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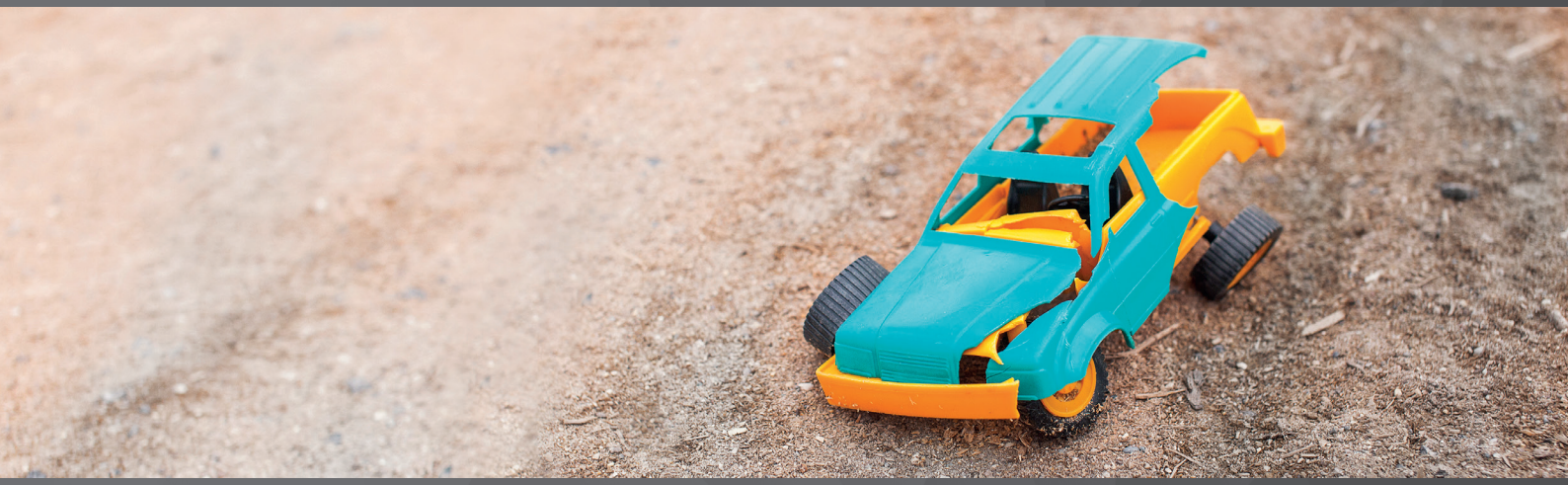

Insurance & Reinsurance 2020

A practical cross-border insight into insurance and reinsurance law

Ninth Edition

Featuring contributions from:

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Arthur Cox
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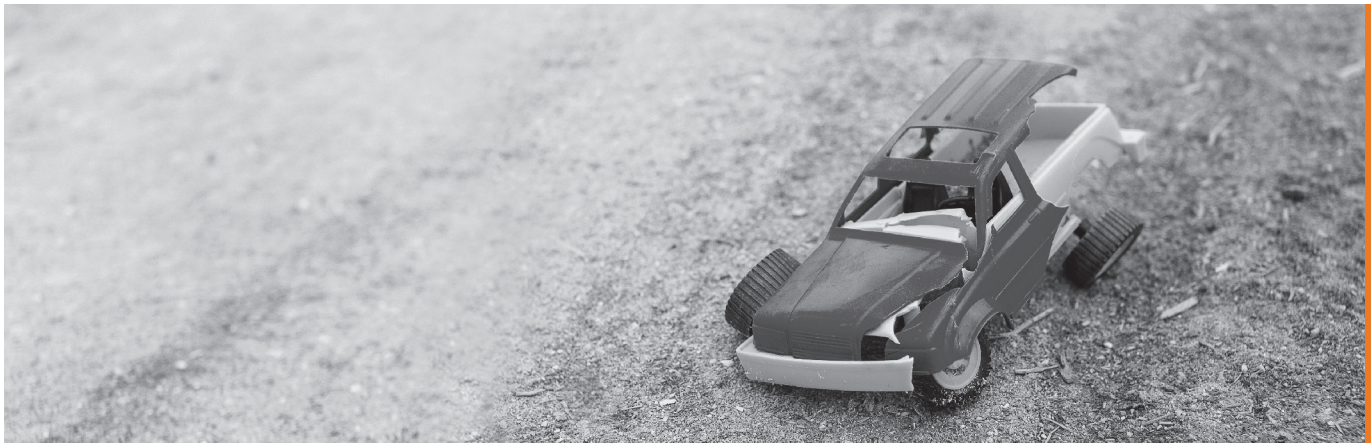

ISBN 978-1-83918-029-3
ISSN 2048-6871

Published by
global legal group
59 Tanner Street
London SE1 3PL
United Kingdom
+44 207 367 0720
info@glgroup.co.uk
www.iclg.com

Group Publisher
Rory Smith

Publisher
Jon Martin

Senior Editors
Suzie Levy
Rachel Williams

Editor
Amy Norton

Creative Director
Fraser Allan

Printed by
Ashford Colour Press Ltd.

Cover image
www.istockphoto.com

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Contributing Editor:
Jon Turnbull
Clyde & Co LLP

Industry Chapter

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South Africa

ENSafrica


Rob Scott


Prof. Angela Itzikowitz


Matthew Morrison


Zara Sher

1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

South Africa has a sophisticated system of financial sector regulation known as the "Twin Peaks" system of regulation, similar to the Australian Twin Peaks model.

The prudential regulator, known as the Prudential Authority (the "**PA**"), is responsible for the first peak, and is charged with the regulation of banks, insurers, cooperative financial conglomerates and certain market infrastructure. In essence, the first peak is dedicated to the maintenance and enhancement of financial stability in the South African financial services sector.

The second peak of regulation is the market conduct regulator known as the Financial Sector Conduct Authority ("**FSCA**"), which regulates the conduct of financial institutions. The main task of this separate and independent body is the deterrence of misconduct and protection of consumers of financial products and services.

While the PA and FSCA are the key insurance regulators, there are other regulators, such as the Competition Commission, the Takeover Regulation Panel and the Johannesburg Stock Exchange, that also regulate companies in the insurance sector, where applicable.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

The Insurance Act 18 of 2017 ("**the Insurance Act**") governs the issuing of insurance licences, in relation to non-life, life, reinsurance and microinsurance business. Application is made to the PA.

There are three categories of insurance licence, namely: a licence for microinsurance business (for both life and non-life insurance business, but with the policy benefits limited to a prescribed maximum); a licence for all other classes of life and non-life insurance business; and a licence for reinsurance business.

An applicant for a microinsurance licence must be a profit company or a non-profit company registered under the Companies Act 71 of 2008 ("**Companies Act**"), or a co-operative registered under the Co-operatives Act 14 of 2005 ("**Co-operatives Act**"). Applicants for life, non-life and reinsurance business licences must be a public company or a state-owned company registered under the Companies Act, a co-operative registered under the Co-operatives Act, or a branch of a foreign reinsurer.

An applicant must be able to demonstrate the following:

- its primary business activity must be the conduct of insurance business and operations arising directly therefrom;
- its key persons and significant owners must meet the prescribed fit and proper requirements; and
- it must have a sound business plan. In particular:
  - it must have a plan to meet its stated commitments in terms of transformation of the insurance sector, including meeting the targets envisaged by the Financial Sector Code (which is an empowerment code governing the financial services industry);
  - it must have adequate operational management capabilities to conduct the classes and sub-classes of insurance business that it wishes to conduct;
  - where it is a branch of a foreign reinsurer, the regulatory framework to which it is subject must be equivalent to the Insurance Act;
  - where it is part of an insurance group, its controlling company must be able to meet the requirements for insurance groups as set out in the Insurance Act;
  - it must be able to comply with the governance framework requirements, financial soundness requirements and reporting and public disclosure requirements of the Insurance Act; and
  - its licensing must not be contrary to the interests of prospective policyholders or the public interest.

State-owned insurers must be created by statute, and be authorised by statute to apply for a licence under the Insurance Act.

The Insurance Act requires licence-holders to maintain certain minimum capital requirements.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Generally, no entity, including a foreign insurer or its South African-based subsidiary, may "conduct insurance business" in South Africa unless that entity is licensed under the Insurance Act.

The Insurance Act provides that a foreign insurer will be regarded as conducting insurance business in South Africa where that insurer conducts business similar to insurance business outside of South Africa, and directly or indirectly solicits business in or from South Africa, or influences in any way the placement of insurance business from the South African market to the foreign jurisdiction.

Where a South African-based commercial entity itself seeks and secures insurance for its business or parts thereof with a foreign insurer, the foreign insurer will not be "carrying on insurance business" in South Africa and will accordingly not be required to obtain an insurance licence. This is most often

the case in the context of coverage under a global insurance programme (issued in a foreign jurisdiction by a foreign insurer) of a South African subsidiary company. Such covers are nonetheless subject to certain regulatory compliance aspects.

Lloyds, and numerous Lloyds underwriters, are licensed to conduct certain classes of insurance business.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

Any provision in a contract of insurance that is contrary to public policy is generally unenforceable.

Legislative restrictions have also been imposed by the Policyholder Protection Rules for all life policies, and the Policyholder Protection Rules for non-life policies owned by natural policyholders and juristic policyholders with an annual turnover or asset value less than ZAR2 million, promulgated in terms of the Insurance Act. The rules provide for comprehensive requirements regarding the content (mandatory and impermissible provisions), language, notification and disclosure requirements for the applicable insurance contracts. Generally, the insurance contract must be fair to the insured, and for instance must:

- include a premium payment grace period (usually 15 days from the due date), during which the insurer cannot reject a claim on the basis of non-payment of premium;
- include a cooling-off period (usually 31 days from receipt of the insurance contract); and
- include the necessary disclosures including insurance limits, exclusions, insurer and intermediary contact information, remuneration and commission details, claims details and complaint details.

1.5 Are companies permitted to indemnify directors and officers under local company law?

Except to the extent that a company's Memorandum of Incorporation provides otherwise, a company may indemnify a director/officer, and may purchase insurance to protect a director/officer against any liability, except in the following instances:

1. In respect of liability to the company itself.
2. Where the director:
   a. acted in the name of the company, signed anything on behalf of the company, or purported to bind the company or authorise the taking of any action by or on behalf of the company, despite knowing that the director lacked the authority to do so;
   b. acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a reckless manner;
   c. was a party to an act or omission by the company despite knowing that the intention was to defraud the creditor, employee or shareholder of the company, being part of an act having or which had any other fraudulent purpose;
   d. incurred any liability arising from wilful misconduct or wilful breach of trust; or
   e. incurred a fine as a result of a conviction of an offence in terms of national legislation.

1.6 Are there any forms of compulsory insurance?

Yes, various legislation has been enacted which provides for compulsory insurance through the establishment and operation of certain funds, for example, the Road Accident Fund ("**RAF**"), the Workmen's Compensation Fund, and the Unemployment Insurance Fund ("**UIF**").

Certain professional bodies, for instance those in respect the auditing and engineering professions, require that their members carry professional indemnity insurance cover.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

The South African substantive law relating to insurance does not favour either the insurer or the insured.

2.2 Can a third party bring a direct action against an insurer?

In the case of assets and life insurance covers, where a third party is a beneficiary or has a noted interest, such third party may bring an action directly against the insurer.

In the case of liability insurance covers, a third party may bring an action directly against an insurer in respect of any liability incurred by the insured towards a third party, but then only in the event of the sequestration or insolvency of the insured.

2.3 Can an insured bring a direct action against a reinsurer?

No, unless the insurance contract contains a clause which allows the insured to approach the reinsurer directly in certain circumstances (commonly known as a cut-through clause), thereby creating a contractual nexus with the reinsurer in the circumstances contemplated.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

In the event of a material misrepresentation or a material non-disclosure by the insured, the insurance contract may be rendered voidable at the election of the insurer.

The insurer may therefore, at its election, rescind the insurance contract, which will result in the termination of the insurance contract, and the setting aside of all its legal consequences, which generally includes a refund of any premiums paid.

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

Yes, as a general rule, with limited exceptions.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

Subrogation arises automatically as a matter of common law, and applies to all contracts of indemnity insurance. An insurer is, however, not subrogated to an insured's right of action until it has paid the claim under the policy.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

In principle, commercial insurance disputes are capable of being resolved in any court of law of competent jurisdiction.

The most relevant courts are the High Courts of South Africa, the Magistrates' Courts and the Small Claims Courts. A special "Commercial Court" has also recently been set up to try to resolve commercial litigation matters in the High Courts, quickly, cheaply, fairly and with acuity.

Save for the type of matters which the different courts can deal with, the main distinction between the courts is their respective monetary jurisdiction.

The lower courts have a maximum monetary limit, as published from time to time. The current monetary jurisdiction is as follows:

- The Regional Magistrates' Courts: R400,000.00 (four hundred thousand rand).
- The District Magistrates' Courts: R200,000.00 (two hundred thousand rand).
- The small claims courts: R15,000.00 (fifteen thousand rand).

Parties can submit or consent (at the time proceedings are instituted or in advance) to the jurisdiction of the Magistrates' Courts even if the value of the claim falls outside the monetary jurisdiction of that court.

The High Courts do not have a prescribed monetary jurisdictional limit in respect of the value of the claims over which they exercise jurisdiction. However, if the party instituting proceedings elects to institute proceedings in a High Court, even though the monetary value falls within a lower court's jurisdiction, the court has a discretion to award costs on the scale of a lower court where the party is successful.

Accordingly, in which court a litigant institutes proceedings will largely depend on the monetary value of the claim.

South Africa does not have a jury system.

Mention must be made of the office of the Ombudsman for Long Term Insurance and the Ombudsman for Short Term Insurance, which are regulated by the Financial Services Ombudsman Schemes Act. Subject to certain jurisdictional restrictions, the Insurance Ombudsman offices provide the insuring public and the insurance industry with a free, efficient and fair dispute resolution mechanism, through an alternative dispute resolution process, applying the law and principles of fairness and equity.

3.2 What, if any, court fees are payable in order to commence a commercial insurance dispute?

None. However, incidental costs are payable to, *inter alia*, the sheriff, who charges a set fee for effecting service of legal process.

Furthermore, where the party instituting proceedings is not resident within the court's jurisdiction (a *peregrinus*), such a party may, in certain circumstances, be required to furnish security for the costs of the other party to the proceedings.

3.3 How long does a commercial case commonly take to bring to court once it has been initiated?

Anywhere from three months to three years depending on various factors, including the type of procedure used, complexity of the matter and conduct of the parties.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action, and (b) non-parties to the action?

(a) In respect of parties to an action, the courts have the power to order discovery/disclosure of documents when one of the parties has failed to discover and/or disclose (produce) all relevant documents, as required by the Rules of Court. If any party fails to make proper discovery of evidence, or fails to allow for inspection and/or copies of the relevant documents in accordance with the Rules of Court, the party requiring discovery or inspection/copies may apply to a court for an order compelling compliance, and failing such compliance, the court may, on application, dismiss the action or strike out the action or defence, as the case may be.

The court can also of its own accord order discovery (within the parameters of the Rules of Court relating to discovery).

(b) Persons who are not parties to the proceedings, but who have in their possession documents relevant to the proceedings, can be required to produce such documents, and allow copies to be made, by way of a *subpoena duces tecum*. If a party fails to comply with the subpoena, such party may be found by a court to be in contempt of court, and may be liable for a fine or imprisonment.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers, or (b) prepared in contemplation of litigation, or (c) produced in the course of settlement negotiations/attempts?

(a) A party can withhold disclosure of documents relating to advice given by lawyers in terms of legal advice privilege, which forms part of legal professional privilege.

- The general rule is that communications/documents between a legal adviser and his or her client are privileged if:
  (1) the legal adviser was acting in a professional capacity at the time;
  (2) the communication/disclosure was made in confidence;
  (3) for the purpose of obtaining legal advice or for the purposes of litigation; and
  (4) the advice does not facilitate the commission of a crime or fraud.

(b) A party can withhold from disclosure documents prepared in contemplation of litigation in terms of litigation privilege which forms part of legal professional privilege.

- Litigation privilege protects communications/documents between a litigant or his/her legal advisor and third parties, if such communications/documents are made for the purpose of pending or contemplated litigation. In general, the communication/document will be privileged if:
  (1) the communication/document was obtained or brought into existence for the purpose of a litigant's submission to a legal advisor for legal advice; and
  (2) that litigation was pending or contemplated as being likely or probable at the time.

(c) A party can withhold from disclosure documents produced in the course of *bona fide* settlement negotiations – known as "without prejudice" statements.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

Generally no, but may do so in certain circumstances where the court is requested by one of the parties, or with the consent of the parties.

4.4 Is evidence from witnesses allowed even if they are not present?

Although as a general rule, evidence is given orally in open court by sworn witnesses, in certain circumstances evidence can be provided by way of affidavit.

In terms of the Rules of Court, a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit, or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may meet. However, where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can attend, the evidence of such witness shall not be given on affidavit.

Furthermore, a court may, on application, in any matter where it appears convenient or necessary for the purposes of justice, make an order for taking the evidence of a witness before or during the trial before a commissioner of the court, and permit any party to any such matter to use such deposition in evidence on such terms, if any, as determined by the court.

The court's discretion to allow evidence to be given on affidavit or before a commissioner must be exercised judicially after a consideration of all of the facts.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

In terms of the Rules of Court, no person shall, save with leave of the court or consent of all of the parties to the suit, be entitled to call an expert witness, unless notice of intention to do so and a summary of the expert's opinion and reasons therefor, are provided timeously in accordance with the Rules of Court.

In general, the court is not of its own accord permitted to appoint or require expert evidence to be presented. However, in limited circumstances and where the interests of justice requires the court to do so, the court may advise or request a party to present expert evidence, provided that the court is mindful of the dangers associated with the judge intervening in the calling of witnesses, and there is no objection. However, it has not been decided by our courts, whether the court can require such evidence where the other party objects to such evidence being produced.

4.6 What sort of interim remedies are available from the courts?

Typically, a wide range of interim remedies are granted in urgent proceedings.

Some examples of interim orders that may be granted by courts in legal proceedings include:

(1) Interim attachment orders to preserve assets pending judgment or a final order:
- a Mareva injunction (an order freezing a party's assets);
- an Anton Piller order (an order preserving evidence where there is fear or risk of destruction); and
- an anti-dissipation interdict (an order preventing or restraining a party from dissipating or concealing assets pending the final outcome).

(2) Interim orders to enforce/compel compliance with the Rules of Court.

(3) Other interim orders that are available are the following:
- rule *nisi*: a court order which provides for a return date on which date the parties have an opportunity to show cause why the order should not become final;
- orders for the stay of proceedings: court orders suspending court proceedings; and
- interdicts: prohibitory interdict order (to prevent an act); mandatory interdict/mandamus order (to compel the carrying out of a particular act); and restitutionary interdict (to compel the return of property).

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

The appeal process and the stages of appeal depend on which court is the court of first instance.

Parties generally have an automatic right to appeal a civil judgment/order of a Magistrate's Court, as a court of first instance, to the High Court.

In respect of a High Court decision:
- There is no automatic right to appeal a decision of the High Court. Parties wishing to appeal such a decision must first seek and obtain leave or permission to appeal.
- Leave may be granted if:
  (a) the appeal would have a reasonable prospect of success; or
  (b) there is some other compelling reason why the appeal should be heard.
- If the court consisted of a single judge, parties may either appeal to a full bench of that High Court, or appeal to the Supreme Court of Appeal.
- If the court consisted of more than one judge, parties may appeal to the Supreme Court of Appeal.

A decision of the Supreme Court of Appeal, or in exceptional circumstances a decision of the High Court, may be appealed to the Constitutional Court. Leave may be granted by the Constitutional Court on the grounds that a matter raises a point of law which is of general public importance.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Interest is generally recoverable in respect of claims, unless interest is expressly, plainly and unambiguously excluded by agreement between the parties.

In terms of the common law *in duplum* rule, interest on a debt will cease to accrue where the total amount of arrears interest that has accrued equals the total outstanding principal debt.

Parties may also agree to the rate of interest to be applied.

In terms of the Prescribed of Interest Act 55 of 1975, where the interest rate is not governed by any other law or by an agreement or a trade custom or in any other manner, interest shall be calculated at the prescribed rate of interest as determined by the Minister from time to time, as at the date interest starts to accrue. The current prescribed rate of interest is 9.75% with effect from 16 January 2020, and is calculated as the repo rate plus 3.5%.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

The overarching rule is that all awards of costs are in the discretion of the court. This discretion must be exercised judicially and after a consideration of all of the facts.

The general rule is that costs follow the outcome – the successful party should be awarded costs. This rule should be departed from only where good grounds for doing so exist.

Costs are awarded on a tariff basis and calculated in terms of fixed court tariff scales.

Furthermore, in terms of the Rules of Court, a defendant may at any time unconditionally or without prejudice make a written offer to settle the plaintiff's claim. The effect of the offer is to place the plaintiff in a position where, if the plaintiff rejects it, the plaintiff will run the risk of having to pay the costs subsequently incurred, unless the plaintiff is able to prove an amount in excess of the amount tendered.

4.10 Can the courts compel the parties to mediate disputes, or engage with other forms of Alternative Dispute Resolution? If so, do they exercise such powers?

Mediation is currently still voluntary in terms of South African Law, and therefore courts cannot compel parties to mediate disputes or engage in Alternative Dispute Resolution in the absence of an agreement between the parties.

In any pre-trial conference the parties are, however, required to consider whether the dispute should be referred for possible settlement by mediation.

4.11 If a party refuses to a request to mediate (or engage with other forms of Alternative Dispute Resolution), what consequences may follow?

A court may award a punitive costs order against a party who/which refused to mediate and/or engage in Alternative Dispute Resolution methods, where the court finds that the parties ought to have done so.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

The courts favour the principle of party autonomy in relation to arbitration proceedings, and will generally uphold arbitration agreements and be reluctant to set aside or review an arbitration award.

The South African domestic law of arbitration is governed by the Arbitration Act. South Africa has recently introduced an International Arbitration Act, based on the UNCITRAL model law.

The courts are able to intervene in the conduct of an arbitration, but then only in limited instances, as provided for in the respective Arbitration Acts.

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

In order for a dispute in relation to a contract of (re) insurance to be subjected to arbitration, it is necessary to include an arbitration agreement in the (re) insurance contract, or to have a separate agreement/document, which contains an agreement to arbitrate and is incorporated into the contract of (re) insurance by reference.

No specific form of words is required, although in terms of the Arbitration Act the wording should provide for the referral to arbitration of any existing dispute or future dispute relating into any matter specified in the contract.

The Policyholder Protection Rules (refer to question 1.4 above) provide that an arbitration clause in a non-life insurance contract, which provides that any dispute arising in respect of such contract of insurance can be resolved only by arbitration and by no other means, shall be void.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

A court will generally enforce an arbitration agreement in a contract of (re) insurance, subject to the provisions of the Policyholder Protection Rules (refer to question 5.2 above). A court will only refuse to enforce an arbitration agreement where there is sufficient reason for doing so, for instance in order to avoid a multiplicity of proceedings dealing with the same issues of law/fact.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

Under the Arbitration Act, a court may grant interim relief by making orders in respect of:

(a) security for costs;
(b) discovery of documents and interrogatories;
(c) the examination of any witness before a commissioner;
(d) giving of evidence by affidavit;
(e) the inspection or the interim custody or the preservation or the sale of goods or property;
(f) an interim interdict or similar relief;
(g) securing the amount in dispute;
(h) substituted service of notices; and
(i) the appointment of a receiver.

Under the International Arbitration Act, a court may only grant interim relief if the arbitral tribunal, being competent to grant the order, has not already determined the matter, and if:

(a) the arbitral tribunal has not yet been appointed and the matter is urgent;
(b) the arbitral tribunal is not competent to grant the order; or
(c) the urgency of the matter makes it impractical to seek such order from the arbitral tribunal.

The court may also only grant interim relief in respect of:

- orders for the preservation, interim custody or sale of any goods which are the subject matter of the dispute;
- an order securing the amount in dispute but not an order for security for costs;
- an order appointing a liquidator;

- any other orders to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual; and
- an interim interdict or other interim order.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

In terms of the International Arbitration Act, adequate reasons must be given for an award.

The Arbitration Act does not provide for the giving of reasons. However, in practice, the parties usually agree that a reasoned award must be provided, and make provision for this in the procedural rules adopted by the parties for the arbitration proceedings.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

In the absence of an agreement between the parties conferring a right of appeal, an arbitration award is final and binding.

An arbitration award made in terms of the Arbitration Act or the International Arbitration Act may, however, be set aside or reviewed on limited procedural irregularity grounds, and as more specifically set out in the said Acts respectively.

Acknowledgments

Thanking Metumo Shilongo and Nicole Gabryk for their contributions.

Rob Scott is an Executive in ENSafrica's Dispute Resolution department.
He has substantial experience in insurance, general commercial, construction including construction insurance and mining disputes (the latter in both national and cross-border contexts).
Rob has worked in the insurance industry, is experienced in the application of both the common and civil laws, and is admitted to practise in both South Africa and the Seychelles. He is a Fellow of the Insurance Institute of South Africa and heads up the firm's insurance practice group.

ENSafrica
The MARC, Tower 1, 129 Rivonia Road
Sandton, 2196
Johannesburg
South Africa

Tel: +27 11 269 7897
Email: rscott@ensafrica.com
URL: www.ensafrica.com

Matthew Morrison is a director in ENSafrica's corporate commercial department. He specialises in corporate finance, insurance and financial services law and regulation. Matthew's experience includes previously working as a solicitor in London, in financial markets regulation and in the Lloyd's of London insurance market.

ENSafrica
The MARC, Tower 1, 129 Rivonia Road
Sandton, 2196
Johannesburg
South Africa

Tel: +27 11 269 7975
Email: mmorrison@ensafrica.com
URL: www.ensafrica.com

Prof. Angela Itzikowitz is an Executive in ENSafrica's Banking and Finance department. She specialises in banking and financial market regulation, including finance and regulatory reform, card and related electronic payment instructions, derivatives, loan agreements, collective investment schemes, insurance, money laundering and debt origination and securitisation.
She has done a significant amount of work in Southern African Development Community ("**SADC**") countries inclusive of regulatory law reform through capacity building projects. She has advised the World Bank on deposit insurance and bank insolvencies and participated in a number of financial market initiatives in Asia.

ENSafrica
The MARC, Tower 1, 129 Rivonia Road
Sandton, 2196
Johannesburg
South Africa

Tel: +2711 269 7702
Email: aitzikowitz@ensafrica.com
URL: www.ensafrica.com

Zara Sher is an Associate in ENSafrica's Dispute Resolution department. She focuses primarily on insurance and construction disputes, but also on general commercial litigation matters.
Zara has a specific expertise in construction insurance guarantees, including securities and recoveries in relation to such guarantees, both nationally and cross-border, and construction and engineering insurance covers.
She has a special interest in alternative dispute resolution, and in particular in international arbitration.

ENSafrica
The MARC, Tower 1, 129 Rivonia Road
Sandton, 2196
Johannesburg
South Africa

Tel: +27 82 310 3859
Email: zsher@ensafrica.com
URL: www.ensafrica.com

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