cover under the contract is renewed. The non-payment of the premium in the case of indemnity insurance is not without any effect at all. Apart from the fact that the cover is not renewed for the next period, the existing policy lapses with the non-payment of the premium. This means that should the insured decide to conclude a new contract to enjoy insurance cover again, a new policy has to be prepared and stamped by the insurer. The issuance of a new policy is inevitably accompanied by the payment of further stamp duties, as well as the possibility of different terms, including a possible increase in the premium.⁴⁶

In the case of non-indemnity insurance contracts, by contrast, the Insurance Act makes ample provision for the protection of the benefits of the insured in terms of the contract. The Act provides for statutory periods of grace in the case of certain classes of non-indemnity insurance. The parties are not allowed to exclude or reduce these statutory periods of grace from their contract. But they are allowed to increase the days of grace in the policy. The Act also provides that the insurer is in certain circumstances under an obligation to issue a paid-up policy or to apply the non-forfeiture value of the policy to maintain the policy for a certain period.⁴⁷

It is submitted that the insured in terms of an indemnity insurance contract does not enjoy sufficient protection by our law against the lapse of the insurance cover in terms of the policy in the case of the non-payment of the premium. The remainder of the discussion in this paragraph is concerned with the possible reform of this part of our insurance law.

10.5.2 The Historical and Comparative Materials

In Roman-Dutch law, marine insurance was the dominant form of insurance and usually only a single premium was payable, often in advance. As a result the legal con-

45 See again ch 8 par 8.4.1 above.

46 See again ch 8 par 8.4.2 above.

47 See again ch 8 par 8.4.3 above.

sequences of the non-payment of the second or further premium(s) were not treated in Roman-Dutch insurance law materials.⁴⁸ Hence the issue under discussion is an example of a case where Roman-Dutch law, being our common law, provides no answer or principle at all. In such case the other sources of South African insurance law, including comparative materials, must be approached for a suitable solution.⁴⁹

In Dutch law article 7.17.1.10 of the draft *NBW* provides that the non-payment of a second or later premium in the case of an indemnity contract will not result in the suspension or termination of the insurance cover or the insurance contract, unless the insurer has sent the insured a letter of demand. It must give the insured the opportunity to pay the outstanding premium within a period of 30 days following the original due date, or the date on which the letter of demand was received, whichever is the latest. This provision applies to all types of insurance.⁵⁰

In Belgian law the insurer is required to send the insured a notice of demand to place the insured in mora in the case of the non-payment of the premium. Before the Law of 1992 came into operation, it was sufficient for the insurer to prove that he had in fact sent a notice of demand, even if the insured never actually received it. Since 1992 it has become necessary for the insurer to prove that the insured has actually received the notice. In terms of this statutory protection to the insured, the insurer must give him at least fifteen days to pay the premium. This period of fifteen days is calculated from the day of service or from the day after the letter was posted. Section 16 of the Law of 1992 provides in detail for the different possibilities which may be included in the letter of demand. For example, the insurer may decide to suspend the cover if the insured fails to pay the premium within the fifteen days of grace, or it may couple the suspension of the cover with the possibility of the termination of the contract if the insured fails to pay timeously.⁵¹

In English law an indemnity insurance contract sometimes provides for a period of grace, but in the absence of such clause the insurer is under no legal duty to allow the insured a period of grace to pay the premium. Likewise, in the absence of an undertaking by the insurer to send the insured a reminder to pay the premium timeously or to pay a premium which is overdue, the non-payment of the premium will cause the lapse of the policy. Thus, if the contract does not provide for a period of grace or for the insurer to send the insured a reminder to pay the premium, the cover and consequently also the contract itself will usually lapse for non-payment of the premium.⁵²

In Australian law it is standard practice for insurers to send a notice of reminder to the insured in terms of an indemnity insurance contract. Before the enactment of the

48 See again ch 3 par 3.4 above.

49 See again ch 1 par 1.2.1.2 above for a discussion of the role of Roman-Dutch law in the development of the modern South African law of insurance.

50 See again ch 4 par 4.4.1 and 4.4.2 above.

51 See again ch 5 par 5.4.2 above.

52 See again ch 6 par 6.4.2 above.

Insurance Contracts Act 1984, a failure by the insurer to send out such a notice did not have any legal consequences for the insurer as it was under no legal duty to do so. Section 39 of the Insurance Contracts Act 1984 now provides for a statutory period of grace of fourteen days for general insurance contracts, that is, indemnity insurance contracts. If the premium is unpaid during this period, the insurer *may refuse to pay a claim* which arose during the period for which the premium is unpaid. Section 62 of the same Act further restricts the right of the insurer to *cancel the contract* to those cases where the premium is unpaid for more than one month. Section 58(2) further provides that an insurer must give the insured at least fourteen days' notice in writing of the day on which and the time at which the cover under an existing contract will expire. Section 58(3)(b) provides that if the insurer fails to comply with section 58(2) and the insured has not obtained insurance cover from another insurer to replace that provided by the original contract, then the original contract will be deemed to be renewed gratuitously by operation of the law.⁵³

The study of those concepts from South African indigenous law which are insurance-like revealed that the non-payment of the contribution seldom if ever results in the automatic forfeiture of benefits by the member whose contribution is late. The agreement between the members usually provides for a fine if a member does not have an acceptable excuse why his contribution is late. Stokvel members are generally sympathetic towards defaults which are the result of unemployment, illness and death. Stokvel groups usually pay out what is owed to a member who resigns for an acceptable reason, or to the estate of a member who dies.⁵⁴

10.5.3 Recommendation

In the majority of legal systems which were examined, an attempt is made by the legislature to protect the insured against the arbitrary suspension of the cover in terms of an indemnity insurance contract, or the cancellation of the contract by the insurer, in the case of non-payment of the premium by the insured. In the case of South African indigenous law there are inherent measures of protection to members of stokvels who fail to pay their contribution timeously. Those measures of protection also apply to those indigenous concepts which are in the nature of indemnity insurance.

It is submitted that South African insurance law lags behind in the protection of the benefits of the insured in the case of an indemnity insurance contract. The non-payment of the premium by the insured may be the result of any of a number of factors, some of which may be beyond the control of the insured. For this reason, as well as the fact that the suspension or termination of the insurance cover may have serious repercussions for the insured, it is suggested that legislation be introduced which will restrict the right of the insurer to cancel the contract. This legislation should be formulated along the lines of those provisions which are in operation in the legal systems which have been referred to earlier, especially those in force in Australia.

53 See again ch 7 par 7.4.2 above.

54 See again ch 9 par 9.4.2 above.

Thus, it would appear that the enactment of the following legislative provisions in South African insurance law are called for. First, a statutory period of grace in the case of indemnity insurance contracts should be introduced during which the insured is given the opportunity to pay the premium and to ensure that claims which might arise during the period for which the premium was unpaid, are paid by the insurer. Secondly, the insurer should be required to inform the insured in writing of his right to pay the premium during the period of grace to ensure continuation of the cover. Thirdly, the insurer must send the insured a second notice in writing if the insured fails to pay the premium within the period of grace, informing him of its intention to cancel the contract within a stipulated period of time. It should then be possible for the insured, if he so wishes, to be able to ensure the continuation of the cover in terms of the policy by paying the overdue premium. In order to compensate the insurer for the inconvenience caused by the insured's neglecting to pay the premium timeously and the consequent administrative costs involved for it, the insured should perhaps be expected to pay a small amount in addition to the premium to ensure continuation of the cover. Such additional amount would serve as a penalty for the insured's failure to pay the premium.⁵⁵

10.6 THE RECEIPT OF THE PREMIUM BY THE BROKER

10.6.1 The Current Position in South African Law

Section 20*bis*(1)-(7) of the Insurance Act provides in detail for the receipt and handling of premiums by agents, brokers and other insurance intermediaries. The gist of this section turns on the acknowledgement and confirmation that a broker or other agent receives and holds the premium which is paid by the insured on behalf of the insurer. Section 20*bis*(5) provides that "[p]ayment of a premium *by a policyholder* in terms of his insurance policy to an agent, broker or other [intermediary] shall be deemed to be payment in terms of such policy". In short, for purposes of the receipt of the premium, the broker, agent or other intermediary is deemed to be the agent of the insurer.⁵⁶ But section 20*bis*, as it currently reads, does not provide sufficient protection for the insured. First, as it only applies to premiums paid by *policyholders*, moneys or "premiums" received by brokers and agents from *applicants for insurance* are not covered by it. Secondly, it does not provide that the broker or agent is also deemed to be the agent of the insurer for purposes of the renewal of the contract of insurance.

10.6.2 The Historical and Comparative Materials

In Roman-Dutch law, section 37 of the Amsterdam Keur of 10 March 1744 provided that payment of the premium by the insured to the broker was tantamount to payment to the insurer if the insurer had granted credit for the payment of the premium to the broker. Section 39 of the same Keur went one step further and proclaimed that the

55 See again ch 8 par 8.4.2 above.

56 See again ch 8 par 8.5.3 above.

broker was liable to the insurer for the premium simply because he received his commission from the insurer. The latter rule caused some discontent among the brokers and resulted in an amendment in 1745. In terms of this amendment it was made clear that the insured could be liable to the insurer for the premium where the broker went insolvent and the insured had not yet paid the premium to the broker. Be that as it may, in terms of section 37, as well as according to trade usage of the time, the broker received and held the premium on behalf of the insurer.⁵⁷

In modern Dutch law a trade usage exists in the case of non-marine insurance in terms of which the broker is personally liable to the insurer if the insurer gives credit to the broker for the payment of the premium. In the case of marine insurance, the broker is personally liable for any unpaid premiums if no credit was given by the insurer to the insured.⁵⁸ Generally, payment of the premium by the insured to the broker is regarded as the equivalent of payment to the insurer. In respect of the receipt of the premium, the broker is therefore regarded as the mandatary of the insurer.⁵⁹

In Belgian law a trade usage exists in both marine and non-marine insurance that the broker acts as mandatary of the insurer in the receipt of the premium.⁶⁰

In English law a trade usage exists that the broker in terms of a marine insurance contract, as well as a policy issued at Lloyd's, acts as mandatary of the insurer in the receipt of the premium. Payment of the premium by the insured to the broker in these two cases is therefore tantamount to payment to the insurer. There is also authority that this trade usage applies with equal force to insurance contracts other than marine insurances and policies issued at Lloyd's.⁶¹

In Australian law the position in respect of non-marine insurance contracts and policies issued at Lloyd's is similar to the position in English law. Before 1984, Australian courts held that there was not sufficient evidence of a general trade usage, that is, one extending to non-marine insurance policies as well, to the effect that payment of the premium by the insured to the broker was tantamount to payment to the insurer. But section 14(2) of the Insurance (Agents and Brokers) Act 1984 now provides that payment of the premium by the insured or an intending insured to an insurance intermediary, which includes a broker, is a discharge as between the insured and the insurer. Nevertheless it has been suggested in a recent Australian decision that section 14(2) should be amended to the effect that payment of the premium by an applicant for insurance to the broker should have the same effect as payment to and acceptance by the insured for purposes of conclusion of the contract. Thus, as section 14(2) currently reads, it does not provide that the broker is the agent of the insurer for purposes of entering into the contract. Without the proposed amendment to section

57 See again ch 3 par 3.5.4 above.

58 See again ch 4 par 4.5.3 above.

59 See again ch 4 par 4.5.4 above.

60 See again ch 5 par 5.5.3 above.

61 See again ch 6 par 6.5.3 and 6.5.4.

14(2), it has been suggested, the protection to the insured aimed at by the Insurance (Agents and Brokers) Act 1984 would not be complete.⁶²

10.6.3 Recommendation

It is submitted that the current position in the South African law of insurance as reflected by the provisions contained in section 20*bis*(1)-(7) of the Insurance Act, and in section 20*bis*(5) in particular, which regard the broker as the mandatary of the insurer for purposes of the receipt of the premium, is satisfactory from a legal point of view. Not only is the fact that the broker or agent is regarded as the agent of the insurer for purposes of the receipt of the premium in accordance with the position in terms of Roman-Dutch law, but it also corresponds, to a large extent, with the legal position in all the other jurisdictions examined.

However, a number of amendments to our Insurance Act are proposed to provide the maximum protection to the insured or applicant for insurance. First, our Insurance Act should be amended along the same lines as section 14(2) of the Australian Insurance (Agents and Brokers) Act 1984 to provide that the broker should be regarded as the agent of the insurer also in respect of moneys received from *applicants* for insurance. This would ensure that in the case where the application for insurance, that is, the offer by the insured to the insurer to conclude a contract, is turned down by the insurer, the insured will be entitled to reclaim his money from the insurer where the broker has gone insolvent or has disappeared with the money which accompanied the application for insurance. Secondly, the broker, in the receipt of the premium from the insured, should be regarded as the mandatary of the insurer, also for purposes of renewal of the contract. Such amendment would eliminate the difficult and anomalous situation in which the insured currently finds himself. Presently the only way an insured can be certain that his application has been accepted or his policy has been renewed, is to deal directly with the insurer. The proposed amendments would ensure that the broker, in receiving moneys from applicants for insurance or premiums for the renewal of the contract from the insured, acts as mandatary of the insurer.

10.7 THE RETURN OF THE PREMIUM IN THE CASE OF FRAUD BY THE INSURED

10.7.1 The Current Position in South African Law

In South African law the legal position with regard to the insured's right to a return of the premium in the case where he has acted fraudulently is unsatisfactory. While the courts and some authors, notably Gordon and Getz, embrace a somewhat peculiar rule which is followed in English law, authors such as Reinecke and Van der Merwe denounce the application of this rule in our law.⁶³

62 See again ch 7 par 7.5.3 above.

63 See again ch 8 par 8.6.4 above.

In terms of the said rule from English law, which is based on the decision in *London Assurance v Mansel*,⁶⁴ a distinction is drawn between the situation, on the one hand, where the insurer *defends* an action on the ground of the insured's fraud, and the situation, on the other hand, where the insurer *rescinds* the contract and seeks relief by way of *restitution*. If the insurer merely *defends* a claim by an insured in terms of a contract which has been induced by, for example, a fraudulent misrepresentation by the insured, the insurer, so it is argued, is not under an obligation to return the premium to the insured. But if it *rescinds* the contract and wishes to cancel it because of the fraud of the insured, it must tender to return the premium to the insured. This distinction is followed by our courts.⁶⁵

10.7.2 The Historical and Comparative Materials

The writers on Roman-Dutch law agreed that if the insured acted fraudulently, the insurer was entitled to rescind the contract and the insured was not entitled to a return of the premium. This served as a form of penalty and discouraged dishonest conduct by the insured.⁶⁶

In Dutch law the insured is not entitled to a return of the premium if the contract is cancelled by the insurer as a result of the insured's fraud. Article 281 of the *WvK* expressly provides that the insured is under no circumstances entitled to a return of the premium if he has acted fraudulently.⁶⁷

In Belgian law the Law of 1992 provides expressly that the premium will not be returned to the insured if the insurer cancels the contract as a result of the insured's fraudulent conduct. Section 6 of the Law of 1992 provides that the insurer is entitled to keep the premium if it decides to cancel the contract as a result of the fraudulent misrepresentation or fraudulent non-disclosure by the insured. Section 24 of the Law of 1992 provides that the insurer is, as a matter of general principle, entitled to keep the premium if the insured has acted fraudulently. Section 24 therefore provides for fraudulent conduct by the insured other than fraudulent misrepresentation or fraudulent non-disclosure.⁶⁸

English law draws the peculiar distinction which has been explained earlier.⁶⁹ But it has been argued that the case which is referred to in English law as authority for this distinction, *London Assurance v Mansel*,⁷⁰ does not support the weight attached to it. As a matter of fact, the reported judgment of the decision in *London Assurance v Mansel* does not contain any reference at all to the distinction under discussion, let alone expound the applicable legal principles which could form the basis of a ratio

64 (1879) 11 Ch D 363.

65 See again ch 8 par 8.6.4 above and the decisions referred to there.

66 See again ch 3 par 3.6.4 above.

67 See again ch 4 par 4.6.4 and 4.6.5 above.

68 See again ch 5 par 5.6.4 and 5.6.5 above.

69 See again par 10.7.1 above.

70 *Supra*.

decidendi.⁷¹ The decision in *London Assurance v Mansel* influenced the question concerning the return of the premium in the case of fraud by the insured in every legal system with its roots in English insurance law.

Because of the fact that English law is the common law of Australia, the distinction drawn in English law is part and parcel of Australian insurance law.⁷² Although the Australian writers do not expressly criticise the rule which is derived from the distinction under discussion, there are indications that they are not convinced that it is based on sound principle. For example, it is suggested by them that the insurer, in order to avoid the legal effect of the distinction, should not *cancel* the contract when it becomes aware of the fraud of the insured but simply decline the insured's claim if and when he submits it. This suggestion is a strong indication that the Australian legal writers suspect that something is wrong with the rule which their legal system has inherited from English law.⁷³

10.7.3 Recommendation

It is recommended that the legal tenability of the application in South African law of the rule of English law under discussion should be reconsidered by the legislature and the courts if and when the opportunity arises. The underlying reason for the application of the rule is that the insured should not be allowed to set up his own fraud to obtain a benefit or seek relief. Reinecke and Van der Merwe argue convincingly that it is not necessary for South African law to follow the English rule on this point to obtain the same result in our law. The gist of their argument turns on the following two points. First, an insured cannot rely on his own fraudulent conduct, for example, fraudulent misrepresentation, to seek relief by way of restitution of the premium as the contract is voidable at the instance of the misrepresentee only and not at the instance of the misrepresentor. Secondly, there is no apparent justification for treating rescission based on fraud inducing a contract of insurance differently from rescission on the ground of fraud inducing any other type of contract.⁷⁴

In the light of the relevant principle in Roman-Dutch law, which is after all our common law for purposes of insurance law too, as well as recent developments elsewhere, it is suggested that legislation perhaps be introduced to provide for the forfeiture of the premium by the insured if he has acted fraudulently. Such forfeiture should apply irrespective of whether the insurer *defends* a claim under the policy, or whether it *rescinds* the contract because of the insured's fraud. Such forfeiture of the right to a return of the premium would not only be in accordance with our common law but also in line with the sense of justice of the community that fraudulent conduct should be discouraged and penalised. Furthermore it has been shown that the forfeiture of

71 See again ch 6 par 6.6.1 and 6.6.4.

72 See again ch 7 par 7.1 above.

73 See again ch 7 par 7.6.4 above.

74 See again ch 8 par 8.6.4 above.

premiums by the insured where he has acted fraudulently is part of the modern thinking on insurance law as embodied in recent codifications of insurance laws in Europe.⁷⁵

Alternatively, it is argued that fraudulent conduct should perhaps rather be discouraged by the introduction of legislation which will provide that fraudulent conduct by an insured (and for that matter also by the insurer) constitutes a statutory criminal offence, over and above the fact that it may also constitute the common-law crime of fraud. This would mean that the insured who is guilty of fraud will not lose his right to claim a return of the premium, but that he will have to pay a penalty to the State. A number of reasons are advanced why this legislative proposal may perhaps be preferable to the one which provides for the forfeiture of the premium by the insured. This proposal will, although along a different route, further the same aim as the principle provided for in Roman-Dutch law and the codifications of insurance laws in Europe.⁷⁶

10.8 THE PRACTICE OF INSURING THE PREMIUM

10.8.1 The Current Position in South African Law

Although none of the South African legal textbooks or other materials on insurance law which were consulted refers to the practice of insuring the premium, South African insurance practice provides proof that insured are allowed by insurers to insure the premium. In the absence of any writings on the legal tenability of insuring the premium, it therefore has to be accepted that it is not regarded as being in conflict with any of the general principles of the law of insurance.⁷⁷

10.8.2 The Historical and Comparative Materials

The practice of insuring the premium was known in Roman-Dutch law. It would appear that it occurred in one of two ways. The premium could either be insured by the inclusion of the amount of the premium in the value of the goods or ship which were insured, or the premium could be insured as such. Roman-Dutch writers acknowledged and apparently approved the practice of insuring the premium. This practice was also provided for in the municipal legislation of the Roman-Dutch period. One nineteenth-century commentator on Roman-Dutch law, Van Veen, criticised this practice as being in conflict with the principle of indemnity, a cornerstone of the concept of insurance. He argued that the need to insure the premium became relevant only after legislation had been passed which required the payment of the premium in advance. He further argued that if the insured were allowed to recoup the premium through the practice of insuring it, it would affect the insured's attitude towards protecting the insured property.⁷⁸

75 See again par 10.7.2 above.

76 See again ch 8 par 8.6.4 above.

77 See again ch 8 par 8.8.2 above.

78 See again ch 3 par 3.8.2 above.

The practice of insuring the premium is an acknowledged and established fact in Dutch insurance law. For example, it is expressly provided for in article 612 of the *WvK*. But apart from Van Veen's thesis, which appeared more than a century ago and which also dealt with the insurance of the premium in modern Dutch insurance law, very little has been written on the topic since. Van Veen pointed out that this practice is in conflict with the principle of indemnity because, if the uncertain event materialises and the insured is allowed to insure and recoup the insurance premium, he is placed in a better financial position than he was before the conclusion of the contract. He further argued that if the insured object, that is, in the present case the insurance premium, is not exposed to any peril, or rather the uncertainty of peril, there can be no question of insurance. These and the other arguments advanced by Van Veen illustrate that there is authority in Dutch law that the practice of insuring the premium may be in conflict with some of the general principles of insurance law.⁷⁹

Although there is legislative acknowledgement and authorisation in Belgian law for the practice of insuring the premium, the legal tenability of this practice has not yet come under scrutiny by either the Belgian writers or the Belgian courts. One must therefore assume that the insurance of the premium is not seen by Belgian jurists as being in conflict with the general principles which underlie the idea of insurance.⁸⁰

The practice of insuring the premium is acknowledged in English law in respect of marine as well as non-marine insurance. For example, section 13 of the English Marine Insurance Act 1906 provides that the insured has an insurable interest in the charges of insurance, which include the premium and the brokerage. However, the legal tenability of this practice has not yet come under scrutiny from either the English writers or the English courts. One must therefore assume that the insurance of the premium is not seen by English jurists as being in conflict with the general principles which underlie the idea of insurance.⁸¹

The position in Australian law on this point is for all practical purposes identical to that under English law.⁸²

10.8.3 Recommendation

It is submitted that in spite of the fact that the practice of insuring the premium occurred in Roman-Dutch law, and still occurs in the modern South African insurance practice as well as in all the other legal systems which have been examined, it is in conflict with a number of the general principles underlying the idea of insurance. First, it would appear to be in conflict with the basic aim of insurance, namely to form, preserve and develop an estate. This aim of insurance is subject to the element of uncertainty, which is an essential of the contract of insurance. It is a requirement for the conclusion

79 See again ch 4 par 4.8.2 above.

80 See again ch 5 par 5.8.2 above.

81 See again ch 6 par 6.8.2 above.

82 See again ch 7 par 7.8.2 above.

of a valid insurance contract that the occurrence of the uncertain event must, generally speaking, be outside the control of the parties. The undertaking to pay the premium is given voluntarily by the insured. Thus, the liability to pay the premium is the result of a willed act by the insured, namely the conclusion of the insurance contract. Secondly, if the insured is allowed to insure and recoup the premium, it would mean that the insured has not paid for the cover which he enjoyed in terms of the contract. As "premiumless" or "free" insurance is not legally possible,⁸³ a contract in terms of which the premium is insured and returned to the insured in the case of loss, is not an insurance contract but perhaps a contract of gratuitous indemnity.⁸⁴

Finally, it is suggested that the legal tenability of the practice of insuring the premium deserves further careful judicial scrutiny. The fact that it occurs in insurance practice may not necessarily mean that it is in accordance with the general principles of insurance law.

10.9 THE CONTRIBUTION IN TERMS OF A STOKVEL AS THE POSSIBLE EQUIVALENT OF THE PREMIUM IN TERMS OF AN INSURANCE CONTRACT

10.9.1 The Current Position in South African Law

The term "stokvel" connotes a variety of concepts of South African indigenous law.⁸⁵ Some types of stokvel have as their primary aim the spreading of the risk of the materialisation of an uncertain event. Thus, the activities of certain types of stokvel resemble the concept of "insurance", that is, the transfer or spreading of the risk to a community of equally exposed and covered persons.⁸⁶ Although the members of those types of stokvel which resemble the concept of "insurance" regard them as a form of "insurance", the question of whether or not they may be regarded as insurance from a legal point of view has as yet escaped the attention of legal commentators. Further, and in conjunction with the topic of this thesis, the question of whether the contribution which is undertaken and paid in terms of those types of stokvel may be regarded as the equivalent of the premium in terms of an insurance contract, has not been investigated either.⁸⁷

The current position in South African law therefore is that the "formal" insurance law on the one hand, and those concepts of the indigenous law which resemble "formal" insurance contracts on the other hand, have developed to a large extent independently and separately from each other. Likewise, the rules pertaining to "formal" insurance premiums on the one hand, and to the contributions undertaken in terms of a

83 See again par 10.3 above for a discussion of the legal tenability of the concept of "premiumless" or "free" insurance.

84 See again ch 8 par 8.8.2 above for these and further arguments of why the practice of insuring the premium is in conflict with some of the general principles which underlie insurance.

85 See again ch 9 par 9.1.1 above.

86 See again ch 2 par 2.1 above.

87 See again ch 9 par 9.1.2.1 above.

stokvel on the other hand, have developed independently and separately from each other as if the latter are not governed by the general principles of "formal" insurance law.

Thus, as far as could be established, no comparative research has been conducted as regards the possible overlap between "formal" insurance law and concepts of the indigenous law which are insurance-like.

10.9.2 The Historical and Comparative Materials

It was indicated that there are early examples of concepts which contained the germ of mutual assistance and which might well have been the forerunners of modern mutual insurance contracts. Likewise, the contributions which were payable in terms of those agreements served as early forerunners of premium-like payments. It is important to note that the contributions undertaken in terms of those agreements did not necessarily consist of money but sometimes also of other commodities like food and labour.⁸⁸ These examples constitute a historical basis and justification for a comparison between contributions in terms of indigenous mutual assistance contracts on the one hand, and the modern premium in terms of the insurance contract on the other hand.

It has already been indicated that in all the different legal systems which were examined, namely Roman-Dutch law, Dutch law, Belgian law, English law and Australian law, the premium may take the form of something other than money.⁸⁹ It has therefore been established and suggested that the nature of the premium should not be restricted to payments in money.

From the concepts of the South African indigenous law which were examined, it appeared that some of them are insurance-like. For example, those stokvels in terms of which mutual assistance is promised by their members to their fellow-members in the case of the materialisation of an uncertain event, are nothing if not types of mutual insurance.⁹⁰ Of these types of stokvel, the burial society is perhaps the best example to illustrate the similarities between "formal insurance contracts" and concepts of indigenous law which resemble insurance.⁹¹ It is clear that burial societies not only satisfy all the requirements for a valid insurance contract, but that the contribution which is undertaken in terms of these burial societies fits the definition of the premium in terms of a "formal" insurance contract.⁹² For example, these contributions may consist of money or something else; in some cases the contribution is paid in advance while in other cases it is only paid or rendered, for example, where it consists of money, in arrears, that is, after the materialisation of the uncertain event; and the contribution is

88 See again ch 2 par 2.2.2 above.

89 See again par 10.2.2 above.

90 See again ch 9 par 9.1.2.1 above.

91 See again ch 9 par 9.1.1.2 above.

92 See again par 10.2.3 above and the definition of the concept of a "premium" which is advanced there.

legally enforceable against the promisor. These contributions are undertaken as *counter-performance* by the members in return for the undertaking by the other members *to bear the risk* of the materialisation of the uncertain event. These contributions therefore satisfy the requirement of the "price" or premium in return for the transfer or spreading of the risk.⁹³

10.9.3 Recommendation

It is submitted that the essentials of certain types of *stokvel* coincide with the essentials of a mutual insurance contract. It is further submitted that the contribution which is undertaken in terms of those types of *stokvel* which are insurance-like qualifies as the equivalent of the insurance premium. As a result all the general principles of the law of insurance should, in principle, apply to those *stokvels*. These principles include those pertaining to the premium. It is therefore suggested and recommended that in future the general principles of the law of insurance should be compared with and applied to those *stokvels* which are insurance-like. Likewise, the principles which are characteristic to *stokvels* which are insurance-like could and should be compared with and applied to "formal" insurance contracts, whenever the latter lack the necessary principles or solutions to provide a suitable answer to a legal problem. Such cross-application of legal principles should take place whenever either the general principles of "formal" insurance law or the principles pertaining to *stokvels* do not provide an acceptable answer to a problem of law. Such cross-application should, of course, take place with due consideration of the applicability and compatibility of the different systems' principles. In this regard the political, social and economic history of a particular principle from the "formal" insurance law must be considered in order to determine its possible application to a concept of indigenous law, and vice versa.

The cross-application of principles within the broader South African legal system may either be seen as the internal method of *applied comparative law*, or as the analogous method of legal research. Both these methods are accepted and proven methods in the extension and broadening of one's own legal system.⁹⁴ The official South Africa legal system is experiencing a crisis of legitimacy caused by the non-recognition of indigenous South African law. Seen against this crisis of legitimacy, the interaction of indigenous legal concepts and concepts of the "formal" or official legal system will not only enhance the legitimacy of the official South African legal system, but also illustrate and assert the dynamic nature of South African indigenous law.⁹⁵

93 See again ch 9 par 9.2 above.

94 See again ch 1 par 1.2.2.7 above.

95 See again ch 1 par 1.2.2.7 and ch 9 par 9.9 above.

10.10 INSURANCE CONTRACTS AND PREMIUMS: A GENERAL LAW-OF-CONTRACT APPROACH

10.10.1 The Current Position in South African Law

From the decisions of the courts as well as the works of some writers on insurance law, it appears that too often insurance law is regarded as a separate and isolated area of the law which has no connection with other types of contract, or, even worse, as though it is not also governed by the general principles of the law of contract.⁹⁶ In terms of this "narrow" approach, the courts and some writers either restrict themselves to a mechanical construction of the terms of the policy, or look only at "principles of insurance" when confronted with an "insurance-law problem". The approach of considering the "principles of insurance" is, of course, not in itself wrong, except for the fact that many of these principles are of English origin, since our law of insurance has been influenced to a large extent by the English law of insurance.⁹⁷ Thus, restricting oneself to the application of "insurance principles" only, may result in the negation of the principles of Roman-Dutch insurance law and Roman-Dutch law in general, which is after all, our common law, also for purposes of insurance law.⁹⁸

Thus, the current tendency in South African law is to regard the insurance contract as a separate type of contract, mainly governed by principles exclusive to insurance contracts, with little regard to the general principles of the law of contract. If this trend continues, our insurance law will remain caught up in the chains of English insurance law, which itself suffers in certain major respects from inherent deficiencies and an incapability to provide solutions which are based on principle instead of precedent.⁹⁹

10.10.2 The Historical and Comparative Materials

In the chapter which dealt with the historical development of the concepts of "insurance" and "premium", it was argued that the insurance contract developed on the basis of the maritime loan and the simulated contracts of sale and loan. It was also argued that the interest on the maritime loan and the "price" in terms of the simulated sale, although not the equivalent of the genuine premium, fulfilled the same function as the premium.¹⁰⁰ It has been argued that a close link exists between the insurance contract and the contract of sale, the latter, in turn, sharing some similarities with the contract of lease in particular in respect of the concepts of "price" and "rent". As a result of

96 See again the criticism levelled against the approach followed by the Courts in *SA Eagle Versekeringsmaatskappy Bpk v Steyn* 1991 (4) SA 841 (A); *Penderis and Gutman NNO v Liquidators of the Short-Term Business, AA Mutual Insurance Association Ltd* 1991 (3) SA 342 (C); 1994 (2) SA 836 (A); and *Zava Trading (Prop) Ltd v Santam Insurance Ltd* supra as discussed in ch 8 par 8.3.2.1, 8.3.3.3, and 8.3.7 above.

97 See again ch 1 par 1.2.2.4 above.

98 See again ch 1 par 1.2.1.2 above.

99 See again ch 1 par 1.2.1.1 above.

100 See again ch 2 par 2.2.3 above.

this link it has also been suggested that the principles pertaining to the price in terms of a contract of sale and the rent in terms of a contract of lease, may be regarded as a fruitful source of analogous materials to supplement shortcomings and uncertainties which may exist in the insurance law.¹⁰¹

In Roman-Dutch law the point was not expressly made by the writers that the insurance contract is simply another type of contract, but writers such as Van der Kees-
sel did argue that the insurance contract was a contract *bona fidei* and consequently the principles which applied to other (*bona fidei*) contracts applied with equal force to insurance contracts. Many of the general principles of contract were in fact applied to insurance contracts in Roman-Dutch law.¹⁰²

In Dutch law the fact that the insurance contract is simply another type of contract and that all the general principles of the law of contract as embodied in the *NBW* have to be considered when dealing with a problem of insurance law, is expressly stated by the Dutch writers.¹⁰³

In Belgian law a distinction is drawn between commercial contracts on the one hand, and civil contracts on the other hand. From the point of view of the insurer, every contract is a commercial contract. From the point of view of the insured, the contract of insurance is of either a civil or a commercial nature, depending on the status of the insured. For present purposes this distinction is not important. But what is important is that if an insurance contract is classified as a commercial contract, the rules of the commercial law which apply in general to all commercial contracts will also apply to insurance contracts. Likewise, where the insurance contract is classified as a civil contract, the principles of the civil law apply to the contract. This distinction emphasises the principle that an insurance contract is regarded in Belgian law as simply another type of contract.¹⁰⁴

In English law it is acknowledged that all the general principles of the law of contract apply, as a matter of general principle, to the insurance contract.¹⁰⁵ This is also the position in Australian law and it is acknowledged as such by the Australian legal writers.¹⁰⁶

10.10.3 Recommendation

If seen against the fact that the insurance contract has developed from other types of contract, together with the fact that the analogous method of legal research has been acknowledged by our courts as a useful and expedient method to supple-

101 See again ch 2 par 2.3 above.

102 See again ch 3 par 3.2 above.

103 See again ch 4 par 4.1 above.

104 See again ch 5 par 5.2 above.

105 See again ch 6 par 6.1 above.

106 See again ch 7 par 7.1 above.

ment shortcomings in one's legal system, the application of the general principles of the law of contract to the insurance contract seems not only apt but also necessary. This argument is given further impetus by the fact that in all the foreign legal systems which have been examined in this thesis, the insurance contract is not regarded as a separate and isolated contract but simply another type of contract, subject to all the general principles of the law of contract. The notion that the insurance contract is simply another type of contract is therefore critical in the development of a modern South African law of insurance.

It is submitted that the approach followed by our courts and some of our writers, notably Gordon and Getz, in regarding the insurance contract as a special type of contract, governed mainly if not especially by the terms of the particular policy as well as the principles peculiar to insurance contracts, is ill-founded. It must be emphasised that the criticism of the approach followed by our courts does not turn on the fact that the courts *deny* the fact that the insurance contract is also governed by the general principles of the law of contract, but that they *neglect* to consider those general principles when they are confronted with an "insurance-law problem".

The "principles of our insurance law", at least as envisaged by the courts, are mainly based on principles which are of an English law origin. Various matters of our insurance law which are derived from English law are far from clear-cut and are in need of reform. For example, the law relating to the requirement of an insurable interest, pre-contractual misrepresentations in the insurance context and so-called "insurance warranties" may well benefit from a "general law-of-contract" approach.¹⁰⁷ It has in the past been suggested that our insurance law is in need of a process of reform. A broader vision of what constitutes the sources of our law of insurance may be an important starting point for such a reformative process.

107 See again ch 1 par 1.2.1.1 above where the analogous method of legal research is explained and justified as one of the solutions in freeing our insurance law from out-dated and rigid rules of English law.

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