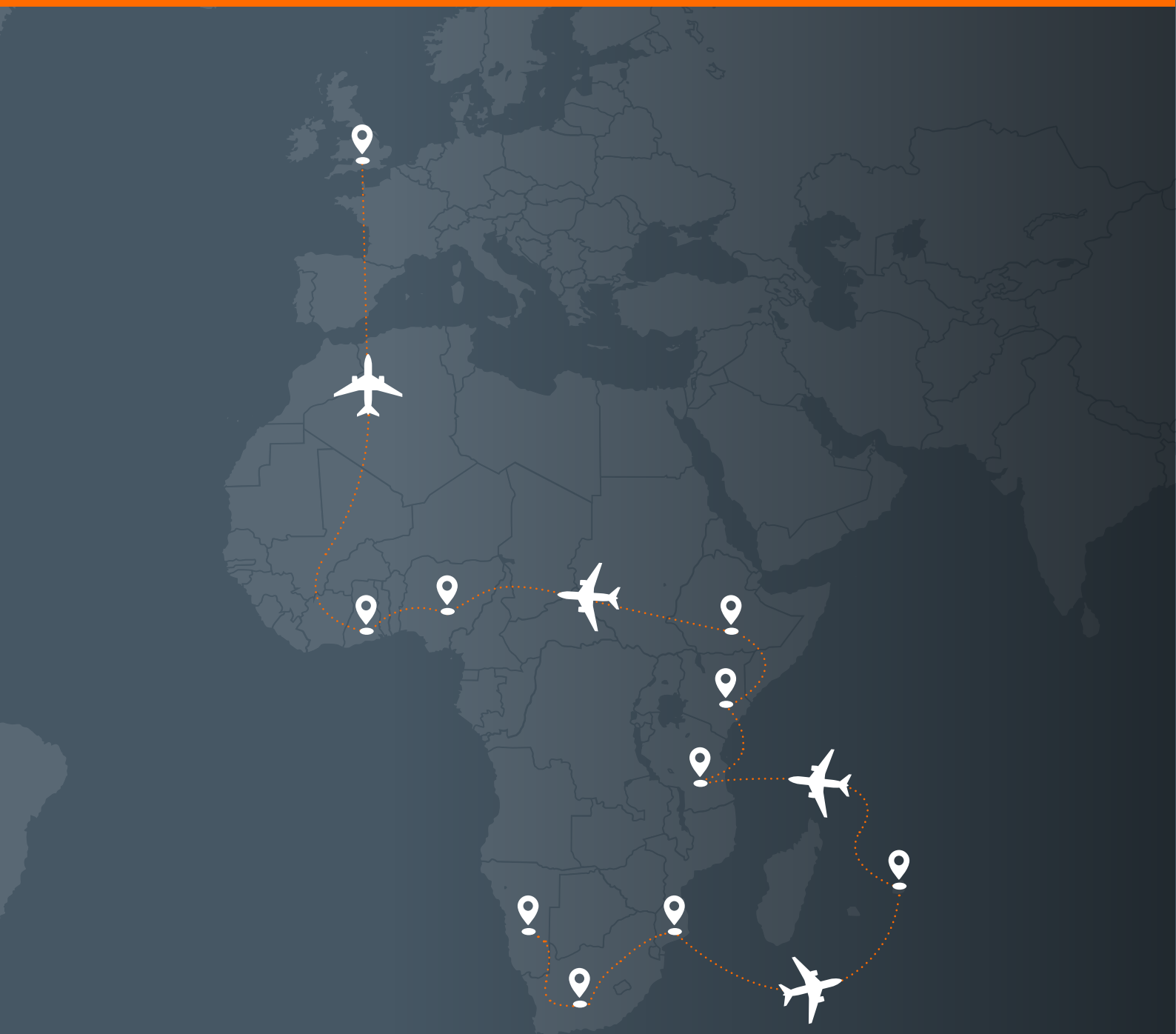
INSURANCE ODYSSEY 2021



WEBBER WENTZEL

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FOREWORD

A CROSS-JURISDICTIONAL TOUR OF KEY INSURANCE LAW PRINCIPLES, FOCUSED ON AFRICA

The Webber Wentzel Insurance Disputes Team is proud to present a cross-jurisdictional tour, focusing on 10 fundamental insurance principles across 10 jurisdictions, namely: - South Africa, Namibia, Mozambique, Ethiopia, Kenya, Tanzania, Nigeria, Ghana, Mauritius and the United Kingdom.

With globalisation in mind, we felt inspired to compare and document fundamental insurance law principles across these 10 jurisdictions and to assess how they are applied similarly or differently in each area. This digi-brochure has been designed to be considered alongside a series of webinars which we, along with our alliance and relationship firms, will be rolling out to our clients.

We want to thank our alliance and relationship firms for teaming up with us, as well as our internal project team, our business development team, and all partners and associates at Webber Wentzel who have had a hand in compiling this material.

We invite you, our clients, to travel this journey with us and we hope you will find this material useful as you traverse insurance law across the African continent and beyond.

Maria Philippides and team.

10 JURISDICTIONS
10 PRINCIPLES
10 LAW FIRMS

Working together to produce 1 publication. Putting clients at the heart of everything we do.

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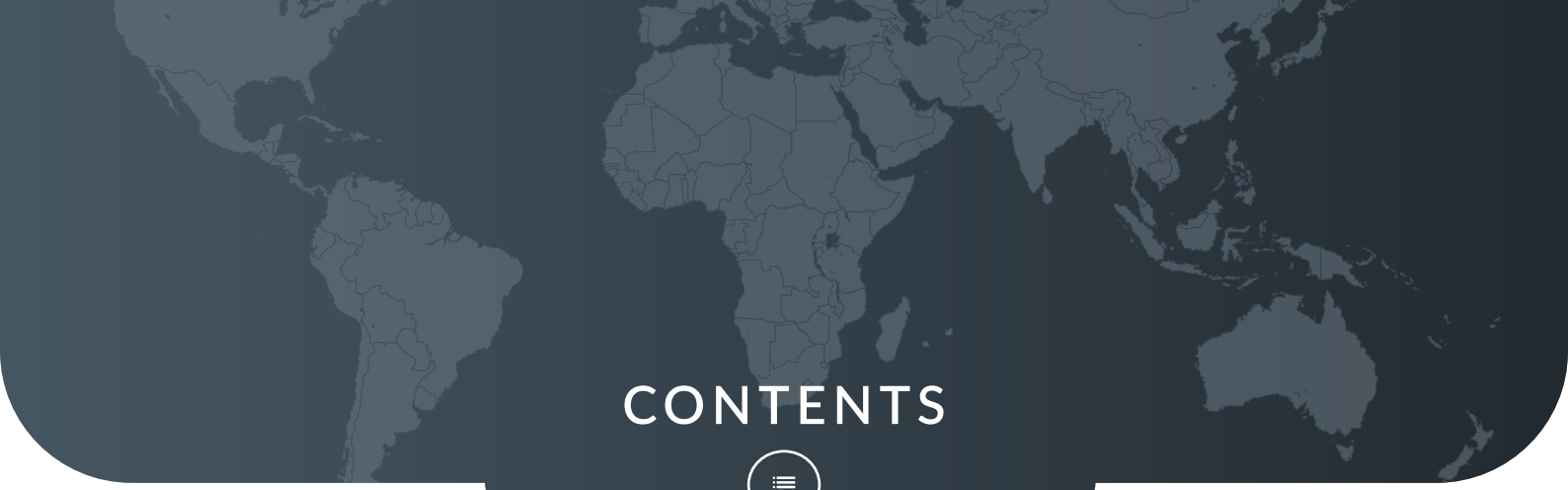

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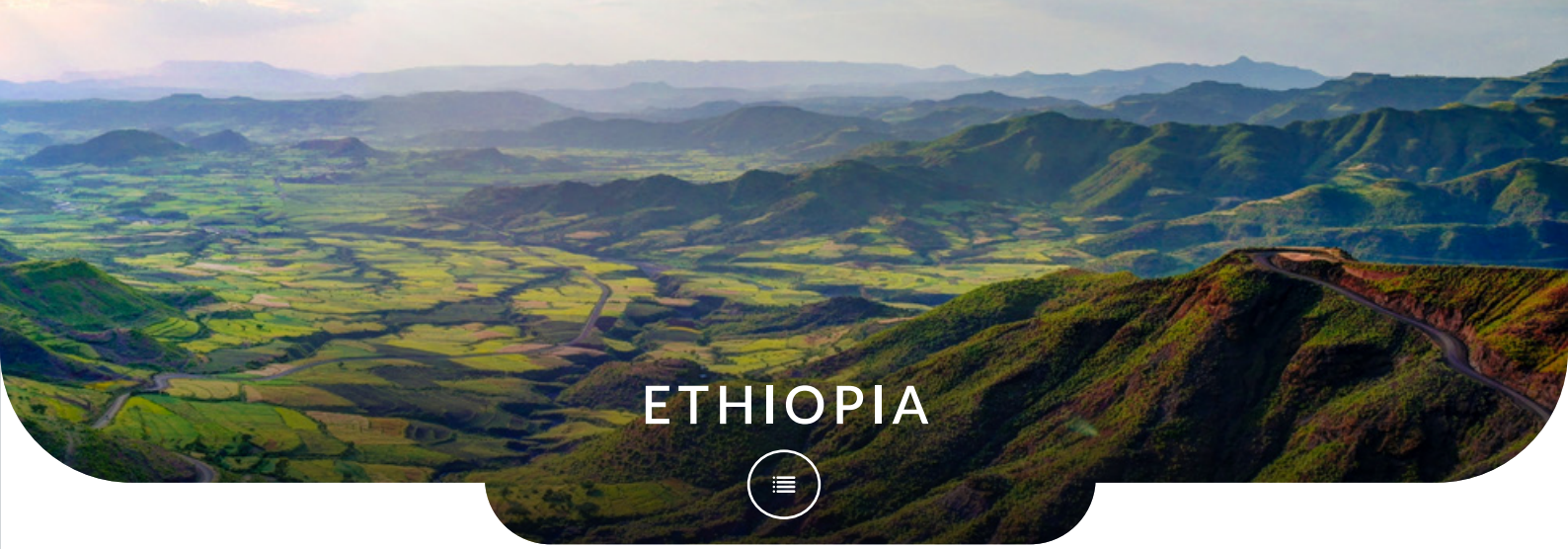
ABOUT TKLO

Tadesse Kiros Law Office (TKLO) was founded in 1996 by Tadesse Kiros, former Deputy Chief Justice of Ethiopia. TKLO is a leading legal service provider covering several areas of practice, including mergers and acquisitions, energy and mining, projects and infrastructure, tax, banking and finance, insurance, employment, construction, procurement, telecommunication, competition, arbitration and intellectual property. Continuously top-ranked by Chambers and Partners, TKLO serves a number of high-profile investors and is a partnership firm in Ethiopia for top global law firms. This relationship has given TKLO the opportunity to share expertise and resources as well as networks. Its membership of prominent international lawyers' networks, coupled with its relationships with prominent global and regional law firms, positions TKLO uniquely as a local service provider capable of deploying its African and global connections to best serve its clients.

TADESSE KIROS
LAW OFFICE



ETHIOPIA

ESSENTIALIA OF AN INSURANCE CONTRACT

QUESTION	ANSWER
01 What are the essential elements of an insurance contract?	In addition to capacity, consent and object, every insurance contract has to be made in writing, and the parties shall agree on: • The payment of one or more premiums by the insured; • Compensation to be paid to a beneficiary of the insurance upon materialization of a specified risk; • Risk insured
02 Please briefly explain each essential element.	Premium: • It is a sum of money the beneficiary agreed to pay in the insurance policy Compensation for loss: • Indemnity insurance contract: The insurance policy shall show: (i) the amount of the guarantee; (ii) the nature of the risk insured; and (iii) the item, liability or person insured. • Non indemnity insurance contract: the insurance contract shall show: (i) the occurrence on which the payment of the agreed amount depends; and, (ii) the manner of calculating any reduction in the value of the policy or its redemption value. Risk insured: • The risk insured is a loss that the beneficiary sustains due to an uncertain event which is a condition precedent for the coming into effect of the insurer's obligations.
03 Is there a term that is mistakenly thought to be essential?	Not applicable in this jurisdiction

ETHIOPIA

INTERPRETING INSURANCE POLICIES

QUESTION	ANSWER
04 How are insurance contracts interpreted (i.e. strictly, loosely or a combination of both)?	Some of the fundamental rules of interpretation in interpreting insurance in Ethiopian courts include: • Interpretation in accordance with good faith, requiring the loyalty and trust which should govern business relations to guide the interpretation of insurance contracts; • Golden rule of interpretation which requires words and phrases in an insurance contract to be given their common meaning • The principle of positive interpretation which requires ambiguous words and phrases to give a meaning that promotes the effectiveness of the contract. This rule encourages maintaining insurance contracts even though they are badly drafted. • Interpretation in favour of the insured which requires pre-drafted contracts, such as insurance contracts which are adhesive in nature to be interpreted in favour of the party that did not prepare the standard contract.
05 Does the contra proferentum rule apply? Briefly explain.	Yes, as insurance contracts are solely drafted by the insurer, and are "take it or leave it" in nature, such stipulations inserted in general provisions, models or forms of contracts prepared by the insurer shall be interpreted in favour of the insured / beneficiary in Ethiopia.
06 Is there a particular rule of interpretation that applies to insurance contracts (and is receiving attention in your jurisdiction)?	Not applicable in this jurisdiction

EXCLUSIONS

QUESTION	ANSWER
07 What is an exclusion / exception and how is it reflected in a policy?	Exclusions are conditions that are not included in the risk. They refer to conditions that are not covered, and if they are causes of loss over the interest insured, then the insurer will not be required to pay under the insurance policy. For instance, in Ethiopia, unless otherwise agreed, risks arising out of civil or foreign war are not borne by the underwriter. Other than the above, in general where damages are insured, the insurance policy extends to the risks arising out of the property or arising out of the insured person's civil liability. Moreover, though war risks are expressly excluded in the Maritime Code, the exclusion does not apply to damage and loss caused to the property insured by hostilities, reprisals, capture, arrest, detention, embargo and molestations by government or authority whatsoever, by explosions of engines of war and, in general, by all fortunes of war as well as by piracy.
08 Who bears the onus to establish that a claim is covered by the insurance contract and who bears the onus to prove an exclusion?	In Ethiopia, a person who demands performance of an obligation shall prove its existence. Therefore, the onus of proof regarding the existence and coverage of the claim by the insurance contract is on the beneficiary of the insurance and, save for exceptions, the same rule applies to establishing exclusions. An exception to the rule is provided under the Commercial Code. The Code provides that, in cases where war risks are not covered under the insurance contract and the loss or damage has occurred due to war risk, the insurer bears the onus to prove the fact.
09 Are there specific interpretation principle(s) that apply to exclusions? If so, please elaborate	As insurance contracts are adhesive in their nature, and are normally prepared by insurers, exclusion clauses are strictly interpreted in Ethiopia.

ETHIOPIA

WARRANTIES AND CONDITIONS PRECEDENT

QUESTION	ANSWER
10 What is the difference between a warranty and a condition precedent?	A warranty is an insurance clause through which the insured gives assurance to the insured that certain facts or conditions are or will be true. A condition precedent is a situation where an otherwise valid obligation of a party is suspended until an uncertain future event materializes. In this type of condition, the agreement of the parties shall remain final, but the conditional obligation of a party will come into force when the stipulated condition materializes.
11 Which types of warranties exist in your jurisdiction? (Please include examples)	Affirmative warranty - warranties that relate to a fact at the time the parties enter into an insurance contract. It could either be express or implied. An example of an implied warranty in marine insurance could be the seaworthiness of a ship. Promissory warranty - a statement regarding facts that will give rise to or remain during the term of the insurance policy. Promissory warranties relate to the future and are expressly included in the insurance contract. For example, an insured promises not to use the insured house for the manufacture of ammunitions during the period of the insurance policy.
12 How are conditions precedent implemented in insurance? (Please include examples)	A condition precedent relates to an obligation which is suspended until a particular uncertain event materializes. For example, in a motor vehicle liability insurance, the obligation of the insurer remains suspended until the insured vehicle causes harm to another's property, person, or life.

INSURABLE INTEREST

QUESTION	ANSWER
13 What does insurable interest mean in your jurisdiction?	A person who takes out an insurance policy should suffer damage from the loss / damage on the subject matter insured or should lose some benefit from the loss/damage. In other words, insurable interest requires the expectation of a reasonable loss materializing over the subject insured.
14 Please provide us with examples of insurable interests.	Indemnity Insurance: • Owner of a property over its economic right over the property. • A secured creditor over a property given as security. Non-Indemnity Insurance: • An individual in the life and/or person of his/her spouse. • A child in the life and/or person of if its parents. • An employer in the life and/or person of its employee.
15 How is insurable interest treated in your jurisdiction?	In Ethiopia, regarding insurance to property, the Commercial Code stipulates: "Any person interested in the preservation of an object may insure it." Article 693 of the Commercial Code also provides: "An insurance policy for the event of death […] made by third party […] shall be of no effect unless the insured person agrees in writing and indicates the amount insured." The Maritime Code strengthens this by stressing that no person may claim under a maritime insurance policy unless s/he has suffered damage because of the casualty.

ETHIOPIA

REJECTION OF CLAIMS

QUESTION	ANSWER
16 When can an insurer reject a claim?	Subject to the terms of the insurance contract, the following are grounds for rejecting claims by the insurer: • Where the peril is not covered under the policy. • Where the risk is excluded by law or policy. • Where the insured does not pay premium. • Where the insured failed to notify insurer in the time set for notification. • Where the insured intentionally caused the damage and/or loss. • Where the insured breaches warranty requirements. • Where no loss or damage is sustained by the insured (in indemnity insurance).
17 What steps must an insurer take if it intends rejecting a claim?	The insurer should reject the claim in clear terms.
18 Are there certain protections afforded to insureds regarding rejection of claims (i.e. guidelines / rules by an Ombudsman / legislative body or precedent)? Please elaborate.	No.

ETHIOPIA

MISREPRESENTATION AND NON-DISCLOSURE

QUESTION	ANSWER
19 What is the duty on an insured in respect of representations and disclosures to its insurer?	In Ethiopia, the relationship between parties to the insurance contract is governed by the principle of uberima fides, and based on this the Commercial Code requires the insured "to state exactly all the circumstances within his/her knowledge and which are likely to assist the insurer to appreciate fully the risks it undertakes to insure." while making a proposal for an insurance policy.
20 What is the remedy for an insurer when there is a material misrepresentation or a non-disclosure? Please explain.	The policy shall be of no effect where the beneficiary intentionally conceals facts or made false statements and such concealment or false statement cause the insurer wrongly to appreciate the risks to be insured so that, had it been aware of the truth, the insurer would not have entered into the policy or would have imposed terms less favourable to the beneficiary. In such cases, the insurer shall retain all premiums paid. Notwithstanding the above, the policy shall remain in force where the concealment or false statements are not deliberate, and it cannot be shown that the beneficiary acted in bad faith. In such case: • Where concealment or false statements are discovered before the risk materializes, the insurer may terminate the policy by giving one month's notice or may maintain the policy and increase the premium. • Where concealment or false statements are discovered after the risk materialized, the sum to be paid by the insurer shall be reduced having regard to the difference between premiums actually paid and the premiums which ought to have been paid, had the beneficiary not concealed the facts or made no false statements.
21 Does the misrepresentation and/or non-disclosure have to be linked to a claim made by the insured to enable an insurer to rely on the remedy? Please explain.	No. The concealment or false statement should not necessarily relate to the claim. As indicated above, under Ethiopian law, the principle of uberima fides obliged the parties to strictly comply with disclosure requirements, and it is based on this rationale that the Commercial Code allows such a defence to the insurer, notwithstanding the fact that the basis of the claim is different.

ETHIOPIA

CAUSATION – PROXIMATE CAUSE

QUESTION	ANSWER
22 What is the test for causation?	Ethiopian law recognizes proximate cause in insurance, and this requires the peril against which insurance is taken out to be the proximate cause for the loss / damage.
23 How have courts applied this test?	In general, Ethiopian courts require the peril to be the cause of the loss/damage in order to say the risk is covered.
24 Was causation a point of contention in business interruption claims? If so, please elaborate	No.

NOTIFICATION OF CLAIMS, PRESCRIPTION, AND TIME-BAR

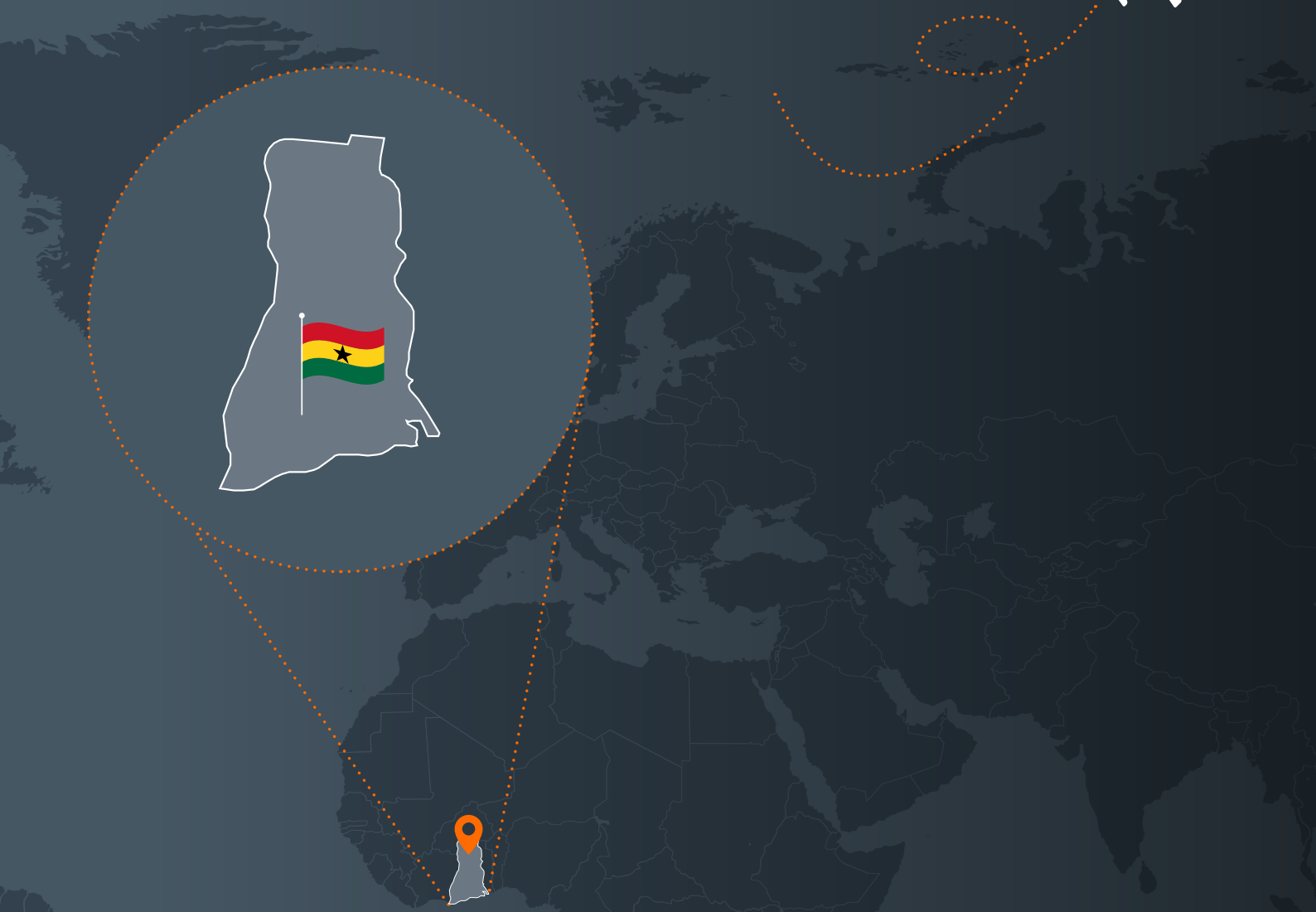
QUESTION	ANSWER
25 What should be notified to an insurer and when must this be done?	Notification is expressly provided under the Commercial Code, and there are two types of notifications in Ethiopia: Notification of event/occurrence: Unless the beneficiary is prevented by force majeure, the beneficiary shall inform the insurer of any occurrences likely to render the insurer liable as soon as s/he knows of such occurrences or within not more than five days. Notification of claim: A duty to notify claims may be imposed under insurance contracts, and in this regard most insurance policies require the insured to notify the insurer of any formal claim, and provide documents and particulars related to the loss and the claim—including evidence that would support the insured¬—to the insured.
26 What are the legislated time periods for an action to prescribe?	The Commercial Code stipulates periods of prescription regarding claims arising out of insurance contracts. These are: • In case of concealment or false statements in the contract of insurance, the period of limitation shall run from the day when the insurer knew of the concealment or false statement. • Any claim arising out of an insurance contract shall be barred after two years from the occurrence giving rise to the claim or from the day when the parties knew the occurrence.
27 Are these legislated time periods capable of amendment by agreement in an insurance contract? Please elaborate.	These legislated time period can be extended through the agreement of the parties. However, the Commercial Code prohibits amendments that shorten these periods.

ETHIOPIA

REGULATORY PRINCIPLES IN RELATION TO CUSTOMERS

QUESTION	ANSWER
28 Are there any regulatory principles relating to the manner in which customers are treated?	Not applicable in this jurisdiction
29 How does your regulator apply these principles and are there consequences of breaching these provisions and/or not complying with these principles?	Not applicable in this jurisdiction
30 Please cite a key decision by your court or regulator relating to the application of these principles.	Not applicable in this jurisdiction

GHANA



ABOUT BELA

Bentsi-Enchill, Letsa & Ankomah (BELA) is the leading law firm in Ghana, providing first-rate legal services for international and local clients in all sectors of the economy. As a full-service law firm, BELA is structured into specialised departments, namely Financial Institutions & Capital Markets, Corporate & Commercial, Energy & Infrastructure and Disputes. The Financial Institutions & Capital Markets department advises a wide range of clients in the banking and non-banking, insurance, investment banking and financial services sectors. It advises on legal and regulatory issues relating to debt and equity capital market transactions, banking and finance transactions, corporate restructuring, mergers and acquisitions, private equity, capital raising and due diligence issues. Its capital markets practice covers a wide range of international and domestic debt and equity capital markets transactions, including listed offerings and private placements.

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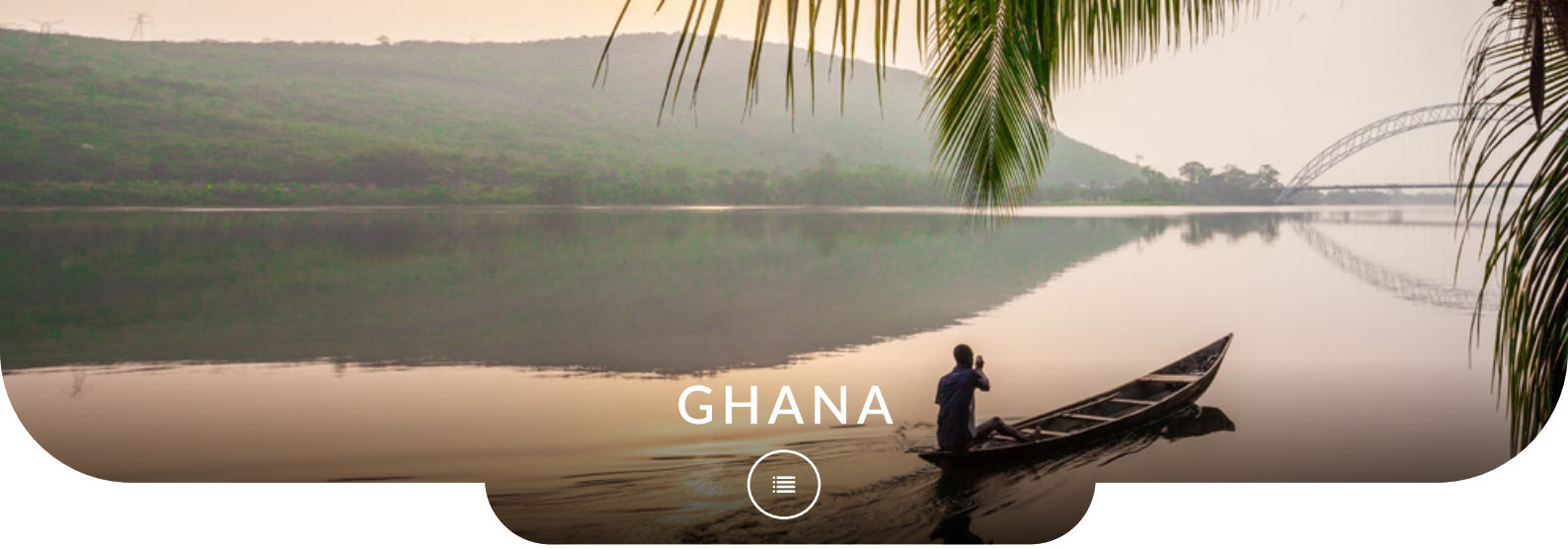

GHANA

ESSENTIALIA OF AN INSURANCE CONTRACT

QUESTION	ANSWER
01 What are the essential elements of an insurance contract?	The insurance contract between an insurer and an insured must state the following key elements : • payment of a premium by the insured to the insurer; • undertaking by the insurer to make a payment or provide a benefit to the insured; • the occurrence of a specified uncertain event which is adverse to the interests of the insured and upon which the insurer will make a payment to the insured; and • the amount or maximum amount of the liability undertaken by the insurer.
02 Please briefly explain each essential element.	Payment of a premium: An insured is required to pay consideration to the insurer in exchange for the undertakings by the insurer under the insurance contract. Until premium has been paid, an insurer is prohibited by the regulator from providing cover to the insured. Undertaking by insurer to compensate/provide a benefit to the insured: An insurer gives an undertaking under the contract to make a payment or provide a benefit to the insured on the occurrence of a specified uncertain event. Occurrence of a specified uncertain event: The insurance contract must specify the scope of the uncertain events that may occur which will adversely affect the insured and which will trigger a payment from the insurer to the insured. Limit on liability: An insurance contract which does not specify the amount or maximum amount of the liability taken by the insurer is void under Ghanaian law. The contract must state the amount/maximum amount of liability which the insurer will undertake on the occurrence of the specified uncertain event.
03 Is there a term that is mistakenly thought to be essential?	Yes, the term 'insurable interest' is a critical aspect of insurance claims and may be mistakenly thought to be an essential element of the insurance contract. A proposed insured does not need to state the nature or extent of his interest in the subject matter at the time of taking out the insurance policy. However, in order for an insurance claim to succeed, the claimant must show that he has an insurable interest at the time of the occurrence of the loss [Assad Fakhry And Sons v. Ghana Union Assurance Co., Ltd. [1981] GLR 163].

GHANA

INTERPRETING INSURANCE POLICIES

QUESTION	ANSWER
04 How are insurance contracts interpreted (i.e. strictly, loosely or a combination of both)?	Ghanaian courts generally apply a combination of both the strict and liberal interpretation of all deeds and documents, including insurance contracts. The position adopted by the courts is to examine the language used, examine all the clauses as a whole, and every clause compared with the other and one entire sense made out of them [Boateng v. Volta Aluminium Co Ltd [1984-86] 1 GLR 733-740].
05 Does the contra proferentum rule apply? Briefly explain.	The contra proferentem applies generally to agreements between parties, and will also apply to insurance contracts. There has not been any judgment of the court that excludes the application of the contra proferentem rule to insurance contracts.
06 Is there a particular rule of interpretation that applies to insurance contracts (and is receiving attention in your jurisdiction)?	No particular rule of interpretation applies to insurance contracts.

EXCLUSIONS

QUESTION	ANSWER
07 What is an exclusion / exception and how is it reflected in a policy?	Exclusion clauses define the boundaries of the risk to be insured by setting out what will not be covered under the contract of insurance. Exclusion clauses are captured clearly, and typically as a standalone clause in an insurance contract. The Insurance Act, 2021 (Act 1061) (the Insurance Act) however prohibits an insurer from excluding or restricting any liability or obligation the insurer may have towards an insured arising out of a regulatory, legal or contractual obligation on the part of the insurer.
08 Who bears the onus to establish that a claim is covered by the insurance contract and who bears the onus to prove an exclusion?	The insured is required to prove the loss and bears the onus of proving that the resulting claim is covered under the policy. The insurer bears the burden of proving the exception and proving an exclusion clause.
09 Are there specific interpretation principle(s) that apply to exclusions? If so, please elaborate	There is no 'specific' interpretation principle that applies to exclusions. In interpreting the clause, words of the exclusion clause are first construed by their ordinary meaning, and where there is an ambiguity, it is construed in favour of the assured [Houghton v Trafalgar Insurance Company Ltd [1953] 2 All ER 1409].

GHANA

WARRANTIES AND CONDITIONS PRECEDENT

QUESTION	ANSWER
10 What is the difference between a warranty and a condition precedent?	A condition precedent is a contractual term/condition required to be performed by a party before the obligations of the counterparty begin or liability accrues under the contract [Farmex Ltd v Royal Dutch Airlines (KLM) and Another [1987-88] 2 GLR 650-665]. A warranty is a contractual assurance, promise, or guarantee by one party that a particular statement of fact is true and may be relied upon by the other party.
11 Which types of warranties exist in your jurisdiction? (Please include examples)	There are two forms of warranties in our jurisdiction: Express warranty, where the warranty is expressly stated in the contract, e.g. a statement provided in the contract such as: "in the event of claim for loss arising under the Policy, it is warranted by the Assured that he/they will produce Documentary evidence in English of the amount of value of stocks held immediately prior to the happening of the loss." [Sfarjilani V. Royal Exchange Assurance [1961] GLR 768]. Express warranties may be: • affirmative (i.e. a warranty as to past or present fact existing when the contract was entered into, e.g. "it is warranted that stock contained in the lowest storey of the buildings is kept on racks or stillage at least 15cm above the surface of the floor"); or • promissory (i.e. a promise by the assured that a statement of affairs will continue, e.g. where an insured party warrants that property to be covered by a fire insurance policy will never be used for the mixing of explosives.) Implied warranty, where the warranty is implied by law or from the circumstances of the contract, e.g. it is assumed that the insurer will provide cover to the insured during the time or upon a circumstance specified in the policy.
12 How are conditions precedent implemented in insurance? (Please include examples)	A condition precedent must first be met for a party to exercise his rights in an insurance claim or to bring an action or suit upon the policy. For example, where a provision stipulates that required particulars are to be given within a reasonable period and that no claim is payable until this is done, such provision constitutes a condition precedent [Welch v Royal Exchange [1939] 1 KB 294]. Again, in order to bind an insurance company to satisfy a judgment debt awarded to the insured, the company must be given notice of the intended action either before the commencement of the action resulting in the judgment or within fourteen days of the commencement of the action [Damalie v. National Employers' Mutual General Insurance Association, Ltd. [1975] 2 GLR 175-176].

GHANA

INSURABLE INTEREST

QUESTION	ANSWER
13 What does insurable interest mean in your jurisdiction?	The Ghanaian courts have explained insurable interest as follows: "Where the insured is the owner of the subject-matter of insurance, he has undoubtedly an insurable interest in it, although this insurable interest is not confined to the interest arising from ownership alone. It includes every kind of interest that may subsist in or be dependent upon the subject-matter that is insured. An assured cannot recover upon a contract of insurance, unless he shows that he has an insurable interest in the subject-matter of the insurance." [Royal Exchange Assurance v. Tailor [1975] 1 GLR 265 – 284]
14 Please provide us with examples of insurable interests.	Examples of insurable interest: • A person in lawful possession of goods has an insurable interest in the goods [Assad Fakhry & Sons v. Ghana Union Assurance Co Ltd [1982] 1 GLR 163 – 173]; • The seller in a hire purchase agreement, who retains ownership of the vehicle, has an insurable interest in the vehicle [Royal Exchange Assurance v. Tailor [1975] 1 GLR 265 – 284]; or • A person has an insurable interest in his own life.
15 How is insurable interest treated in your jurisdiction?	In Ghana, it is a fundamental principle of insurance law that an insured person cannot recover under an indemnity policy unless he has an insurable interest in the subject matter in respect of which the claim is made [Azu Crabbe C.J. in Royal Exchange Assurance v. Tailor [1975] 1 GLR 265 – 284]. In order to make a claim under an insurance contract, therefore, it must be established that an insured has an insurable interest in the subject matter.

GHANA

REJECTION OF CLAIMS

QUESTION	ANSWER
16 When can an insurer reject a claim?	An insurer may reject a claim based on the terms expressly stated in the policy or contract. The following are some examples of general instances where an insurer may reject a claim: • where there has been a breach of warranty; • where the insured has no insurable interest; • where a condition precedent has not been met; • where the uncertain event was induced by the policyholder; • where the stock insured has been moved to a location outside the location agreed in the contract, without the prior approval of the insurer; or • where the risk involved occurs before or after the period of the policy.
17 What steps must an insurer take if it intends rejecting a claim?	Subject to the terms of the policy, where the insurer receives a claim notification by an insured, the insurer shall: • acknowledge receipt of the claim; • investigate the claim; • determine its liability; and • where the insurer determines that it is not liable, inform the policyholder in writing and give reasons for the rejection, and the reasons must be based on sound logic and valid grounds.
18 Are there certain protections afforded to insureds regarding rejection of claims (i.e. guidelines / rules by an Ombudsman / legislative body or precedent)? Please elaborate.	Where an insured is dissatisfied with the decision of the insurer to reject a claim, the insured may seek redress by following the procedure set out by the insurer for receiving, registering and resolving complaints. Where the insured is dissatisfied with the response of the insurer, the insured may make further complaints to the National Insurance Commission (the Commission). The insured may further refer the matter to arbitration, or resort to the court where the insured is dissatisfied with the resolution of the complaint by the Commission.

GHANA

MISREPRESENTATION AND NON-DISCLOSURE

QUESTION	ANSWER
19 What is the duty on an insured in respect of representations and disclosures to its insurer?	The insured is required to make disclosures of material facts he is personally aware of, but that the insurer does not know about and is not likely to suspect. As to what is deemed as knowledge of the fact, the actual knowledge of the fact on the part of the insurer is not essential. As far as the insurer knew he had the means of knowing it, it was within his knowledge. E.g. where the insurer knew that he could learn more about the exact nature of the subject matter, and he chose not to ascertain that material fact, it would be deemed to be within his knowledge [West African Examinations Council v. State Insurance Corporation [1977] 2 GLR 467-487]. The 'uberrimae fidei' rule, which is aimed at avoiding fraud and encouraging good faith, makes it obligatory for the insured to make honest representations and disclosures. An insured is however not under any obligation to make a disclosure of any information, which is waived by the insurer. The courts have also held that where a policy contains a recital such as that the declaration shall be the basis of the contract, the truth of the statements contained in the proposal is thereby made a condition of the liability of the insurer and any inaccurate answer will entitle the insurance company to repudiate liability [Royal Exchange Assurance v. Salifu Kojo And Others [1976] 1 GLR 449-457]
20 What is the remedy for an insurer when there is a material misrepresentation or a non-disclosure? Please explain.	Where there has been a material misrepresentation, the insurer is entitled to repudiate its liability under the contract and therefore reject a claim by the insured. Repudiation of liability means that the insurer has the right not to fulfil its obligations to the insured under the contract. The insurer has the right to repudiate liability on grounds that there has been a breach of a condition or warranty resulting from a misrepresentation by the insured [Salami v State Insurance Corporation [1967] GLR 442 – 446]. The insurer may, on the other hand, based on the materiality of the non-disclosure or misrepresentation (e.g. where the underlying aspects of the contract are misrepresented), repudiate the contract entirely. In this instance, the misrepresentations are fundamental to the existence of a binding contract between the parties.
21 Does the misrepresentation and/ or non-disclosure have to be linked to a claim made by the insured to enable an insurer to rely on the remedy? Please explain.	The misrepresentation does not need to be linked to a claim in order for the insurer to rely on the remedy. If it is a material misrepresentation, even if innocently made, the insurer is entitled to repudiate the contract [Guardian Assurance Co Ltd v Appiah [1967] GLR 47-49]. In determining what is 'material', the court in this case also cited and applied Preston and Colinvaux on The Law of Insurance (2nd ed.): "everything is material which will guide a prudent insurer in determining whether he will take the risk, and, if so, at what premium and on what conditions." Where such material information is misrepresented, therefore, the insurer is entitled to repudiate the contract. The insurer may also rely on a clause contained in the policy which makes any material misdescription, misstatement or omission a basis for the insurer to repudiate liability.

CAUSATION – PROXIMATE CAUSE

QUESTION	ANSWER
22 What is the test for causation?	Causation is basically the relationship between cause and effect. To prove causation in an insurance claim, one must show that the peril insured against actually happened and that the loss caused was due to the occurrence of the peril. The rule of proximity is used to determine causation in insurance law. Thus, only the proximate cause of a loss is to be looked at. Proximate cause means the direct, dominant, operative and efficient cause. If this cause is within the risks covered, the insurers are liable for the loss.
23 How have courts applied this test?	The Ghanaian courts have applied the test for causation generally in matters of tort or crime, and not in terms of insurance claims. We have not found any reported case on causation in insurance claims in our jurisdiction.
24 Was causation a point of contention in business interruption claims? If so, please elaborate	No, causation has not been discussed in terms of business interruption claims in any reported Ghanaian case.

GHANA

NOTIFICATION OF CLAIMS, PRESCRIPTION, AND TIME-BAR

QUESTION	ANSWER
25 What should be notified to an insurer and when must this be done?	The notification requirements will be determined by the terms of the insurance contract. An insurer is required to notify policyholders about the procedures, formalities and common timeframes for claims settlement. Usually, the insured is required to notify an insurer of a loss as soon as it occurs or as soon as is reasonably practicable. The insured must also send notification of claim to the insurer, and it must be made in a timely manner. The timeframes for making notifications must be set out in the insurer's claims manual and in the policy document. The policy document must contain directions as to what a claimant should do in the event of a loss, including early notification of a claim and the list of documents to be submitted.
26 What are the legislated time periods for an action to prescribe?	Under the Limitation Act, 1972 (NRCD 54) (the Limitation Act), the time limits after which an action cannot be brought pursuant to a contract are: • in respect of a simple contract, after the expiration of 6 years from when the cause of action accrued; and • action on a judgement after the expiration of 12 years from the date on which the judgment became enforceable. The prescribed time limits do not apply to any claim for specific performance of a contract or for an injunction or other equitable relief.
27 Are these legislated time periods capable of amendment by agreement in an insurance contract? Please elaborate.	The parties to an insurance contract may contractually agree to shorter time limits under the terms of the insurance contract, other than the statutorily prescribed time limits. However, the parties can only contractually agree to longer time limits (than those specified under the Limitation Act) where those extensions are permitted under the Limitation Act. Extensions are permitted in cases of: • fraud and mistake – the period of limitation does not begin to run until the aggrieved party has discovered the fraud, or could with reasonable diligence have discovered it; • disability – if, on the date when the action accrued, the person to whom the action accrued was under a disability, the period of the disability will not be taken into account in computing the period of limitation. The period of limitation will begin running from the earlier of the date when the person ceases to be under the disability, or the date when the person dies. A person will be deemed to be under a disability if he is an infant or of unsound mind; • acknowledgment of the debt by the liable party – the right of action to recover a debt begins to accrue when the liable party acknowledges the debt in writing; or • part payment of the debt – the right of action to recover a debt will accrue on the date the person liable makes any payment in respect of the debt. In these instances, where a party seeks to rely on the limitation periods, a claimant may successfully make an argument against the statutory time bar on these bases.

GHANA

REGULATORY PRINCIPLES IN RELATION TO CUSTOMERS

QUESTION	ANSWER
28 Are there any regulatory principles relating to the manner in which customers are treated?	The regulator has not issued specific guidelines on the treatment of customers. However, the Insurance Act has the following requirements as to how customers should generally be treated: • senior managers of an insurance company are required to promote a culture of fair treatment of policyholders and potential policyholders; • insurers must maintain risk management procedures where a customer is permitted to use the business relationship before verification; and • insurers must conduct business with integrity, optimum skill, due diligence and care.
29 How does your regulator apply these principles and are there consequences of breaching these provisions and/or not complying with these principles?	Policyholders may lodge complaints at the offices of the insurer, or at the bureau of the Commission to which complaints may be submitted. The Commission may, having regard to the protection of the public against financial loss arising out of the dishonesty, incompetence, malpractice or insolvency of insurers or insurance intermediaries, make resolutions on complaints lodged against insurers that may be adverse to the licensing of the insurer. Where an insurer is in breach of any of these, it will be required to pay the administrative fines provided under the law.
30 Please cite a key decision by your court or regulator relating to the application of these principles.	There are no such decisions by our courts yet. The regulator has however undertaken dispute resolution (through its internal arbitration process) in relation to claims made on insurers by policyholders.

KENYA

ABOUT A&K

A&K is the largest full-service corporate law firm in East Africa, with over 100 lawyers. It has developed specialist expertise in several practice areas, including corporate and commercial law, mergers and acquisitions, private equity, energy, infrastructure, project finance, real estate, competition, capital markets, banking and finance, intellectual property, tax, employment, dispute resolution and forensics, investigations and compliance. A&K operates Africa-wide, both in its own capacity and in collaboration with ALN firms across the continent. It has offices in Nairobi, Mombasa and affiliate offices in Dubai (ALN UAE|Anjarwalla Collins & Haidermota (AC&H)) and Tanzania (ALN Tanzania|A&K Tanzania) which provide corporate and commercial legal services. A&K has won various awards, including the 'African Law Firm of the Year – Large Practice' award at the African Legal Awards five times since the launch of the award in 2013.

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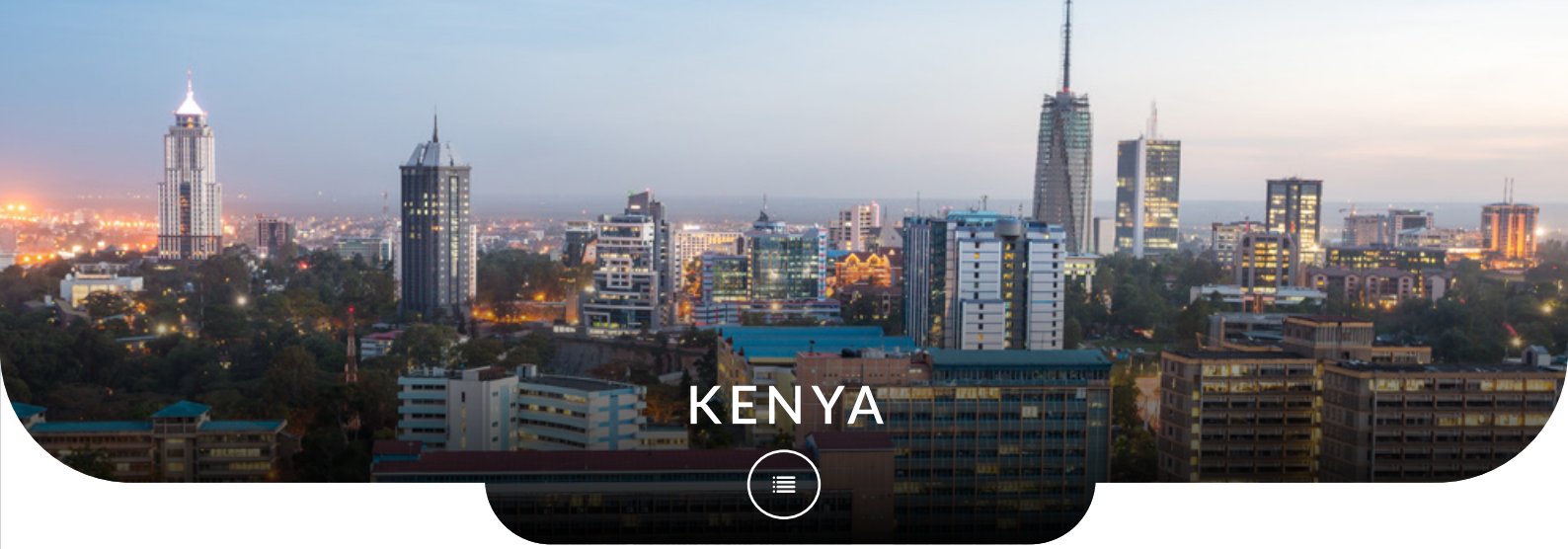
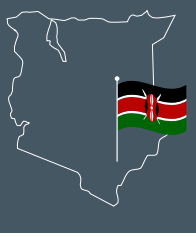


KENYA

ESSENTIALIA OF AN INSURANCE CONTRACT

QUESTION	ANSWER
01 What are the essential elements of an insurance contract?	The basic elements of contracts apply (that is, offer, acceptance and consideration). Further, the Insurance Act Chapter 487 of the Laws of Kenya (the Insurance Act) provides the following additional elements: • Capacity of the insurer (Capacity) • Payment of premium or commission • Certainty of the amount or maximum amount of liability undertaken by the insurer (Certainty) • All amounts to be expressed in Kenyan currency • Insurable interest
02 Please briefly explain each essential element.	Capacity: • All contracts for insurance and reinsurance must be with an insurer or intermediary who is registered with the Insurance Regulatory Authority (IRA). Payment of premium or commission: • The amounts of premium or commission paid, and the way they ought to be paid, must be included in the contract. Certainty: • The amount or maximum amount of the liability undertaken by an insurer must be certain at the point of contracting, otherwise the contract would be void. Kenyan currency: • Amounts and values expressed in contracts for insurance must be in Kenyan Shillings, unless, with the approval of the Insurance Regulatory Authority, the parties contract otherwise. • This requirement does not apply to insurance contracts for aviation, marine, and engineering, and any other industry/sector prescribed by the Ministry responsible. Insurable interest: • Kenya courts have held that, in determining whether a contract of insurance exists, the insured must have an insurable interest. Insurable interest is essentially the pecuniary or proprietary interest which is at stake or in danger should the insured opt to take out an insurance policy on the subject. [Lion of Kenya Insurance Company Limited v Edwin Kibuba Kihonge [2018] eKLR] • The existence of an insurable interest is also a requirement under the Insurance Act.
03 Is there a term that is mistakenly thought to be essential?	None that we are aware of.



KENYA

INTERPRETING INSURANCE POLICIES

QUESTION	ANSWER
04 How are insurance contracts interpreted (i.e. strictly, loosely or a combination of both)?	Kenyan Courts have applied the following principles in the interpretation of insurance contracts: • Courts must avoid over-concentration on the meaning of single words or phrases. They ought to look at contracts more broadly, contextualizing them against the commercial background of the transaction. [Imara Steel Mills Ltd v Heritage Insurance Co. Kenya Ltd & 38 others [2016] eKLR] • Ambiguities in an insurance contract should be resolved in favour of the insured. [Uzuri Foods Limited v Occidental Insurance Company Limited [2020] eKLR] • Limitations of liability should be construed in a manner that precludes the insurer from non-compliance with its obligations. [Masari Distributors Limited v UAP Provincial Insurance Company Limited [2017] eKLR] • Insurance contracts are contracts of uberrimae fidei (utmost good faith) and the insured is under a legal obligation to disclose all material information which may influence or have an impact on the risk that is being insured. Failure to do so voids the contract. [Co-Operative Insurance Company Ltd v David Wachira Wambugu [2010] 1 KLR 254]
05 Does the contra proferentum rule apply? Briefly explain.	Yes, the contra proferentum rule applies where there are ambiguities in an insurance contract. The Kenyan Courts have applied the principle that ambiguities in an insurance contract should be resolved in favour of the insured. [Uzuri Foods Limited v Occidental Insurance Company Limited [2020] eKLR] The principle of contra preferentum is a general principle in law of contract which applies whether pleaded by parties or not. [Direct Line Assurance Co. Ltd v Peter Micheni Muguo [2018] eKLR]
06 Is there a particular rule of interpretation that applies to insurance contracts (and is receiving attention in your jurisdiction)?	The Courts have upheld the principle that, where there are ambiguities in an insurance contract, such ambiguities should be construed against the insurance company. Further, that insurance contracts are contracts of adhesion, therefore they must be construed strictly against the insurer in order to protect the insured's interest. [Masari Distributors Limited v UAP Provincial Insurance Company Limited [2017] eKLR] and [Uzuri Foods Limited v Occidental Insurance Company Limited [2020] eKLR]

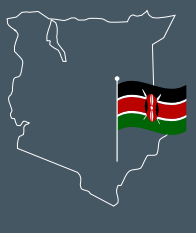
KENYA

EXCLUSIONS

QUESTION	ANSWER
07 What is an exclusion / exception and how is it reflected in a policy?	Exclusion/exception clauses are clauses that set out the specific risks that will not be covered in any event under the insurance policy. They are generally reflected in a separate section of the insurance policy.
08 Who bears the onus to establish that a claim is covered by the insurance contract and who bears the onus to prove an exclusion?	The general rule is that the burden of proof of establishing that a claim is covered by the insurance contract is borne by the insured, while the insurer bears the onus to prove an exclusion. [Uzuri Foods Limited v Occidental Insurance Company Limited [2020] eKLR]
09 Are there specific interpretation principle(s) that apply to exclusions? If so, please elaborate	Exclusion or exemption clauses should be clear and unambiguous. If it is clear and unambiguous, the Court will generally enforce it. [Imara Steel Mills Ltd v Heritage Insurance Co. Kenya Ltd & 38 others [2016] eKLR]

WARRANTIES AND CONDITIONS PRECEDENT

QUESTION	ANSWER
10 What is the difference between a warranty and a condition precedent?	The position in Kenya is - while a warranty is a contractual term under which a contracting party gives an undertaking to another party that specific facts or conditions are true or will be true, a condition precedent is a contractual term that qualifies a contractual obligation by making its enforceability contingent on occurrence of an uncertain future event.
11 Which types of warranties exist in your jurisdiction? (Please include examples)	The types of warranties in Kenya may be express or implied. Under the Marine Insurance Act, Cap 390 (the Marine Act), for instance, an express warranty must be included in, or written upon, the insurance contract, or must be contained in some document incorporated by reference into the contract.
12 How are conditions precedent implemented in insurance? (Please include examples)	Compensation by an insurer will not take place until the condition precedent occurs e.g. an accident in the case of a motor insurance contract or illness in the case of medical insurance.



KENYA

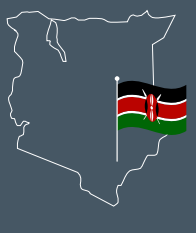
INSURABLE INTEREST

QUESTION	ANSWER
13 What does insurable interest mean in your jurisdiction?	The courts have defined insurable interest at a general level to mean that "the party to the insurance contract who is the insured or policy holder must have a particular relationship with the subject matter with the insurance whether that be "a life or property or a liability to which he might be exposed", and more specifically as "the pecuniary or proprietary interest which is at stake or in danger should the insured opt to take out an insurance policy on the subject matter. It is the interest that the insured stands to lose if the risk attaches." [Lion of Kenya Insurance Company Limited v Edwin Kibuba Kihonge [2018] eKLR] Insurable interest must have a pecuniary value.
14 Please provide us with examples of insurable interests.	Motor vehicle insurance: • the owner of the motor vehicle has an insurable interest in his/her vehicle. Life insurance (as provided under section 94 of the Insurance Act) • a husband, in the life of his wife; • a wife, in the life of her husband; • any person, in the life of another upon whom he is wholly or in part dependent for support or education; • a corporation or other person, in the life of an officer or employee thereof.
15 How is insurable interest treated in your jurisdiction?	In Ghana, it is a fundamental principle of insurance law that an insured person cannot recover under an indemnity policy unless he has an insurable interest in the subject matter in respect of which the claim is made [Azu Crabbe C.J. in Royal Exchange Assurance v. Tailor [1975] 1 GLR 265 – 284]. In order to make a claim under an insurance contract, therefore, it must be established that an insured has an insurable interest in the subject matter.

KENYA

REJECTION OF CLAIMS

QUESTION	ANSWER
16 When can an insurer reject a claim?	The instances where an insurer may reject a claim would usually be set out in the insurance contract. The common instances include: • Where the insured has no insurable interest at the time the insured loss occurs. • Breach of or failure to comply with a condition precedent in the insurance contract. • Breach of a warranty contained in the insurance contract. • Failure to comply with the general terms of the insurance contract, such as timelines for reporting losses or raising claims. • Fraud or connivance on the part of the insured. • Where the actual insured risk does not occur.
17 What steps must an insurer take if it intends rejecting a claim?	If, in the opinion of the insurer, the loss is not covered by the insurance policy, the insurer shall, after exhausting its internal mechanisms on declining a claim, immediately send a notification to the claimant explaining the reasons for declining it. The insurer is also required to promptly notify the insured and to provide reasons why the insurer is not responsible for any part of the claim or if the amount offered is different from the amount claimed. The Insurance Act prescribes a time period of 90 days from the date of reporting the claim or where the determination of liability is by a court, for an insurer to admit or deny liability, determine the amount due, establish the identity of the claimant; and pay the claim. A claim that is reported late should not be repudiated without establishing reasons for the late notification. With respect to motor insurance claims, the Insurance (Motor Vehicle and Third Party Risks) Act, Cap 405 (the Motor Insurance Act) prescribes specific points that an insurer must confirm before settling a claim arising out of the use of the vehicle on a road that has resulted in the death or bodily injury of a person, such as: • that a court has entered a judgment against the insured setting out the judgment sum and costs payable in respect of causing death or bodily harm to any person; • that the insurer had notice of the bringing of proceedings before or within thirty days after the commencement of the proceedings in which the judgment was given; • that execution of a judgment has not been stayed pending an appeal; • the insurance policy had not been cancelled by mutual consent before the occurrence of the event which was the cause of the death or bodily injury giving rise to the liability; • that the claimant had, before determination of liability at the request of the insurer, subjected themselves to medical examination by a certified medical practitioner; and • that the insurer had not before, or within three months after the commencement of the proceedings in which the judgment was given, obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it. In effect, the insurer may reject a claim on the basis of these points.
18 Are there certain protections afforded to insureds regarding rejection of claims (i.e. guidelines / rules by an Ombudsman / legislative body or precedent)? Please elaborate.	Any insurance customer may lodge a written complaint with the Commissioner of the IRA against a regulated entity in relation to the provision of its services.



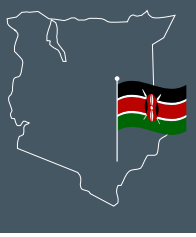
KENYA

MISREPRESENTATION AND NON-DISCLOSURE

QUESTION	ANSWER
19 What is the duty on an insured in respect of representations and disclosures to its insurer?	The insured is subject to a duty of utmost good faith and is required to disclose material facts at the time of appraisal and filling in the proposal form to induce the making of an insurance contract. This duty has been provided for in different forms in Kenyan law, such as under the Motor Insurance Act of the Laws of Kenya which allows an insurer to avoid a policy on grounds that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular. Under the Marine Insurance Act of the Laws of Kenya, where a contract of marine insurance is entered into by an agent on behalf of the assured, the agent is required to disclose to the insurer: • every material circumstance which is known to him/herself, and the agent to insure is then deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to him/her; and • every material circumstance which the assured is bound to disclose unless it comes to his/her knowledge too late to communicate it to the agent.
20 What is the remedy for an insurer when there is a material misrepresentation or a non-disclosure? Please explain.	A contract of insurance is voidable for misrepresentation of material facts or non-disclosure of material facts. The test that has been applied by Kenyan courts is whether the facts misrepresented or not disclosed were material to induce the insurer to decline not to enter into a contract with the insured. [Monarch Insurance Company Limited v Swaleh Moi Juma [2020] eKLR and BMK v AIG Kenya Insurance Ltd [2020] eKLR]
21 Does the misrepresentation and/or non-disclosure have to be linked to a claim made by the insured to enable an insurer to rely on the remedy? Please explain.	No. As mentioned above, what is relevant is whether or not the facts misrepresented or not disclosed were material enough to induce the insurer to decline to enter into a contract with the insured. If a misrepresentation and/or non-disclosure is deemed material, the insured can avoid the contract in its entirety and the insured would not be able to enforce any claim under the contract regardless of its validity or that it does not relate to the misrepresentation or non-disclosure. Misrepresentation or non-disclosure impacts the validity of an insurance contract. [Kenyan Alliance Insurance Company Limited v Pizzaro Kaungania & another [2018] eKLR and BMK v AIG Kenya Insurance Ltd [2020] eKLR]

CAUSATION – PROXIMATE CAUSE

QUESTION	ANSWER
22 What is the test for causation?	What is the test for causation? Kenyan courts have held that the doctrine of causation as applied in English courts would apply i.e. what was the proximate cause for the injury/loss suffered, based on fact and common-sense principles? [Muthama Gemstones (K) Ltd V CMC Motors Group Ltd & Another[2012] eKLR]
23 How have courts applied this test?	The same position would apply, i.e. that the insured peril must be the cause of the loss or damage in order for an insured to recover under the policy. The courts have held that proximate cause means a cause which is a natural and continuous chain unbroken by any intervening event, produces injury and without which injury would not have occurred. It is, however, not necessary for an insured to prove precisely how the casualty occurred, but he must show that the proximate cause falls within the perils insured against. For example, the insured will discharge his burden under an all risks policy if he can show that the loss occurred accidentally. [LWW (Suing As The Administrator Of The Estate Of BMN) Deceased V Charles Githinji [2019] eKLR] [Uzuri Foods Limited V Occidental Insurance Company Limited [2020] eKLR]
24 Was causation a point of contention in business interruption claims? If so, please elaborate	While there have been no decided cases so far on business interruption claims related to the Covid-19 pandemic, our view is that there would indeed be contention between the insurer and the insured as to whether the pandemic was the proximate cause of the loss/damage suffered. For example, in circumstances where business premises or manufacturing facilities have been closed as part of a mandatory governmental order or voluntarily closed by the business owner as part of Covid-19 containment measures or out of fear of contamination, but the physical facilities are otherwise still habitable and uncontaminated, it is possible that a generic business interruption cover will not respond, since there has been no property damage / no direct physical loss. By contrast, if the premises have become physically contaminated and uninhabitable due to coronavirus, there may be a basis for a policyholder to claim that a direct physical loss has occurred. Business owners considering Covid-19-related insurance claims would also need to bear in mind the specific exclusions in their insurance policies which may preclude coverage. Generic commercial property insurance and business interruption policies will typically exclude damage arising from epidemics or pandemics. We have also seen insurers in Kenya respond to this issue by developing bespoke Covid-19 covers.



KENYA

NOTIFICATION OF CLAIMS, PRESCRIPTION, AND TIME-BAR

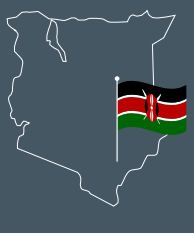
QUESTION	ANSWER
25 What should be notified to an insurer and when must this be done?	Same position in Kenya. Insurance policies will have a clause requiring the insured to report to the insurer any injury/loss that is covered by the insurance policy within a given timeframe usually specified in the Insurance policy.
26 What are the legislated time periods for an action to prescribe?	Under section 4 of the Limitation of Actions Act (Chapter 22, Laws of Kenya), the following actions may not be brought after the end of six years from the date on which the cause of action accrued: • actions founded on contract; • actions to enforce a recognizance; • actions to enforce an award; • actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture; or • actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law. In addition, an action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.
27 Are these legislated time periods capable of amendment by agreement in an insurance contract? Please elaborate.	Same position in Kenya i.e. the Limitation of Actions Act only provides for the maximum duration of time beyond which a relevant claim cannot be brought. Contracting parties (including under a policy of insurance) are therefore capable of providing for shorter periods of time than those under law.

REGULATORY PRINCIPLES IN RELATION TO CUSTOMERS

QUESTION	ANSWER
28 Are there any regulatory principles relating to the manner in which customers are treated?	Yes, the IRA also holds the view that treating customers fairly (TCF) is an outcome-based regulatory approach intended to ensure fair treatment of policyholders and beneficiaries under insurance policies. It requires regulated entities to demonstrate fair treatment of their customers at all stages of their relationship from product design to marketing, advice before point of sale, at the point of sale and after sale stages. TCF Provisions are enshrined in laws in the following ways: • Through various provisions of the Constitution of Kenya relating to consumer rights (article 46), right to information (article 35), and fair administrative procedures (article 47). • Through the Consumer Protection Act (Act No. 46 of 2012, Laws of Kenya). • Through the Competition Act (Act No. 12 of 2010, Laws of Kenya) which has provisions on consumer welfare, including protections against false or misleading representations and unconscionable conduct. • Through various provisions of the Insurance Act which is implemented by the IRA; • Through guidelines issued by the IRA, including the Guideline to the Insurance Industry on Market Conduct for Insurers, 2013, that has TCF provisions.

REGULATORY PRINCIPLES IN RELATION TO CUSTOMERS

QUESTION	ANSWER
29 How does your regulator apply these principles and are there consequences of breaching these provisions and/or not complying with these principles?	Under the Insurance Act, the Commissioner of Insurance may take administrative action against a member of the insurance industry where he has reason to believe that: • an offence under the Insurance Act or a default in complying with any provisions of the Act or subsidiary legislation made thereunder is being committed by such member; • the affairs of such member are being conducted in a manner which is detrimental or prejudicial to the interests of that member, any policyholder, the economy or the insurance industry; or • an insurer may be unable or is likely to become unable to meet his obligations or, in the case of long-term insurance business, to fulfil the reasonable expectation of policyholders or potential policyholders; The Commissioner may also take administrative action where the Commissioner: • receives a requisition signed by not less than ten per cent of policyholders holding policies of life assurance in force respectively for not less than three years with an insurer and which on maturity will be for a total value of not less than KES 1,000,000, that an investigation be held into the affairs of that insurer; or • receives a requisition signed by not less than one-tenth of the shareholders holding not less than one-tenth of the issued share capital of an insurer, that an investigation be held into his affairs. The administrative actions that the Commissioner may take include: • a direction to be furnished with additional information; • a direction that the person concerned does not dispose of or otherwise deal with or remove from Kenya an asset in Kenya specified in the notice; • prohibition against a member of the insurance industry from entering into any particular transaction or class of transactions; or • ordering an investigation into the affairs of the affected person. Failure to comply with the above provisions is an offence and, on conviction, a person shall be liable to a fine of not more than KES 5,000, and if the offence is a continuing one, a further fine of KES 100 for every day that the offence continues. Under section 67A of the Insurance Act, the Commissioner may also at any time and from time to time cause an inspection to be made by a person authorized by the Commissioner, of any insurer and any other person registered under the Insurance Act, and of its books, accounts and records. The powers of the Commissioner following such investigation include intervening in the management of the insurer/person registered under the Act. In addition to the above provisions, the Competition Act also provides that contravention of the consumer welfare provisions thereunder is an offence. On conviction, a person shall be liable to imprisonment for a term not exceeding five years or to a fine not exceeding KES 5,000,000, or both. The Competition Authority of Kenya may initiate investigations into a consumer complaint on its own initiative or upon receipt of information or a complaint from any person, government agency, ministry or consumer body.

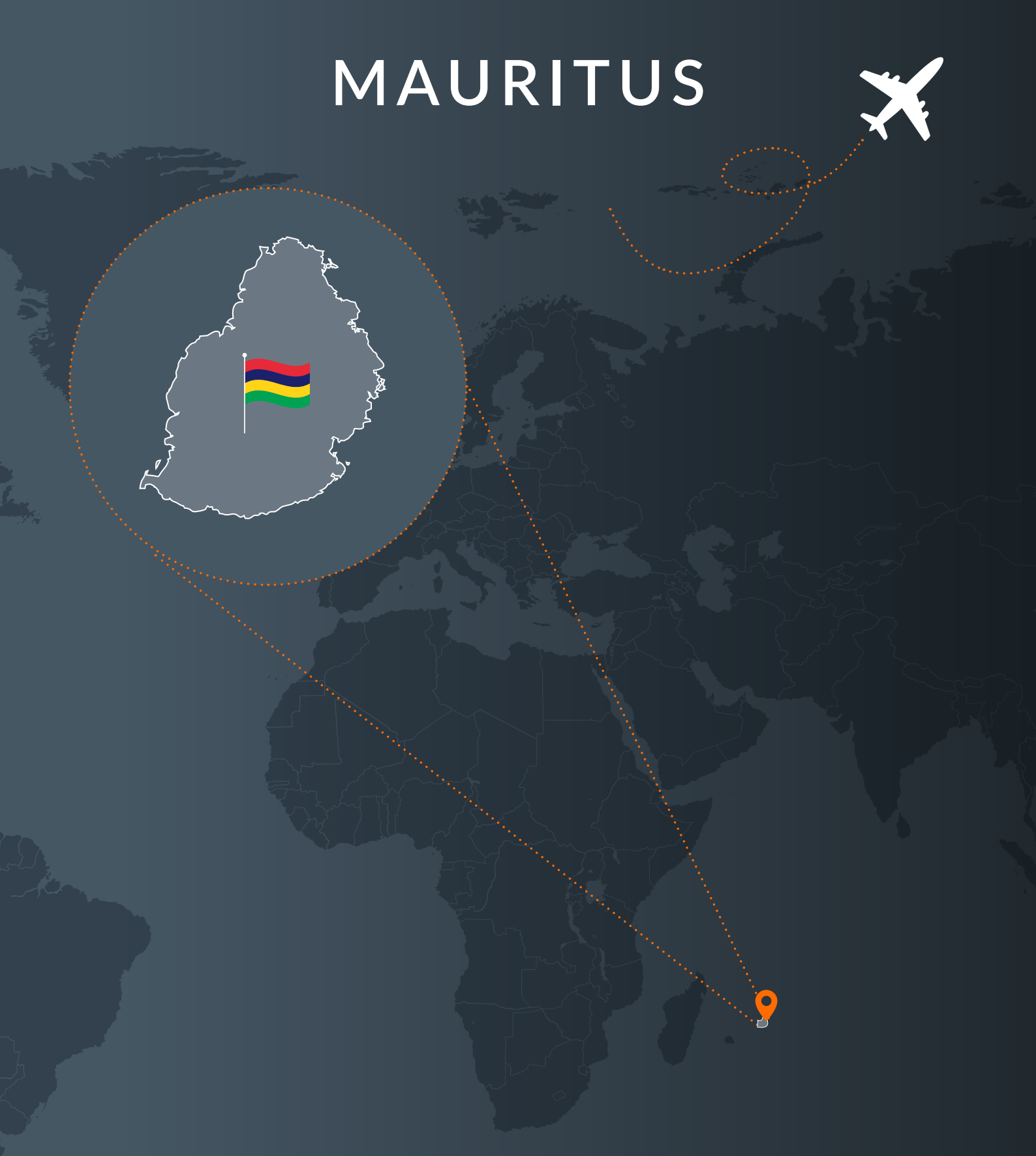


KENYA

REGULATORY PRINCIPLES IN RELATION TO CUSTOMERS

QUESTION	ANSWER
30 Please cite a key decision by your court or regulator relating to the application of these principles.	In April 2020, the IRA issued a guidance note to the insurance industry in Kenya specifically addressing challenges brought about by the Covid-19 pandemic. The following are key highlights from this guidance that aim to promote TCF principles: • insurers to expeditiously process and settle all claims and payments related to the pandemic; • insurers to pay last expense claims or death benefits arising out of the pandemic expeditiously, even in cases of delayed submission or absence of required documentation; • insurers not to reject claims due to delayed reporting and challenges that may arise out of Government directives relating to containment of the pandemic; • insurers should put in place contingency measures to enhance customer services, such as deferral of payment of premium or renewal premium, including considering offering premium holidays and payment of premium in instalments; • insurers to avail policyholders of a three-month grace period which may be over and above any contractual premium holidays already in place for existing policies; • insurers to be proactive and clearly explain and communicate to their policyholders on the policy coverage and applicable exclusions; • insurers not to introduce new product exclusions or change product terms and conditions for existing products without prior approval of the IRA; and • insurers to communicate to existing policyholders which policies are likely to be impacted by the pandemic.

MAURITUS



ABOUT BLC ROBERT & ASSOCIATES

BLC Robert & Associates Ltd is the leading independent business law firm in Mauritius. It serves a spectrum of corporate and institutional clients, multinational companies, financial institutions, funds and public sector bodies. With deep expertise, a client-centric approach and service excellence, it helps clients investing or doing business in Africa and Asia via the Mauritius IFC to achieve their objectives, close deals, protect and preserve their business interests. The firm's lawyers are multi-specialists, with in-depth expertise in diverse sectors, and they have strong capabilities to provide clients with tailored commercial, pragmatic solutions to complex legal matters. BLC Robert & Associates, which has been named as 'Law Firm of the Year in Mauritius' by both Chambers Global and IFLR, is a member of Africa Legal Network (ALN), an alliance of independent, highly-ranked firms in 13 countries.

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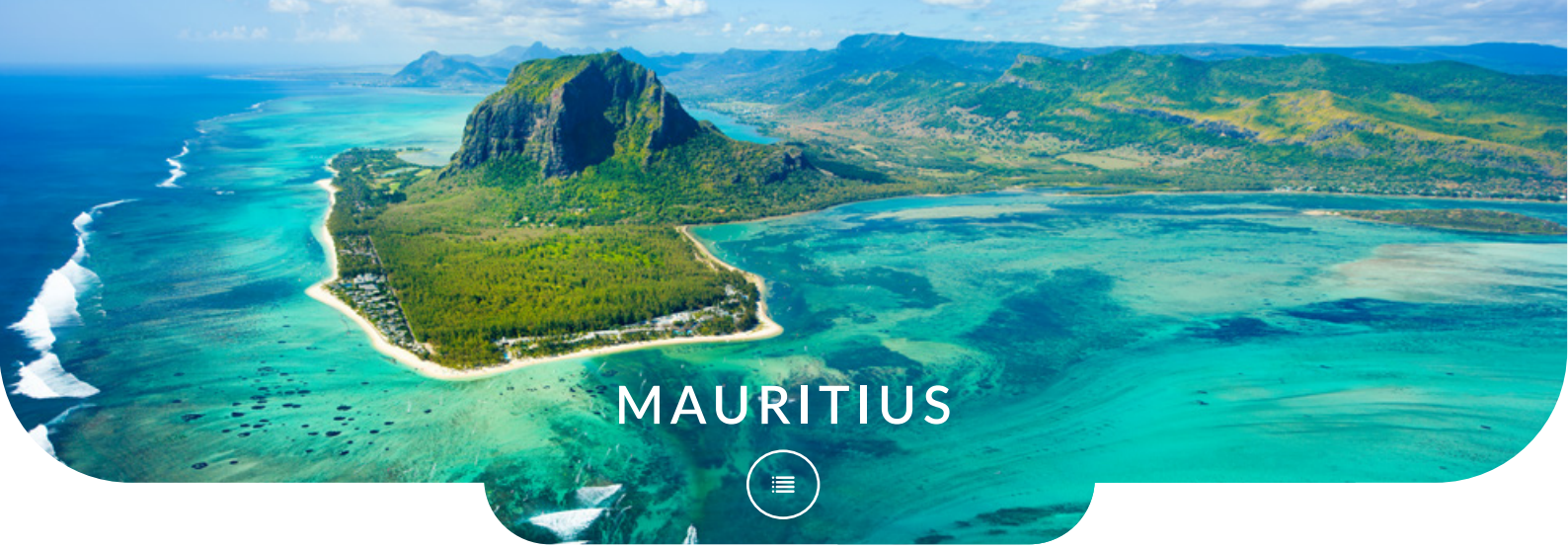


MAURITIUS

ESSENTIALIA OF AN INSURANCE CONTRACT

QUESTION	ANSWER
01 What are the essential elements of an insurance contract?	The essential elements of an insurance contract are: • Payment of a premium by the insured (premium) • Payment of compensation by the insurer (sum insured) • The occurrence of a risk. In addition, the policy document must be dated the day it is concluded. The duration of the insurance contract must be clearly stated in bold characters.
02 Please briefly explain each essential element.	Premium: • The premium, calculated on the basis of the risk to be insured, must be stated in the insurance contract and must be paid at the agreed time by the insured. Compensation for Loss: • The amount of the insurance must be specified in the insurance contract. Uncertain event: • All insurance contracts have an element of uncertainty. Liability only arises when the uncertain event occurs. The event is dependent on a peril. Whether or not the peril causes damage is the risk. The transfer of the risk underpins insurance contracts.
03 Is there a term that is mistakenly thought to be essential?	Not applicable in this jurisdiction.

MAURITIUS

INTERPRETING INSURANCE POLICIES

QUESTION	ANSWER
04 How are insurance contracts interpreted (i.e. strictly, loosely or a combination of both)?	The following are the general rules concerning the interpretation of contracts, which would apply to the interpretation of an insurance contract: • The intention of the contracting parties must be determined and, if the interpretation of a clause may give rise to two meanings, the meaning that will produce an effect is favoured. • In addition, if the interpretation of a clause may give rise to two meanings, the meaning that is closest to the subject matter of the contract is favoured.
05 Does the contra proferentum rule apply? Briefly explain.	Yes. In case of doubt, a contract is interpreted in favour of the party who has contracted the obligations and against the party who has provided the provisions.
06 Is there a particular rule of interpretation that applies to insurance contracts (and is receiving attention in your jurisdiction)?	No specific rule applies to the interpretation of insurance contracts. In case of ambiguity, the court would apply the rules of interpretation of contracts as specified above, which are contained in the Mauritian Civil Code.

EXCLUSIONS

QUESTION	ANSWER
07 What is an exclusion / exception and how is it reflected in a policy?	An exclusion / exception clause is used to limit, qualify or define the risks that are insured. This clause is specified in a separate clause in the insurance contract.
08 Who bears the onus to establish that a claim is covered by the insurance contract and who bears the onus to prove an exclusion?	The insured bears the burden of establishing that the peril that caused the loss is covered in the insurance contract, and the insurer bears the burden of establishing that an exclusion exception applies in the context.
09 Are there specific interpretation principle(s) that apply to exclusions? If so, please elaborate	An exclusion / exception would be interpreted strictly because it operates against the interest of the insured.

MAURITIUS

WARRANTIES AND CONDITIONS PRECEDENT

QUESTION	ANSWER
10 What is the difference between a warranty and a condition precedent?	A warranty is a contractual term in which one contracting party gives an undertaking or assurance to another party that specific facts or conditions are presently true or will be true. A condition precedent is a particular type of contractual term which qualifies a contractual obligation by making its enforceability and continued existence contingent on the condition.
11 Which types of warranties exist in your jurisdiction? (Please include examples)	The law does not distinguish between types of warranties and it will be up to the contracting parties to explain the nature and extent of a warranty if this is specified in a contract.
12 How are conditions precedent implemented in insurance? (Please include examples)	A condition precedent is in essence a suspensive condition. The obligation is not enforceable until the occurrence of an uncertain future event. For example, in a fire insurance policy an insurer's obligation to pay the sum insured is only enforceable if the insured's factory burns down.

INSURABLE INTEREST

QUESTION	ANSWER
13 What does insurable interest mean in your jurisdiction?	The Mauritian Civil Code provides for two categories of insurable interests: (i) insurance concerning the life, health or integrity of the insured, and (ii) insurance against material damage or loss of an object (Article 1983-3 and Article 1983-7).
14 Please provide us with examples of insurable interests.	• Insurance guaranteeing a banking facility • Motor Vehicle Insurance (on all risks)
15 How is insurable interest treated in your jurisdiction?	In Mauritius, the insured must have an insurable interest at the time the insurance contract is made and at the time the risk materialises.

MAURITIUS

REJECTION OF CLAIMS

QUESTION	ANSWER
16 When can an insurer reject a claim?	Subject to the terms of the insurance contract, the following are examples of situations when the insurer may reject a claim: • Where the loss does not fall within the terms of the indemnity provided under the policy. • Where cover is excluded in terms of an exclusion clause. • Where a condition precedent to the insurer's liability is not met. • Where the insured fails to perform a material obligation under the insurance contract, for example defaulting on the payment of premiums. • Where the insured, at the time of the loss, lacks an insurable interest in the property damaged or destroyed. • Where the insured has not notified, claimed or instituted action within the required time.
17 What steps must an insurer take if it intends rejecting a claim?	The insurer must notify the insured in writing that it intends to reject the claim and give reasons motivating the intention to reject the claim.
18 Are there certain protections afforded to insureds regarding rejection of claims (i.e. guidelines / rules by an Ombudsman / legislative body or precedent)? Please elaborate.	Yes. An insured may file a complaint with the Office of the Ombudsperson for Financial Services and the latter may make an award of compensation against an insurance company, where appropriate. The Ombudsperson for Financial Services may also issue directives. However, before a complaint is filed with the Office of the Ombudsperson for Financial Services the insured must have lodged a complaint with the insurance company. Only after having made the complaint, and if still aggrieved or having received no reply from the insurance company three months from the date of the complaint, the insured may lodge the complaint with the Ombudsperson for Financial Services. A complaint may be lodged both by post or online.

MAURITIUS

MISREPRESENTATION AND NON-DISCLOSURE

QUESTION	ANSWER
19 What is the duty on an insured in respect of representations and disclosures to its insurer?	The insured has an obligation to truthfully and correctly disclose known circumstances or facts that are material to the insurer's assessment of the risk under the policy concerned. This obligation stems from the Mauritian Civil Code. If the insured intentionally fails to disclose all material information or makes a fraudulent statement at the time of the conclusion of the insurance contract, the insured will not be liable for any damages or loss arising from a willful or fraudulent omission or a material misrepresentation. The material misrepresentation or non-disclosure which induces the insurance contract would occur during the conclusion of the insurance contract, or upon its renewal. It is to be noted that an omission or incorrect declaration made by the insured without any bad faith does not render the insurance contact null and void.
20 What is the remedy for an insurer when there is a material misrepresentation or a non-disclosure? Please explain.	The insured is entitled to avoid the contract in the event of misrepresentation or material non-disclosure. The insurer may also claim back any compensation paid to the insured by the insurer.
21 Does the misrepresentation and/or non-disclosure have to be linked to a claim made by the insured to enable an insurer to rely on the remedy? Please explain.	No.

CAUSATION – PROXIMATE CAUSE

QUESTION	ANSWER
22 What is the test for causation?	There must be a direct causal link between the act and the result.
23 How have courts applied this test?	The insured peril must be the cause of the loss or damage for an insured to receive compensation under the policy.
24 Was causation a point of contention in business interruption claims? If so, please elaborate	There are no reported cases on this point.

MAURITIUS

NOTIFICATION OF CLAIMS, PRESCRIPTION, AND TIME-BAR

QUESTION	ANSWER
25 What should be notified to an insurer and when must this be done?	The insured has the obligation to notify the insurer, as soon as he becomes aware and no later than five days, of any sinister matters which can entail the guarantee of the insurer. (Article 1983-20 of the Mauritius Civil Code).
26 What are the legislated time periods for an action to prescribe?	By virtue of Article 1983-37 of the Mauritian Civil Code, an action under an insurance act is time-barred five years from the date of the occurrence of the event. However, where there is a false or incorrect declaration or an omission to notify the insured of the event, this five-year period starts from the time the insured became aware of the false or incorrect declaration or omission. Where there has been a peril, this delay starts to run from the day the interested parties became aware of the peril, provided they establish they were not aware until the date they became aware.
27 Are these legislated time periods capable of amendment by agreement in an insurance contract? Please elaborate.	No, these prescription periods cannot be amended by a contractual provision.

REGULATORY PRINCIPLES IN RELATION TO CUSTOMERS

QUESTION	ANSWER
28 Are there any regulatory principles relating to the manner in which customers are treated?	Policyholders must be treated fairly. In that regard, the regulator is mandated under the Insurance Act 2005 to ensure fair treatment of policyholders.
29 How does your regulator apply these principles and are there consequences of breaching these provisions and/or not complying with these principles?	Not applicable in this jurisdiction.
30 Please cite a key decision by your court or regulator relating to the application of these principles.	Not applicable in this jurisdiction.

MOZAMBIQUE

ABOUT ABCC

Avillez, Bacar, Centeio & Cambule (ABCC) (formerly SCAN) is a first-tier law firm in Mozambique, which was established in 2009 by combining a team of lawyers with around 25 years of experience. The firm has represented government institutions and public companies, as well as private entities, including major engineering companies and foreign organizations, in matters related to natural resources (water, waste, energy, construction and civil engineering, and logistics sectors). It has also advised on many of the largest and most important transactions in Mozambique in the areas of commercial law, mergers and acquisitions, privatizations, banking, financial, tax and customs, and acted on numerous lawsuits, including recovery claims and arbitration. ABCC has been recognised in the main legal directories such as Chambers Global, IFRL1000 and Legal 500.

ABCC
AVILLEZ BACAR CENTEIO & CAMBULE

MOZAMBIQUE

ESSENTIALIA OF AN INSURANCE CONTRACT

QUESTION	ANSWER
01 What are the essential elements of an insurance contract?	In addition to the normal contractual requirements of offer (by the insured) and acceptance (by the insurer), parties should be ad idem on the following essential elements of the insurance contract: • Payment of a premium by insured (premium) • Occurrence of an uncertain future event which triggers insurer's obligations (risk); and • Compensation for the insurer (sum insured).
02 Please briefly explain each essential element.	Premium: Premium is the counterpart of the agreed coverage. The insurer undertakes to cover a specific risk and is required to pay the agreed instalment if the uncertain event occurs. The insured is required to pay the premium. Uncertain event/risk: Risk plays a core role in the insurance contract. It is defined as the harmful, future and uncertain event which is not reliant on the will of the insured, against which occurrence is intended to be covered. Compensation: The insurer should pay the insured capital to the insured as soon as the damages are known.
03 Is there a term that is mistakenly thought to be essential?	The insurable interest. For the conclusion of the insurance contract, the insured must have an interest worthy of legal protection in relation to the covered risk.

MOZAMBIQUE

INTERPRETING INSURANCE POLICIES

QUESTION	ANSWER
04 How are insurance contracts interpreted (i.e. strictly, loosely or a combination of both)?	The Insurance Regime establishes, as a general rule, that the interpretation of the adhesion clauses of the insurance contract (written by the insurer) without individual negotiation, when ambiguous or contradictory, must be made in the most favourable sense to the insured. With regard to the interpretation of the clauses negotiated between the parties, in case of doubt, the general rule of the Civil Code will be applied, according to which the interpretation must be made taking into account the declarant's real will. If not known, the declarant's real will must be deduced. However, the interpretation of these clauses must have a minimum correspondence to the text of the contract clauses, even if imperfectly expressed.
05 Does the contra proferentum rule apply? Briefly explain.	Yes. The contra proferentum rule only applies to the adhesion clauses provided by the insurer.
06 Is there a particular rule of interpretation that applies to insurance contracts (and is receiving attention in your jurisdiction)?	The rule of interpretation of the adhesion clauses mentioned above is the particular rule of interpretation that applies to insurance contracts. It establishes that the interpretation of the adhesion clauses of the insurance contract (written by the insurer) without individual negotiation, when ambiguous or contradictory, must be made in the most favourable sense to the insured.

EXCLUSIONS

QUESTION	ANSWER
07 What is an exclusion / exception and how is it reflected in a policy?	It is a type of clause that excludes the coverage of certain risks, among which are the risks of war, insurrection or terrorism. The exclusion clause must be written using highlighted characters so that it can be effectively identified. Otherwise, it is presumed that the clause was not communicated and known by the insured.
08 Who bears the onus to establish that a claim is covered by the insurance contract and who bears the onus to prove an exclusion?	The general rule establishes that, regardless of the causes of the accident (except when intentionally caused), the insurance covers the risk. However, the parties may appoint experts to assess the risks, circumstances and consequences of the claim to assess the insurance coverage of the risk. Unless otherwise agreed, the assessment made by the expert is binding on all parties to the insurance contract. If an expert is not appointed, it is up to the insured to prove that the claim falls under the insurance clause and the insurer must prove the exclusions of its liability.
09 Are there specific interpretation principle(s) that apply to exclusions? If so, please elaborate	No. However, insurers are required to provide pre-contractual information regarding the conditions of the contract, to base the relationship on the principle of good faith and highlight the exclusion clauses.

MOZAMBIQUE

WARRANTIES AND CONDITIONS PRECEDENT

QUESTION	ANSWER
10 What is the difference between a warranty and a condition precedent?	A warranty is a contractual statement of a fact/conditions by one party to another, asserting that a particular fact is true at one point in time or that the fact will continue into the future. A condition precedent is a circumstance or contractual clause agreed to between the parties for the production of certain effects of the legal transaction. Neither figure has a legal definition, which gives the parties the freedom, under the terms of private autonomy, to establish what constitutes and characterizes the warranties and conditions precedent.
11 Which types of warranties exist in your jurisdiction? (Please include examples)	Under the Mozambican legal system, there are no provisions of warranties, therefore this falls into the private autonomy. Notwithstanding the lack of this provision, it has been practice to compose warranties given by one party to another confirming the veracity of a certain legal fact or the existence or absence of a certain legal situation.
12 How are conditions precedent implemented in insurance? (Please include examples)	The Mozambican legal system does not state the figure of conditions precedent. Therefore, the conditions precedent are covered by the private autonomy of the parties. In other words, the parties have the power to freely determine the content of the contracts within the limits of the law.

INSURABLE INTEREST

QUESTION	ANSWER
13 What does insurable interest mean in your jurisdiction?	The Insurance Regime defines the insurable interest as the interest worthy of legal protection in relation to the covered risk. This is an imperative rule. The doctrine understands that interest also assumes the role of defining the subjectivity of insurance: • Personal insurance – when the contract covers the interest of the insured; • Third party insurance – when the insurance covers third party interest.
14 Please provide us with examples of insurable interests.	Damage Insurance • The interest in the integrity of a commercial establishment's goods. • The interest in a car's integrity. Personal Insurance • A dancer secures her legs (object of work) in the interest of ensuring the physical integrity of her legs. • The producer of a horror movie secures the lives of all viewers, against the eventuality of being scared to death, during the movie.
15 How is insurable interest treated in your jurisdiction?	In Mozambique, for an insured to successfully claim under an insurance contract, the insured interest must be worthy of legal protection in relation to the covered risk.

MOZAMBIQUE

REJECTION OF CLAIMS

QUESTION	ANSWER
16 When can an insurer reject a claim?	Subject to the terms and conditions of the insurance contract executed by the parties, the insurer may reject a claim in the following situations: • Wilful non-compliance with the duty to inform. • Failure to comply with the duty to provide information. • Where cover is excluded in terms of an exclusion clause. • If the insured, acting in bad faith, does not communicate the aggravation of the risk. • Failure to pay the insurance premium or fraction.
17 What steps must an insurer take if it intends rejecting a claim?	The insurer must, within 15 days after receiving the claim, inform the insured of its duly substantiated position.
18 Are there certain protections afforded to insureds regarding rejection of claims (i.e. guidelines / rules by an Ombudsman / legislative body or precedent)? Please elaborate.	Yes. In the event of a claim being rejected, the insured can submit a claim to the insurance supervising authority – Insurance Supervision Institute of Mozambique (ISSM). The ISSM will contact the insurer, mediate the conflict and issue the respective response to the claim. If the response is not favourable to the insured, an legal action may be instituted with the competent court.

MOZAMBIQUE

MISREPRESENTATION AND NON-DISCLOSURE

QUESTION	ANSWER
19 What is the duty on an insured in respect of representations and disclosures to its insurer?	The insured must act with loyalty, providing all the clarifications required by the circumstances and information legally or contractually required and not intentionally aggravate the risk assumed by the insurer. In addition to the above information and the insured identification data, prior to the execution of the contract, the insured must accurately state all the circumstances known and considered reasonably significant for the insurer's assessment of the risk. For this purpose, the insurer must provide a questionnaire on a printed form.
20 What is the remedy for an insurer when there is a material misrepresentation or a non-disclosure? Please explain.	In the event of material misrepresentation or a non-disclosure, the insurer has two options: Wilful misconduct failure to provide information: Wilful misconduct non-compliance with the duty to provide information determines the nullity of the contract, and the insurer is entitled to the corresponding insurance premium. Non-compliance with the duty to provide information, due to negligence: Failure to comply with the duty to provide information, due to negligence, entitles the insurer, within sixty days from the date on which it became aware of it, to: • propose to the insured an amendment to the contract, setting a deadline of not less than thirty days for delivery of the acceptance or, if foreseen, the counterproposal; • terminate the contract, demonstrating that under no circumstances would it enter into contracts to cover risks related to the fact omitted or inaccurately stated.
21 Does the misrepresentation and/or non-disclosure have to be linked to a claim made by the insured to enable an insurer to rely on the remedy? Please explain.	No. The insurer may invoke the non-compliance with the duty to provide information, whether due to misrepresentation and/or non-disclosure, regardless whether the insured submits a claim.

CAUSATION – PROXIMATE CAUSE

QUESTION	ANSWER
22 What is the test for causation?	The test for causation is the factual connection that connects the damage to the fact, i.e., it is the proof that there was effective damage, motivated by the agent's conduct.
23 How have courts applied this test?	Courts apply the test for causation in a restrictive way, seeking the direct relationship between the agent's conduct and the damage caused.
24 Was causation a point of contention in business interruption claims? If so, please elaborate	Yes. We have two ongoing cases related to termination of lease agreements. The parties are discussing the extent to which the crisis caused by Covid-19 caused the tenant to default on the payment of rent. On the one hand, the landlord argues that before the Government implemented measures to prevent the spread of Covid-19 and the worsening of the national situation due to the pandemic, the lessee was already in default. On the other hand, the lessee claims that the non-compliance is due to the measures imposed by the Government and the global crisis of Covid-19, which create a force majeure.

MOZAMBIQUE

NOTIFICATION OF CLAIMS, PRESCRIPTION, AND TIME-BAR

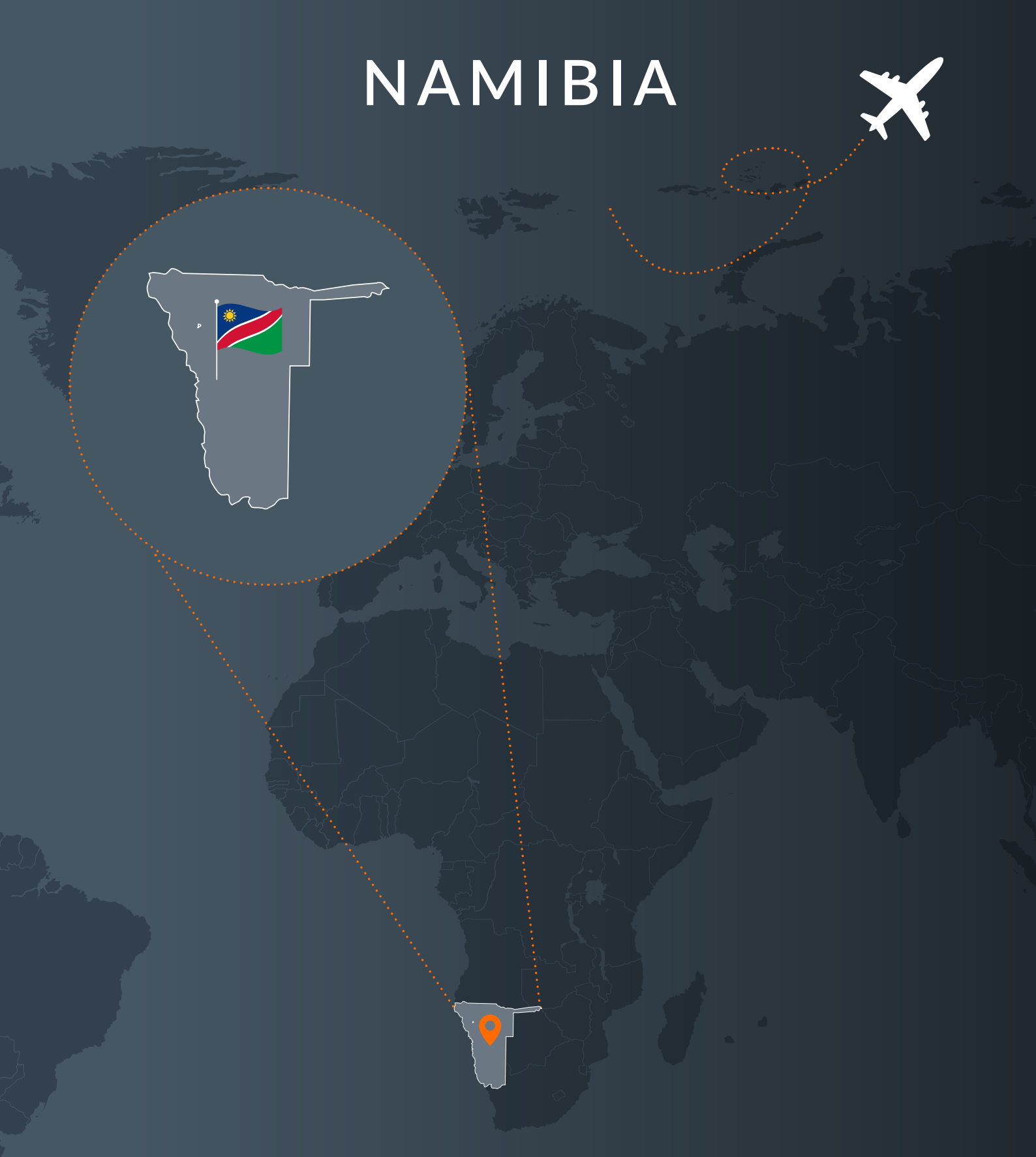
QUESTION	ANSWER
25 What should be notified to an insurer and when must this be done?	The Insurance Regime imposes on the insured the duty to provide the following notifications: Notification of aggravation of risk: The insured must, during the term of the contract and in the eight days following its knowledge, communicate to the insurer all the facts or circumstances likely to determine aggravation of the risk. Once the aggravation is verified, the insurer may, within fifteen days, opt for the proportional reduction of the warranty or the presentation of new conditions. The insured may, within fifteen days of receiving the insurer's proposal, oppose the presentation of new conditions, the proportional reduction of the warranty or, in any case, terminate the contract. Notification of event/occurrence: The claim, or knowledge of reasonable probability of its occurrence, must be communicated to the insurer within the period established in the contract or, in the absence thereof, within eight days following the date of its occurrence or of which it is aware. The communication must be made by the insured when he becomes aware of the claim or the reasonable probability of its occurrence. The communication must clearly explain the circumstances of the claim and its consequences. In turn, the insurer must, within fifteen days of receiving the claim, inform the insured of its position on the acceptance of the claim. Multiple Insurance Notification: The insured must notify the insurers involved of the possible existence of two or more contracts relating to the same risk, even if accelerated by different insureds.
26 What are the legislated time periods for an action to prescribe?	The parties have a period of five years (from the date on which the holder becomes aware of the right) to exercise the rights arising from the insurance contract. If there is room for ordinary prescription, the parties will have a period of 20 years from the fact that gave rise to it.
27 Are these legislated time periods capable of amendment by agreement in an insurance contract? Please elaborate.	No. The modification of the legal time periods or the conditions under which the prescription operates its effects nullifies the contract.

MOZAMBIQUE

REGULATORY PRINCIPLES IN RELATION TO CUSTOMERS

QUESTION	ANSWER
28 Are there any regulatory principles relating to the manner in which customers are treated?	Not applicable in this jurisdiction.
29 How does your regulator apply these principles and are there consequences of breaching these provisions and/or not complying with these principles?	Not applicable in this jurisdiction.
30 Please cite a key decision by your court or regulator relating to the application of these principles.	Not applicable in this jurisdiction.

NAMIBIA



ABOUT ENGLING, STRITTER & PARTNERS

Engling, Stritter & Partners is a leading Namibian corporate and commercial law firm serving government, multinationals, financial institutions and entrepreneurs, and has enjoyed year-on-year growth in each of the sectors in which it operates. The firm is primarily a commercial and corporate legal practice, representing a substantial number of sizeable Namibian and international companies, both listed and unlisted. With a formidable track record in mergers and acquisitions, banking and finance, mining conveyancing, commercial litigation and dispute resolution, Engling, Stritter & Partners is distinguished by the people, clients and work that the firm attracts and retains. The firm has a broad dealsheet, and its product specialisations include: Mining; Corporate and Commercial Law; Competition Law; Mergers and Acquisitions; Energy and Environment; Project Finance; and Commercial Law; Competition Law; Mergers and Acquisitions; Energy and Environment; Project Finance; and Infrastructure Development.

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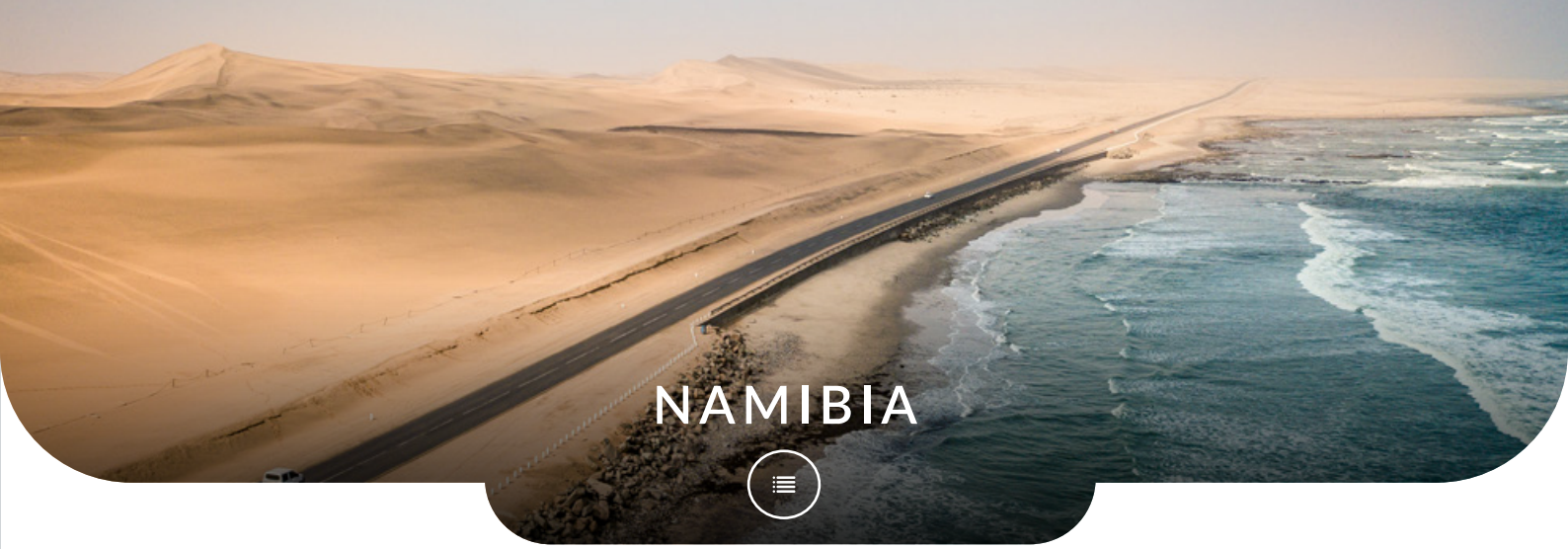


NAMIBIA

ESSENTIALIA OF AN INSURANCE CONTRACT

QUESTION	ANSWER
01 What are the essential elements of an insurance contract?	In Namibia, the normal contractual requirements of offer (by the insured) and acceptance (by the insurer). Parties should be ad idem on the following: • Compensation for the loss by insurer (sum insured) • Payment of a premium by insured (premium) • Occurrence of an uncertain future event which triggers insurer's obligations (insured peril / risk)
02 Please briefly explain each essential element.	The law in this regard remains unchanged in post-independence Namibia. Compensation for Loss: • Indemnity insurance contract – must contain a term stating (i) insurer undertakes to pay; and (ii) the insured is entitled to claim compensation for patrimonial loss suffered. • Non-indemnity insurance contract – is identified when (i) the insurer undertakes to pay; and (ii) insured has an interest deemed worthy of protection. Premium: • Insurance is a method of spreading risk. The premium is a marker and value of what and how much of the risk is spread in a community. Uncertain event: • All insurance contracts have an element of uncertainty. Liability only attaches when the uncertain event occurs. The event is dependent on a peril. Whether or not the peril causes damage is the risk. The transfer of the risk underpins insurance contracts.
03 Is there a term that is mistakenly thought to be essential?	The insurable interest is not an essential element for the conclusion of an insurance contract. However, the insurable interest must exist at the time of materialisation of the risk insured against, or else the claim will not be payable.

NAMIBIA

INTERPRETING INSURANCE POLICIES

QUESTION	ANSWER
04 How are insurance contracts interpreted (i.e. strictly, loosely or a combination of both)?	These are some of the fundamental principles applied by Namibian courts: • The general approach to interpretation was laid out in Total Namibia v OBM Engineering and Petroleum Distributors [2015 (3) NR 733 (SC) at para 18]. The court adopted the approach followed by Wallis JA to the interpretation of documents in South Africa in Natal Joint Municipal Pension Fund v Endumeni Municipality." • This approach is: "The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like." • The golden rule of interpretation, as it pertains to insurance contracts, remains that of the South African position as laid out in Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd 1934. This is that words in an insurance contract must be given their plain, ordinary, popular and grammatical meaning unless this would result in some absurdity, or it is evident from the context that the parties intended the words in question to bear a different meaning. • To the extent that it is possible, an insurance contract must be interpreted by giving effect to every word contained in it. • Words creating ambiguity may be dealt with by considering (i) the nature of the contract; (ii) the purpose of conclusion; or (iii) the nature and purpose of the specific clause from which the words emanate. • As with any business contract, an insurance contract must be interpreted to allow for and to take account of business efficacy. An exception or limitation clause is interpreted strictly. This informs the general approach that Namibian courts interpret an insurance contract in favour of cover. It should also be noted that Namibian courts have held that an insurance contract is one of utmost good faith. This would be a prominent factor in its interpretation.
05 Does the contra proferentum rule apply? Briefly explain.	Yes, as in South African law, in an instance where all the rules of interpretation have been exhausted but there remains ambiguity, then the insurance contract must be interpreted against the drafter (often the insurer). The contra proferentem rule is to be applied only as a last resort when other rules have not provided the required certainty.
06 Is there a particular rule of interpretation that applies to insurance contracts (and is receiving attention in your jurisdiction)?	No.

NAMIBIA

EXCLUSIONS

QUESTION	ANSWER
07 What is an exclusion / exception and how is it reflected in a policy?	The position in Namibia is the same as in South Africa. It is a type of clause that is used to limit, qualify, or define the transferred risk. An exclusion ordinarily identifies what is not included in the risk. Exclusions are often reflected in a separate section of the insurance contract and are generally grouped together.
08 Who bears the onus to establish that a claim is covered by the insurance contract and who bears the onus to prove an exclusion?	In Namibian law, the insured must establish the insured peril that caused the loss and that the claim is covered by the insurance contract. The insurer must prove the operation of an exclusion of that loss. The insured bears the burden of proving the claim falls within the insuring clause (i.e. falls within the four corners of the policy). The insurer bears the burden of proving any exclusions of its liability (i.e. what is not covered in the insurance contract).
09 Are there specific interpretation principle(s) that apply to exclusions? If so, please elaborate	No, however the relevant recent South African cases would provide significant persuasive value. Judgments of the South African Appeal Court, handed down after independence of Namibia (1990), are still persuasive in the Namibian Courts.

WARRANTIES AND CONDITIONS PRECEDENT

QUESTION	ANSWER
10 What is the difference between a warranty and a condition precedent?	As in South African law, a warranty is a contractual term in which one contracting party gives an undertaking or assurance to another party that specific facts or conditions are presently true or will be true. A condition precedent is a particular type of contractual term which qualifies a contractual obligation by making its enforceability and continued existence contingent on the occurrence of an uncertain future event.
11 Which types of warranties exist in your jurisdiction? (Please include examples)	Affirmative warranties – relate to the present or the past. A warranty is affirmative if the insured warrants to the insurer the correctness of a representation regarding an existing fact. For example, an insured warrants that the captain of a ship is in possession of the necessary certification to sail the ship. Promissory warranties – in terms of this warranty, an insured warrants the performance of a certain act or that a given state of affairs will exist in the future. Promissory warranties therefore relate to the future and are created by directly including a suitable term in the policy contract. For example, an insured will ensure that all fire extinguishers on the ship are serviced annually.
12 How are conditions precedent implemented in insurance? (Please include examples)	In Namibian law, a condition precedent is in essence a suspensive condition. The obligation is not enforceable until the occurrence of an uncertain future event. For example, in a fire insurance policy, an insurer's obligation to pay the sum insured is postponed or only enforceable if the insured's factory burns down.

NAMIBIA

INSURABLE INTEREST

QUESTION	ANSWER
13 What does insurable interest mean in your jurisdiction?	"If the insured can show that he stands to lose something of an appreciable commercial value by the destruction of the thing insured, then even though he has neither a jus in re [real right in property] or a jus ad rem [personal right to a thing] to the thing insured his interest will be an insurable one." We agree that this definition is parochial as it limits insurable interest to a thing, which excludes non-indemnity insurance. We further agree that a more holistic description would be an interest by a party in the non-occurrence of an event rather than an interest in a particular object of risk.
14 Please provide us with examples of insurable interests.	The same categories apply in Namibian law as in South African law: indemnity insurance – • eg. the interest of a homeowner in the movables located on the premises. non-indemnity insurance – • eg the interest of a child in the life of its parents.
15 How is insurable interest treated in your jurisdiction?	In order for an insured to successfully claim under an insurance contract, it must have an insurable interest in the asset insured. The interest does not need to exist at the time the insurance contract was entered into. However, the interest must exist at the time risk materializes.

NAMIBIA

REJECTION OF CLAIMS

QUESTION	ANSWER
16 When can an insurer reject a claim?	In Don v Hollard Insurance Company of Namibia Ltd (HC-MD-CIV-ACT-OTH-2019/02372) [2020] NAHCMD 217 (10 June 2020), the Namibian High Court held that if an insurer denies liability in a policy on the grounds of a breach by the insured of one of the terms of the policy, the onus is on the insurer to plead and to prove such breach. Subject to the terms of the insurance contract, the following are examples of situations when the insurer may reject a claim: • Where the loss does not fall within the terms of the indemnity provided under the policy. • Where cover is excluded in terms of an exclusion clause. • Where a condition precedent to the insurer's liability is not met. • Where a warranty is not met. • Where the insured fails to perform a material obligation under the insurance contract. • Where the insured, at the time of the loss, lacks an insurable interest in the property damaged or destroyed. • Where the insured has not notified, claimed or instituted action within the required time frame.
17 What steps must an insurer take if it intends rejecting a claim?	The insurer must, in clear terms, provide the insured with a notice rejecting the insured's claim. An insurer must accept, reject or dispute a claim or the quantum of a claim under an insurance contract within a reasonable period after it received notification of the claim.
18 Are there certain protections afforded to insureds regarding rejection of claims (i.e. guidelines / rules by an Ombudsman / legislative body or precedent)? Please elaborate.	Yes, the Namibian Financial Institutions Supervisory Authority (NAMFISA) has a dedicated Complaints Department that investigates complaints on behalf of consumers of non-bank financial services and products. These complaints range from breach of contract, i.e. increasing repayment periods without prior consent, increasing repayment amounts (instalments) due to increased interest rates, over-charging on loans, non-payment of insurance benefits as per contract/ agreement, non-payment of pension benefits, etc. In the event that the consumer feels aggrieved, he/she can lodge a complaint against non-bank financial institutions (registered and doing business in Namibia) with NAMFISA. It is important to note, however, that NAMFISA only has jurisdiction over institutions registered with it and doing business in Namibia.

NAMIBIA

MISREPRESENTATION AND NON-DISCLOSURE

QUESTION	ANSWER
19 What is the duty on an insured in respect of representations and disclosures to its insurer?	The High Court of Namibia in Wilke No v Swabou Life Insurance Co. Ltd 2000 NR23 (HC) held that an insurance contract is the primary illustration of a category of contracts described as uberrimae fidei, i.e. of utmost good faith. Misrepresentation made by an insured when claiming entitles an insurer to repudiate a claim.'
20 What is the remedy for an insurer when there is a material misrepresentation or a non-disclosure? Please explain.	In Don v Hollard Insurance Company of Namibia Ltd (HC-MD-CIV-ACT-OTH-2019/02372) [2020] NAHCMD 217 (10 June 2020), the Namibian High Court held that where the insurer can prove a material misrepresentation, it can reject the claim on this basis. There are no special rules or tests and the usual rules of evidence apply to proving such misrepresentation.
21 Does the misrepresentation and/ or non-disclosure have to be linked to a claim made by the insured to enable an insurer to rely on the remedy? Please explain.	In Don v Hollard Insurance Company of Namibia Ltd (HC-MD-CIV-ACT-OTH-2019/02372) [2020] NAHCMD 217 (10 June 2020), the Namibian High Court held that the adjustment of evidence to suit the claim of the defendant satisfied the court that the defendant was either untruthful or determined to hoodwink the insurer. The court did not expressly state that the misrepresentation must be linked to a claim, therefore the position in South Africa could also apply where the misrepresentation has occurred in the formation of the contract. Therefore, the fact that an insured may have a valid claim in terms of an insurance contract which may be unrelated to the misrepresentation or non-disclosure may be irrelevant. This is because there may not have been an agreement had the insurer been made aware of the misrepresented or non-disclosed facts at the time that the insurance contract was concluded.

NAMIBIA

CAUSATION – PROXIMATE CAUSE

QUESTION	ANSWER
22 What is the test for causation?	The Namibian High Court, in African Dynasty Investment CC v Xavier Gomes (I 2009/2015) [2017] NAHCMD 280 (6 October 2017), set out the two-step test for causation as follows: • Factual causation: the 'but-for' test or the theory of conditio sine qua non. (Minister of Police v Skosana 1977 (1) SA 31 (A)). In the course of time the 'but-for' test has been criticized as not being perfect. But in Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA), the Supreme Court of Appeal was of the view that any hurdles in the way of the application of the 'but-for' test should not be exaggerated unduly because a plaintiff does not have to establish factual causation with absolute certainty. The plaintiff only has to prove that the conduct complained of probably caused the harm or loss and that this entails a 'sensible retrospective analysis of what would probably have occurred based upon the evidence and what can be expected to occur in the ordinary course of human affairs' (Van Duivenboden (SCA), para 25). • Legal Causation: a person may be held liable for only the consequences that are closely linked to his or her conduct – either directly or sufficiently closely. Where the consequences are not linked closely to the defendant's conduct or where the link is not strong enough, then there is no legal causation, that is, the consequences alleged by the plaintiff are too remote, as the defendant in the instant case contends. (See Max Loubser (ed.), The Law of Delict in South Africa, Cape Town, OUP, 2nd edn (2012), para 5.2.). This second element is based on policy and it entails considerations of reasonableness, fairness and justice. (Max Loubser (Ed), para 6.6). It involves a delicate question of law: how far should the law go in requiring the defendant to pay damages for a loss or harm which his or her conduct has in fact been a substantial factor in producing; that is, is it fair, reasonable and just for the court to require the defendant to pay damages for consequences of his or her conduct, regardless of remoteness of the consequences?
23 How have courts applied this test?	There is no specific case law in Namibia on this point. It is likely the South African case of Oelofsen No v Cigna Insurance Co of SA Ltd 1991 (1) SA 74 (T) would hold significant persuasive value. Therefore, the insured peril must be the cause of the loss or damage in order for an insured to recover under the policy. To qualify as the proximate cause, the cause does not have to be the sole or exclusive cause (unless so stipulated in the insurance contract). It is sufficient if it is one of two co-operating causes. Accordingly, an insured will not be barred from claiming under an insurance contract purely by virtue of there having been more than one proximate cause (one of which is covered under the insurance contract and one which is not).
24 Was causation a point of contention in business interruption claims? If so, please elaborate	There is currently a case involving Hollard Insurance and business interruption claims arising from the Covid-19 pandemic. We will be able to update on this point once the case has been heard and judgment handed down.

NAMIBIA

NOTIFICATION OF CLAIMS, PRESCRIPTION, AND TIME-BAR

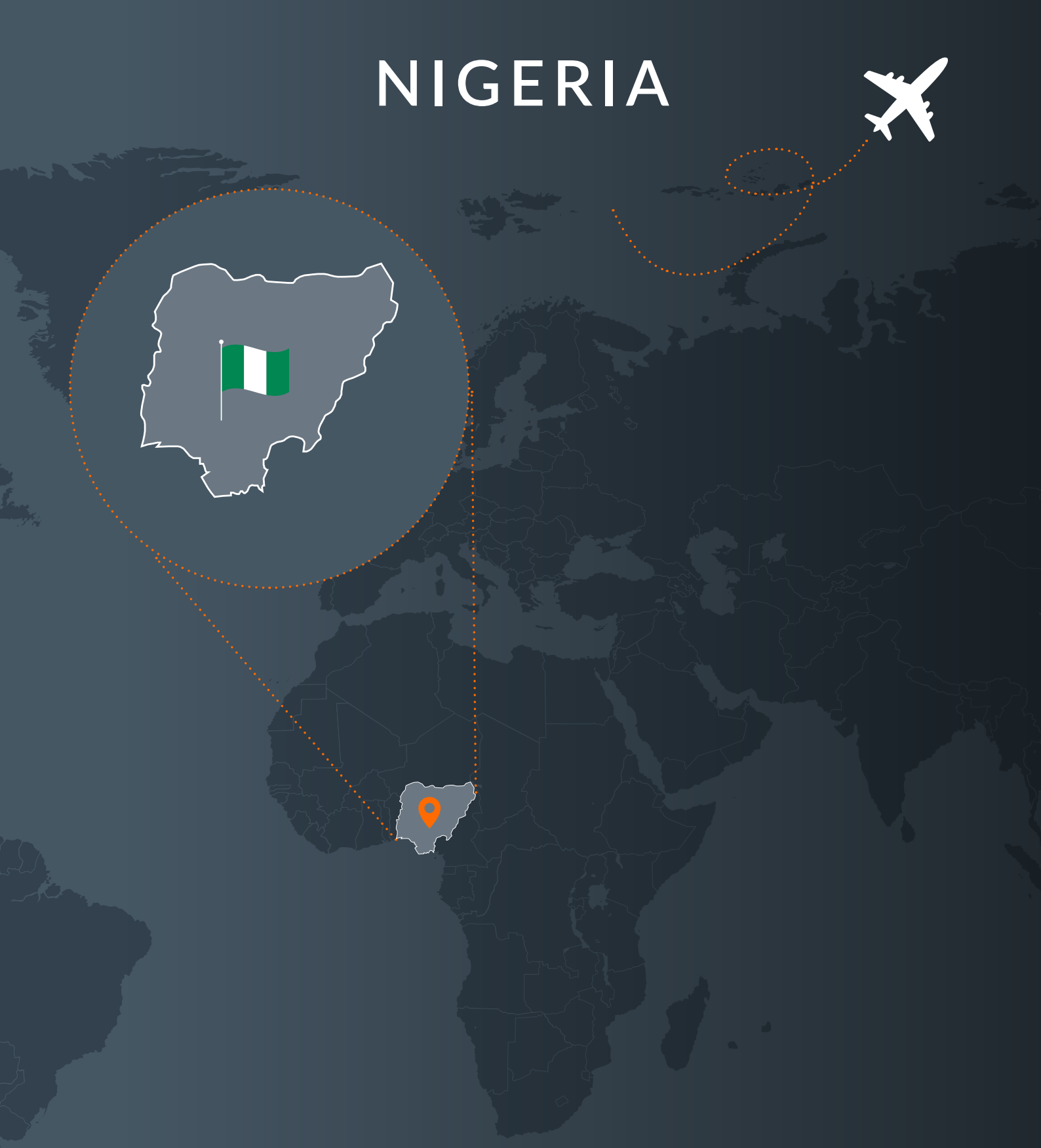
QUESTION	ANSWER
25 What should be notified to an insurer and when must this be done?	Although, there appears to be no common law or implied duty on the insured to give notice of any kind to the insurer in Namibian law, insurance contracts frequently impose on the insured certain notification duties. Notification of event/occurrence: Insurance contracts (such as an occurrence-based policy) often require the insured to give notice to the insurer of an event/occurrence that may give rise to a claim under the insurance contract. The South African case of Collen v AA Mutual Insurance Association Ltd 1954 (3) SA 625 (E) is pre-independence and forms part of Namibian law. Therefore, notice must be given within a reasonable time after the event/occurrence. This notification allows the insurer to investigate the circumstances that may give rise to a claim at the earliest possible time, and to mitigate its potential liability in the event of a claim Notification of claim: The case of Irving v Sun Insurance Office 1906 ORC 24) forms part of Namibian law. Insurance contracts may impose a duty on the insured to: (i) submit a formal claim; (ii) provide full and further particulars of the loss; and/or (iii) provide documents and/or proof in support of the claim.
26 What are the legislated time periods for an action to prescribe?	In terms of section 11 of the Prescription Act 68 1969 (as applied in Namibia), summons must be served on the debtor within the time periods set out below: • thirty years in respect of: (i) any debt secured by mortgage bond; (ii) any judgment debt; (iii) any debt in respect of any taxation imposed or levied under any law; and (iv) any debt owed to the State in respect of a share of the profits royalties or similar consideration payable in respect of the right to mine minerals or other substances; • fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor; • six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract; or • three years in respect of any other debt.
27 Are these legislated time periods capable of amendment by agreement in an insurance contract? Please elaborate.	Yes, legislated time periods can be amended in terms of the insurance contract. There are usually time-bar clauses in the insurance contract which extinguish claims under the policy at a time before prescription has completed. A clause can also stipulate that an action must be instituted within a certain period after the insurer has denied liability for loss. The Namibian Courts have not considered the constitutionality of these clauses, however the South African Constitutional Court's decision in Barkhuizen is likely to be of significant persuasive value.

NAMIBIA

REGULATORY PRINCIPLES IN RELATION TO CUSTOMERS

QUESTION	ANSWER
28 Are there any regulatory principles relating to the manner in which customers are treated?	Not currently. However, the Financial Institutions and Markets Bill (FIM Bill) (which would consolidate and harmonise the laws regulating financial institutions, financial intermediaries and financial markets in Namibia), which was considered and approved by the National Assembly and signed by the President but not yet Gazetted, will inter alia introduce formal market conduct rules into the Namibian regulatory environment for financial services. This will include TCF and PPR-like rules and will define "advice" and mandate the giving of "advice" at certain, as yet to be determined, standards. Minimum fit and proper standards for financial advisers will also be introduced and enforced. In addition to the FIM Bill, there is also a Financial Services Adjudicator (FSA) Bill being considered (effectively an Ombudsman for financial services), but the initial Bill was removed from the Parliamentary roll as a different approach to what was in the draft FSA Bill being considered. It seems likely that a new FSA Bill will be drafted and consulted on in due course.
29 How does your regulator apply these principles and are there consequences of breaching these provisions and/or not complying with these principles?	Not applicable in this jurisdiction, see above. NAMFISA does act as a de facto complaints adjudicator for disgruntled customers, but outcomes are largely reliant on willing co-operation between the Regulator and the regulated industries in the absence of any substantive legislation in this regard.
30 Please cite a key decision by your court or regulator relating to the application of these principles.	There are currently three cases involving Hollard Insurance and business interruption claims arising from the Covid-19 pandemic. We will be able to update on this point once the matters have been heard and judgment handed down.

NIGERIA



ABOUT ALUKO & OYEBODE

Aluko & Oyebode is one of the largest integrated law firms in Nigeria, providing a comprehensive range of specialist legal services to top-tier Nigerian, international and multinational clients. It was established in January 1993 and now has 19 Partners and about 85 Managing Associates, Senior Associates and Associates. The firm's areas of specialisation include: Mergers and Acquisitions; Capital Markets; Banking and Corporate Finance; Compliance and Investigation; Corporate and Commercial Practice; Energy and Natural Resources; Intellectual Property; Litigation and Arbitration; Power/Infrastructure Finance; Privatisation; Public Private Partnerships; Real Estate; Taxation; Admiralty and Shipping; Aviation; and Telecommunications, Media and Technology. The head office is in Lagos and there are also offices in Abuja and Port Harcourt. Aluko & Oyebode consistently achieves a top tier ranking across its various practice groups by IFLR1000, Chambers Global, Legal 500 and has received many other internationally-recognized awards.

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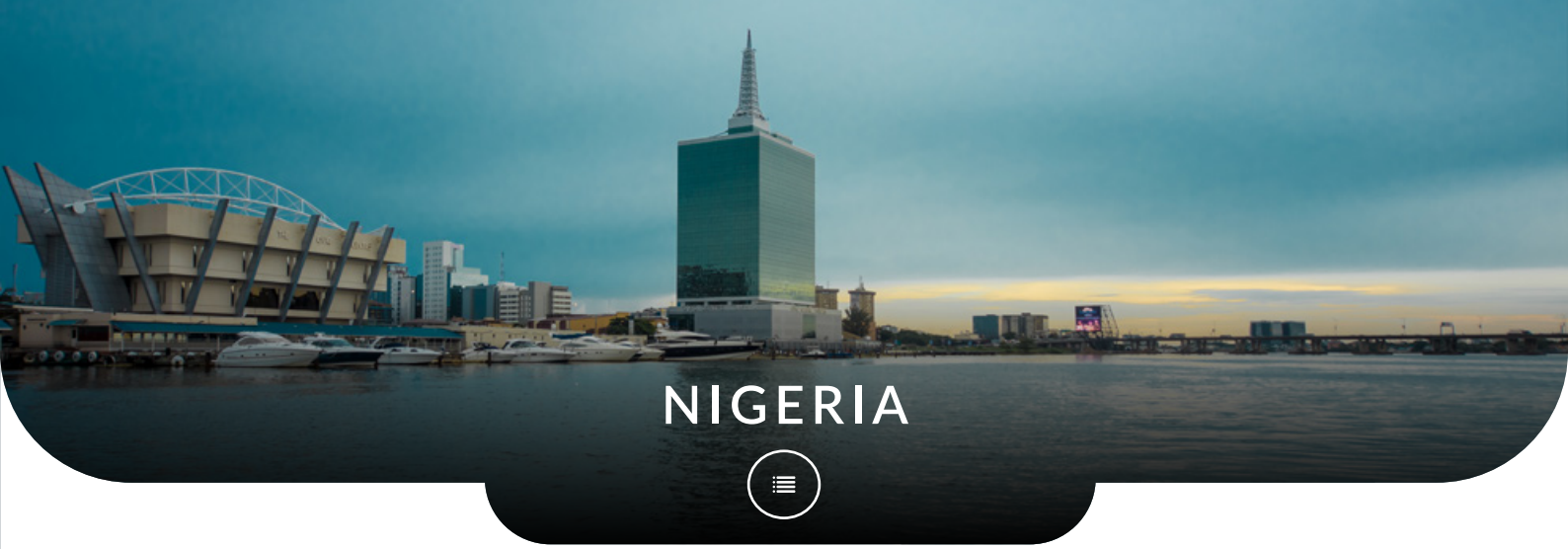


NIGERIA

ESSENTIALIA OF AN INSURANCE CONTRACT

QUESTION	ANSWER
01 What are the essential elements of an insurance contract?	In Nigeria, for an insurance contract to be valid, it must conform with the essential elements of general contracts, which are: • Offer and acceptance; • Intention to create legal relations; and • Valuable consideration. In addition to the above general elements, an insurance contract must contain a provision for the payment of an insurance premium as it is a condition precedent for the establishment of a valid insurance contract.
02 Please briefly explain each essential element.	Offer and Acceptance • An insurance contract must contain an offer by either the insured or the insurer and an acceptance by the recipient of the offer (i.e. either the insurer or insured). The insurer could make the offer by stating the premium payable in respect of a risk proposed to be insured and invite the insured to accept it. The insured could accept by signing the proposal form. In practice most insurance proposal forms stipulate that the offer is subject to the insurer's usual terms and conditions. Where the insured accepts, the transaction is concluded, and the agreed premium starts to run. Nigerian courts have also held in a number of cases that a contract of insurance is created only in a situation where there exists an unqualified acceptance by one party of an offer made by the other party. [Jumbo United Company Limited v. Leadway Assurance Limited (Part 1536)] Intention to Create Legal Relations • For an insurance contract to be valid, it is essential that parties to the contract have the intention to create a legally binding obligation in respect of which they will be able to exercise legally enforceable remedies. Consideration • In an insurance contract, the consideration on the part of the insured is the premium he pays to the insurer and the consideration on the part of the insurer is the promise to pay in the event of loss. Premium • Premium is the consideration paid or payable by the insured in return for the insurer's undertaking to indemnify or to compensate the insured in the event of loss or liability arising under an insurance contract. Pursuant to section 50 of the Insurance Act 2003 (the Insurance Act), payment of an insurance premium is a condition precedent to the establishment of a valid insurance contract.
03 Is there a term that is mistakenly thought to be essential?	In addition to the above-listed essential elements, the following elements are also considered essential to an insurance contract: • Dependence on the happening of a specified event which must be uncertain or fortuitous. • There must be an insurable interest in the subject matter of the insurance. • There must be a legal duty or obligation to pay an agreed sum on the happening of the contingency or specified event.

NIGERIA

INTERPRETING INSURANCE POLICIES

QUESTION	ANSWER
04 How are insurance contracts interpreted (i.e. strictly, loosely or a combination of both)?	Generally, the object of interpretation of insurance contracts is to ascertain and give effect to the intention of parties as evidenced in the contract. Therefore, Nigerian courts, when interpreting an insurance contract: • Give every word the ordinary meaning (i.e., all terms, words and phrases used in the contract are interpreted in their natural, ordinary and popular sense) and where such words are technical words, they would be given their technical meaning. [Ojo v. Nigeria Insurance Company (1983) 2 F.N.R. 313 AT 319] • Read the contract as a whole to ascertain the intention of the parties. [Akaighe v. Idama (1964) ALL NLR 317] • Interpret words and clauses to make the contract reasonable, where giving the ordinary meaning to an insurance contract would render the contract unreasonable. • Construe any ambiguity against the insurer.
05 Does the contra proferentum rule apply? Briefly explain.	Yes, if there is an ambiguity or doubt in the word or use of terms in an insurance contract or where a clause is in contrast with another clause, the court would adopt the interpretation that is most favourable to the insured. This is based on the rule of interpretation, that a document must be construed strictly against its originator and, in practice, insurance contracts are prepared by the insurer.
06 Is there a particular rule of interpretation that applies to insurance contracts (and is receiving attention in your jurisdiction)?	No, when interpreting any general contract, courts in Nigerian would typically adopt the golden rule of interpretation. Where the circumstance warrants it, they would adopt the contra proferentum rule to prevent the insurer from avoiding its obligations under the insurance contract.

EXCLUSIONS

QUESTION	ANSWER
07 What is an exclusion / exception and how is it reflected in a policy?	Unlike exclusion / exception clauses in ordinary contracts, an exclusion clause in an insurance contract does not exclude or limit the liability of a party to the contract. An exclusion in an insurance contract identifies risks not covered by the policy.
08 Who bears the onus to establish that a claim is covered by the insurance contract and who bears the onus to prove an exclusion?	The onus of proving that a loss constituting a claim was caused by peril covered by the insurance is on the insured [Ojo V. Nigeria Reliance (1983) 2 F.N.R) at p 318]. Where there is a loss arising from an insured peril, the insured would typically be required to establish his claim and show that the loss was caused by the insured peril. On the other hand, the onus of proving that the insured claim is exempted is on the insurer. [Akinjola v. Express Insurance Co] Where the insurer claims it is not liable for a claim by the insured, the insurer has the burden of bringing the insured's claim within the exception.
09 Are there specific interpretation principle(s) that apply to exclusions? If so, please elaborate	When interpreting insurance contracts generally, Nigerian courts give words their natural, ordinary and general meaning. The courts also adopt this principle when interpreting an exclusion clause in an insurance contract. The insurer is also required to list all exclusions under the policy in the proposal form and bring them to the attention of the insured.

NIGERIA

WARRANTIES AND CONDITIONS PRECEDENT

QUESTION	ANSWER
10 What is the difference between a warranty and a condition precedent?	Warranties are terms in general contracts by which a party undertakes that certain facts or conditions are true or will occur. In an insurance contract, warranties are used by insurers to protect their interests and to ensure that the insured does nothing to increase the risk covered by an insurance policy. Conditions precedent on the other hand are conditions that delay the vesting of a right until the happening of an event. [Atolagbe v. Awuni (1997) 9 NWLR (pt. 522)] Generally, the difference between a warranty and a condition is that a condition goes directly to the root of the contract. When it is broken, the insurer can treat the insurance contract as vitiated. A breach of warranty is a breach of a term that is subsidiary to the main purpose of the insurance which entitles the insurer to damages and does not affect the discharge of the contract of insurance. However, section 55 of the Insurance Act provides that a breach of term (whether warranty or condition) will not give rise to any right or afford a defence to the insured unless the term is material and relevant to the risk or loss insured.
11 Which types of warranties exist in your jurisdiction? (Please include examples)	Warranties in insurance contracts are subdivided into affirmative warranty and promissory warranty. • Affirmative Warranty - An affirmative warranty is a statement by the insured to the insurer relating to facts at the time the contract of insurance was entered into. For example, an insured warrants that the life insured is a person of temperate habit. • Promissory Warranty - A promissory warranty is a statement about the future or facts that will continue to be true during the subsistence or term of the policy. For example, an insured who insured its shop with the insurer undertakes that it would maintain a specified book of account during the currency of the policy. • Implied Warranty - In a marine insurance policy, a warranty may be implied - Section 34 (2) Marine Insurance Act. For example, where a marine policy relates to a voyage which is performed in different stages during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation for the purpose of that stage.
12 How are conditions precedent implemented in insurance? (Please include examples)	• A breach of a condition precedent in an insurance contract would typically give the insured the right to refuse a claim. • For example, in Nigeria, payment of premium is a condition precedent for the validity of an insurance contract. • For example, an insured insures his car for a period of 12 (twelve) months for a premium of ₦1,000,000.00 (One Million Naira) and made a deposit of ₦500,000.00 (Five Hundred Thousand Naira) on the date of the insurance. Where the car is stolen before payment of the balance, there would be no valid contract as the condition precedent for a valid contract (i.e. payment of premium in full) was not fulfilled.

NIGERIA

INSURABLE INTEREST

QUESTION	ANSWER
13 What does insurable interest mean in your jurisdiction?	Insurable interest is the connection between the insured and the risk which may occasion pecuniary or economic loss thereof. Therefore a person who would foreseeably suffer financial loss from the occurrence of an event would be deemed to have an insurable interest in a subject matter which is sought to be insured. [Law Union and Rock Insurance Nigeria Limited V. Omuoha (1998) N.W.L.R] Therefore, insurable interest must exist for a valid insurance contract to be formed. The absence of insurable interest will make the insurance contract void or voidable depending on the peculiarity of each case. The interest must be real and subsisting and mere hope of interest expected to be acquired in the future is not sufficient to confer insurable interest.
14 Please provide us with examples of insurable interests.	The following are general examples of insurable interests: • A trustee, beneficiary and executor have an insurable interest in a trust property. • The owner of a property (e.g. a car or house) has an insurable interest in such property. • A mortgagee to whom property is mortgaged as security for a loan has an insurable interest to the extent of the mortgage debt. • With respect to life insurance, a person has an insurable interest in his life. • With respect to another person's life, a person seeking to take out an insurance policy on the life of another must establish that he has an insurable interest in the life insured and a person shall be deemed to have an insurable interest in the life of any other person where he stands in any legal relationship to that person or in any other event be prejudiced by death of that person or the loss from the occurrence of the event.
15 How is insurable interest treated in your jurisdiction?	In Nigeria, the law requires that every person who takes out an insurable policy must have an insurable interest in the subject matter of an insurance contract. If the insured has no insurable interest, the contract is invalid. The legal requirement for the existence of an insurable interest to make the insurance contract valid and enforceable varies with the different classes of insurance as indicated below: Life Insurance: • The insurable interest need not be present at the time of death or at the time the policy matures, but it must be present at the time the contract is made. Marine Insurance: • The insurable interest must be in existence at the time of loss. (Section 8(1) of the Marine Insurance Act.) Fire and Accident Insurance: • In fire and accident insurance the legal requirement is that there must be insurable interest both at the time the insurance contract is executed and at the time of the loss.

NIGERIA

REJECTION OF CLAIMS

QUESTION	ANSWER
16 When can an insurer reject a claim?	Unless provided otherwise in the insurance contract, an insurer may reject the claim of an insured: • Where there is a misstatement in a proposal form, whether material or not, the existence of such misstatement is a ground on which an insurer may avoid liability under an insurance policy. • Where there is non-disclosure of facts which they deem material to the insurance policy. • Where the loss is excluded or not covered under the insurance contract. Generally, in a contract of insurance, a breach of warranty or a condition would not ordinarily give rise to the right to reject the claim of the insured unless the term is material and relevant to the risk or loss insured against.
17 What steps must an insurer take if it intends rejecting a claim?	Where an insurer intends to reject a claim, on submission of the proposal, the insurer will issue a notice of refusal to the insured within five working days of receipt of a claim assessment report from the adjuster.
18 Are there certain protections afforded to insureds regarding rejection of claims (i.e. guidelines / rules by an Ombudsman / legislative body or precedent)? Please elaborate.	Yes, insurers are generally required to establish well-documented policies and procedures through which an insured can lodge complaints. Such complaints are expected to be dealt with expeditiously. The insurer may also institute an action in court and, pursuant to the Market Conduct and Business Practice Guidelines for Insurance Institutions in Nigeria issued by the National Insurance Commission (NAICOM) (the Guidelines), the insurer cannot dissuade the insured from engaging the services of a solicitor.

NIGERIA

MISREPRESENTATION AND NON-DISCLOSURE

QUESTION	ANSWER
19 What is the duty on an insured in respect of representations and disclosures to its insurer?	Nigeria as a common law country has adopted the principle of utmost good faith, which means that the insured must disclose all material facts of the contract which he knows or ought to know would influence the judgment of the insurer in determining whether or not to insure the risk or to insist on a higher premium for accepting to bear the risk. The insurer also has a duty not to conceal material facts relating to the insurance policy. Failure of either party to disclose such material facts renders the insurance voidable. Pursuant to section 54 of the Insurance Act, where an insurer requires an insured to complete a proposal form or other application form for insurance, the form should be drawn up in such manner as to elicit such information as the insurer considers material in accepting the application for insurance of the risk and any information not specifically requested would be deemed not material. In practice, a misrepresentation or non-disclosure would occur at the point of entering into the contract by making false material statements to induce the other party to contract or not disclosing important information that could affect the decision of the other party to contract.
20 What is the remedy for an insurer when there is a material misrepresentation or a non-disclosure? Please explain.	Where the insured conceals essential facts that he knows would have influenced the insurer's decision to enter into the insurance contract, he would be guilty of fraudulent non-disclosure. In addition to voiding the contract for fraud, the insurer would also be entitled to obtain damages from the insured for fraud. [Akpata & Anor. V. African Alliance Insurance Company Limited (unreported)]
21 Does the misrepresentation and/or non-disclosure have to be linked to a claim made by the insured to enable an insurer to rely on the remedy? Please explain.	No, misrepresentation/non-disclosure need not be linked to a claim made by the insured for the insurer to rely on the remedy. It typically goes to the root of the contract because the duty of disclosure relates to the fairness of the contract to both parties. The right to rely on the remedy would be triggered when the insurer discovers the existence of a fact which, if disclosed at the time of negotiation, would have affected his decision to execute the insurance contract.

CAUSATION – PROXIMATE CAUSE

QUESTION	ANSWER
22 What is the test for causation?	The proximate cause doctrine is a fundamental principle of insurance law that the insurer would only be liable under an insurance policy if an insured peril is the proximate cause of the loss or damages in question.
23 How have courts applied this test?	The insured peril should be the real cause or dominant cause of the loss for an insurer to be liable under the policy. On the application of the proximate cause doctrine, the courts have held that the practicability of the doctrine should be taken into consideration, since causation is to be understood in its ordinary sense.
24 Was causation a point of contention in business interruption claims? If so, please elaborate	We are not aware of any reported cases where causation has been a bone of contention on business interruption claims. However, the question whether an insurer would be able to claim insurance cover for business interruption would depend on the wording and the terms of the policy. Insurance policies are contracts between the insurer and the insured and, like any other contract, would be interpreted by the courts in light of the parties' clear intentions as conveyed by the language (wordings) of the policy.

NIGERIA

NOTIFICATION OF CLAIMS, PRESCRIPTION, AND TIME-BAR

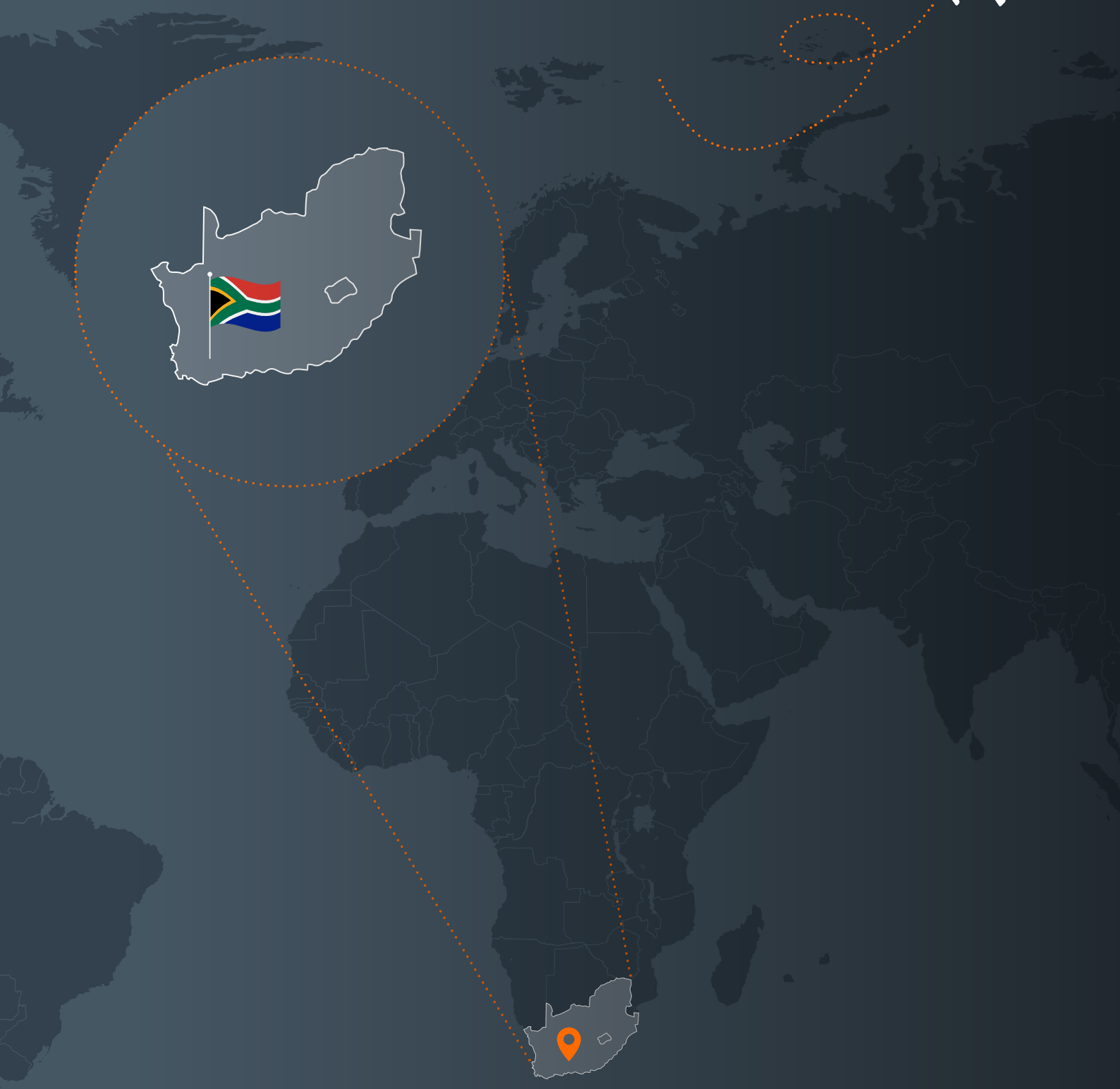
QUESTION	ANSWER
25 What should be notified to an insurer and when must this be done?	The procedure for instituting a claim on an insurer in respect of a policy is usually stipulated in the insurance contract and it is commenced by notification of the loss or damage to the insurer. In practice, the claim conditions would require the insured to give notice to the insurer that a loss has occurred. It is this notice that would set in motion the procedure for a claim as stipulated in the policy. Where procedures are stipulated for making claims under an insurance policy, non-compliance is fatal to the insured's claim, especially where they are conditions precedent to the insurer's liability. Unless notice in writing is expressly required by the insurance contract, an oral notification given to the agent of the insured who has authority to receive such notification would suffice.
26 What are the legislated time periods for an action to prescribe?	Pursuant to the Statutes of Limitation Act, Limitation Law, Lagos State 2015 and Limitation Act, Abuja 2004; • actions founded on simple contracts: must be commenced within six years of occurrence; • actions for damages for negligence: must be commenced within three years of occurrence; • actions for damages for slander: must be commenced within three years of occurrence; • actions upon instruments under seal: must be commenced within twelve years of occurrence; • actions by the Lagos State authority to recover land: must be commenced within twenty years. Such an action must be commenced within twelve years in Abuja; • actions for recovery of land (individual): must be commenced within twelve years; and • actions against public officers: must be commenced within three months by virtue of Section 2(a) Public Officers Protection Act.
27 Are these legislated time periods capable of amendment by agreement in an insurance contract? Please elaborate.	Yes, generally, just like every other contract, parties to an insurance contract are bound by the terms of the contract. Therefore, where the insurance contract stipulates a period after which the insurer's liability under the contract will cease, then it will apply. However, such period stipulated in the insurance contract must not exceed the time stipulated by the statutes.

NIGERIA

REGULATORY PRINCIPLES IN RELATION TO CUSTOMERS

QUESTION	ANSWER
28 Are there any regulatory principles relating to the manner in which customers are treated?	Yes, the Guidelines also regulate the treatment of customers. Paragraph 1.2.0 of the Guidelines on fair treatment of customers provides that: • The board and senior management of an insurance company shall have the ultimate responsibility for fair treatment of customers. • Fair treatment of customers should be taken into consideration by insurance companies in the design of their business strategy and development of products. • All insurance institutions are to entrench a culture of fair treatment of customers. In addition to the above, the Guidelines also prohibit unfair trade practices, and highlight information to be disclosed by insurance companies to the customers and regulate: • Professional advice to be given to customers. • Policy servicing or after-sales services. • Personal information protection. • Conflicts of interest. • New product development. • Pre-sales requirement and advertisement.
29 How does your regulator apply these principles and are there consequences of breaching these provisions and/or not complying with these principles?	Application of the Principles of Treatment of Customers: The Guidelines were issued by NAICOM in exercise of the powers conferred on it under Insurance Act and the National Insurance Commission Act and forms part of the Insurance Act. Therefore, NAICOM regulates the general conduct of insurance companies and their compliance with all applicable laws, regulations and guidelines. Also, on NAICOM'S website, there is a section dedicated to policy holders or new customers who have complaints regarding insurance providers. Consequences of non-compliance: An insured has the right to institute an action in court where non-compliance with an applicable law would affect its rights under the Insurance Act. In addition to the right of the insured to institute an action in court, the insurer is likely to be sanctioned by NAICOM if non-compliance is ascertained. The sanction could be in the form of a fine or cancellation of registration.
30 Please cite a key decision by your court or regulator relating to the application of these principles.	Although there is a section on NAICOM's website for receiving complaints from policyholders, the decision of NAICOM is communicated only to the insurer and the policyholder. NAICOM does not publish its decisions relating to matters between policyholders and insurers. NAICOM has also indicated that it is compiling a list of insurance companies for necessary regulatory sanctions over unsettled claims.

SOUTH AFRICA



ABOUT WEBBER WENTZEL

With over 150 years of experience and industry knowledge, Webber Wentzel is the leading full-service law firm on the African continent. We combine the collective knowledge and experience of our firm to provide clients with seamless, tailored and commercially-minded business solutions within record times. We value excellence and innovation and we work with our clients to help them achieve success in whatever they do. Our passion to help our clients achieve their goals shows in the quality of the delivery of our service. We aim to add value in everything we do and to be the trusted adviser to our clients. Our alliance with Linklaters and our deep relationships with outstanding law firms across Africa provide our clients with the best expertise wherever they do business.

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SOUTH AFRICA

ESSENTIALIA OF AN INSURANCE CONTRACT

QUESTION	ANSWER
01 What are the essential elements of an insurance contract?	In addition to the normal contractual requirements of an offer (by the insured) and an acceptance (by the insurer), parties should be ad idem on the following: • Compensation for the loss by insurer (sum insured) • Payment of a premium by insured (premium) • Occurrence of an uncertain future event which triggers insurer's obligations (insured peril / risk)
02 Please briefly explain each essential element.	Compensation for loss: • Indemnity insurance contract – must contain a term stating (i) insurer undertakes to pay; and (ii) the insured is entitled to claim compensation for patrimonial loss suffered. • Non-indemnity insurance contract – is identified when (i) the insurer undertakes to pay; and (ii) insured has an interest deemed worthy of protection. Premium: • Insurance is a method of spreading risk and the premium is a marker and value of what and how much of the risk is spread in a community. Uncertain event: • All insurance contracts have an element of uncertainty. Liability only attaches when the uncertain event occurs. The event is dependent on a peril. Whether or not the peril causes damage is the risk. The transfer of the risk underpins insurance contracts.
03 Is there a term that is mistakenly thought to be essential?	Yes, insurable interest is not an essential element for the conclusion of an insurance contract. However, the insurable interest must exist at the time the risk insured against materialises, otherwise the claim will not be payable.

SOUTH AFRICA

INTERPRETING INSURANCE POLICIES

QUESTION	ANSWER
04 How are insurance contracts interpreted (i.e. strictly, loosely or a combination of both)?	These are some of the fundamental principles applied by South African courts: • The golden rule of interpretation is that words in an insurance contract must be given their plain, ordinary, popular and grammatical meaning unless this would result in some absurdity, or it is evident from the context that the parties intended the words in question to bear a different meaning [Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd 1934]. • To the extent that it is possible, an insurance contract must be interpreted by giving effect to every word contained in it. • Words creating ambiguity may be dealt with by considering (i) the nature of the contract; (ii) the purpose of conclusion; or (iii) the nature and purpose of the specific clause from which the words emanate. • As with any business contract, an insurance contract must be interpreted to allow for and to take account of business efficacy. • An exception or limitation clause is interpreted strictly. This informs the general approach that South African courts interpret an insurance contract in favour of cover.
05 Does the contra proferentum rule apply? Briefly explain.	Yes, in the event that all the rules of interpretation have been exhausted but ambiguity remains, then the insurance contract must be interpreted against the drafter (often the insurer). The contra proferentem rule is to be applied only as a last resort when other rules have not provided the required certainty.
06 Is there a particular rule of interpretation that applies to insurance contracts (and is receiving attention in your jurisdiction)?	Apart from the contra proferentem rule, South African courts have time and again applied the principle of interpreting an insurance contract in favour of the insured when an ambiguity arises. This principle is usually in conjunction with the rule that limitations and/or exceptions are interpreted strictly. As is the case with the contra proferentem rule, this pattern favouring the insured is applied as a last resort.

EXCLUSIONS

QUESTION	ANSWER
07 What is an exclusion / exception and how is it reflected in a policy?	It is a type of clause that is used to limit, qualify, or define the transferred risk. An exclusion ordinarily identifies what is not included in the risk. Exclusions are often reflected in a separate section of the insurance contract and are generally grouped together.
08 Who bears the onus to establish that a claim is covered by the insurance contract and who bears the onus to prove an exclusion?	Generally, the insured must establish the insured peril that caused the loss and that the claim is covered by the insurance contract; the insurer must prove the operation of an exclusion of that loss. The insured bears the burden of proving that the claim falls within the insuring clause (i.e. falls within the four corners of the policy). The insurer bears the burden of proving any exclusions of its liability (i.e. what is not covered in the insurance contract).
09 Are there specific interpretation principle(s) that apply to exclusions? If so, please elaborate	A strict interpretation is adopted to penalty, limitation, or exclusion clauses. The rationale is that insurance contracts are contracts of indemnity and therefore should be interpreted reasonably and fairly to this end. [Guardrisk Insurance Co Ltd v Café Chameleon CC 2021 (2) SA 323 (SCA)] Furthermore, it is the insurer's duty to spell out clearly the specific risks it wishes to exclude. [Centriq Insurance Company Limited v Oosthuizen and Another (237/2018) [2019] ZASCA 11]

SOUTH AFRICA

WARRANTIES AND CONDITIONS PRECEDENT

QUESTION	ANSWER
10 What is the difference between a warranty and a condition precedent?	A warranty is a contractual term in which one contracting party gives an undertaking or assurance to another party that specific facts or conditions are presently true or will be true. A condition precedent is a particular type of contractual term which qualifies a contractual obligation by making its enforceability and continued existence contingent on the occurrence of an uncertain future event.
11 Which types of warranties exist in your jurisdiction? (Please include examples)	Affirmative warranties – which relate to the present or the past. A warranty is affirmative if the insured warrants to the insurer the correctness of a representation regarding an existing fact. E.g. an insured warrants that the captain of a ship possesses the necessary certification to sail the ship. Promissory warranties – in terms of this warranty, an insured warrants the performance of a certain act or that a given state of affairs will exist in the future. Promissory warranties therefore relate to the future and are created by directly including a suitable term in the policy contract. E.g. An insured will ensure that all fire extinguishers on the ship are serviced annually.
12 How are conditions precedent implemented in insurance? (Please include examples)	A condition precedent is in essence a suspensive condition. The obligation is not enforceable until the occurrence of an uncertain future event. E.g. In a fire insurance policy, an insurer's obligation to pay the sum insured is postponed or only enforceable if the insured's factory burns down.

INSURABLE INTEREST

QUESTION	ANSWER
13 What does insurable interest mean in your jurisdiction?	The first South African case to define insurable interest was Littlejohn v Norwich Union Fire Insurance Society 1905 TH 374: "If the insured can show that he stands to lose something of an appreciable commercial value by the destruction of the thing insured, then even though he has neither a jus in re [real right in property] or a jus ad rem [personal right to a thing] to the thing insured his interest will be an insurable one" This definition is parochial as it limits insurable interest to a thing, which excludes non-indemnity insurance. A more holistic description would be an interest by a party in the non-occurrence of an event rather than an interest in a particular object of risk.
14 Please provide us with examples of insurable interests.	indemnity insurance – • a fiancé would have an interest in an engagement ring purchased for a fiancée. • the interest of a tenant and landlord in the rented premises [Commercial Union Assurance Co of South Africa Ltd v Golden Era Printers and Stationers (Bophuthatswana) (Pty) Ltd 1998 (2) SA 718 (BPD)]. non-indemnity insurance – • one spouse has an interest in the life of another spouse. • interest of employer in a key individual in a business – keyman policy.
15 How is insurable interest treated in your jurisdiction?	In South Africa, for an insured to successfully claim under an insurance contract, it must have an insurable interest in the asset insured. The interest does not need to exist at the time the insurance contract was entered into. However, the interest must exist at the time the risk materialises.

SOUTH AFRICA

REJECTION OF CLAIMS

QUESTION	ANSWER
16 When can an insurer reject a claim?	Subject to the terms of the insurance contract, the following are examples of situations when the insurer may reject a claim: • Where the loss does not fall within the terms of the indemnity provided under the policy. • Where cover is excluded in terms of an exclusion clause. • Where a condition precedent to the insurer's liability is not met. • Where a warranty is not met. • Where the insured fails to perform a material obligation under the insurance contract. • Where the insured, at the time of the loss, lacks an insurable interest in the property damaged or destroyed. • Where the insured has not notified, claimed or instituted action within the required time.
17 What steps must an insurer take if it intends rejecting a claim?	The insurer must, in clear terms, provide the insured with a notice rejecting the insured's claim. An insurer must accept, reject or dispute a claim or the quantum of a claim under an insurance contract within a reasonable period after it received notification of the claim.
18 Are there certain protections afforded to insureds regarding rejection of claims (i.e. guidelines / rules by an Ombudsman / legislative body or precedent)? Please elaborate.	Yes, often an insurance contract provides that an insured may, within a specified period following receipt of the notice of rejection, make representations to the insurer. An insured may use the insurer's internal claims escalation and review process. An insured may lodge a complaint with the relevant Ombud within the appropriate time limit. Finally, an insured may also institute legal action through the courts to seek compensation in terms of the insurance contract.

MISREPRESENTATION AND NON-DISCLOSURE

QUESTION	ANSWER
19 What is the duty on an insured in respect of representations and disclosures to its insurer?	material to the insurer's assessment of the risk under the policy concerned. This duty stems from the common law and is treated no differently in South African law from a misrepresentation in any other commercial contract. This common law duty has been codified in section 53 of the Short-Term Insurance Act; 1998 and section 59 of the Long-Term Insurance Act, 1998. The material misrepresentation or non-disclosure which induces the insurance contract would occur during the negotiation phase, which would either be (i) before the conclusion of the insurance contract; or (ii) at the renewal of the insurance contract. The duty of disclosure would not ordinarily exist at any other time during the period of the insurance contract.
20 What is the remedy for an insurer when there is a material misrepresentation or a non-disclosure? Please explain.	An insurer is entitled to avoid the insurance contract, from inception or renewal, and is not compelled but may elect to exercise this right. The consequence of an avoidance is that the status quo prior to the agreement must be restored. What was performed in terms of the insurance contract must be returned (e.g. insured's premiums and any payments by insurer to insured). In order to establish this defence, South African courts have adopted a two-pronged approach: • Objective prong - materiality must be established by asking whether a reasonably, prudent person would regard the non-disclosure as material. • Subjective prong – inducement must be established by asking whether that particular insurer in those circumstances was induced, as a result of the misrepresentation or non-disclosure, to enter into the insurance contract on those terms. [Regent Insurance Company Ltd v King 2015 (3) SA 85 (SCA)]
21 Does the misrepresentation and/or non-disclosure have to be linked to a claim made by the insured to enable an insurer to rely on the remedy? Please explain.	No. A misrepresentation and/or non-disclosure is not a breach of any term of the insurance contract, but a more fundamental issue: whether there was consensus from the parties to enter into the agreement and/or terms of that agreement. The fact that an insured may have a valid claim in terms of an insurance contract which may be unrelated to the misrepresentation or non-disclosure is irrelevant. This is because there may not have been an agreement had the insurer been made aware of the misrepresented or non-disclosed facts at the time that the insurance contract was concluded.

SOUTH AFRICA

CAUSATION – PROXIMATE CAUSE

QUESTION	ANSWER
22 What is the test for causation?	There are two steps to establish causation, namely: • Factual causation: the conditio sine qua non / but-for test – if you remove the act, will the result also disappear? If yes, then we look at step two. • Legal causation: proximate cause – the peril [or factual cause] must have a sufficiently close relationship to the consequent loss to give rise to legal liability. [Guardrisk Insurance Co Ltd v Café Chameleon CC 2021 (2) SA 323 (SCA)]
23 How have courts applied this test?	The insured peril must be the cause of the loss or damage in order for an insured to recover under the policy. The courts have held that to qualify as the proximate cause, the cause does not have to be the sole or exclusive cause (unless so stipulated in the insurance contract). It is sufficient if it is one of two co-operating causes. Accordingly, an insured will not be barred from claiming under an insurance contract purely by virtue of there having been more than one proximate cause (one of which is covered under the insurance contract and one which is not). [Oelofsen No v Cigna Insurance Co of SA Ltd 1991 (1) SA 74 (T)]
24 Was causation a point of contention in business interruption claims? If so, please elaborate	Yes, it has been a point of contention. In the context of the Covid-19 pandemic, insurers argued that the cause of business interruption and resultant loss was not the outbreak of a disease (the insured peril) but government orders and lockdown restrictions, which were not covered under the insurance contracts. The insureds, on the other hand, argued that, but for the disease, there would have been no government restrictions and thus there is factual causation. Insureds further contended that the proximate cause of the business interruption losses were the disease and thus legal causation was also established. Recent case law has found in favour of the insured (i.e. that the proximate cause of the business interruption loss is the disease and government's response was part and parcel of the insured peril). [Guardrisk Insurance Co Ltd v Café Chameleon CC 2021 (2) SA 323 (SCA)]

SOUTH AFRICA

NOTIFICATION OF CLAIMS, PRESCRIPTION, AND TIME-BAR

QUESTION	ANSWER
25 What should be notified to an insurer and when must this be done?	Although there appears to be no common law or implied duty on the insured to give notice of any kind to the insurer, insurance contracts frequently impose certain notification duties on the insured. Notification of event/occurrence: Insurance contracts (such as an occurrence-based policy) often require the insured to give notice to the insurer of an event/occurrence that may give rise to a claim under the insurance contract. The courts have held that notice must be given within a reasonable time after the event/occurrence. This notification allows the insurer to investigate the circumstances that may give rise to a claim at the earliest possible time, and to mitigate its potential liability in the event of a claim [Collen v AA Mutual Insurance Association Ltd 1954 (3) SA 625 (E)]. Notification of claim: Insurance contracts may impose a duty on the insured to: (i) submit a formal claim; (ii) provide full and further particulars of the loss; and/or (iii) provide documents and/or proof in support of the claim. [Irving v Sun Insurance Office 1906 ORC 24)]
26 What are the legislated time periods for an action to prescribe?	In terms of section 11 of the Prescription Act 68 1969, summons must be served on the debtor within the time periods set out below: • thirty years in respect of: (i) any debt secured by mortgage bond; (ii) any judgment debt; (iii) any debt in respect of any taxation imposed or levied under any law; and (iv) any debt owed to the State in respect of a share of the profits, royalties or similar consideration payable in respect of the right to mine minerals or other substances; • fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor; • six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract; and • three years in respect of any other debt.
27 Are these legislated time periods capable of amendment by agreement in an insurance contract? Please elaborate.	Yes, legislated time periods can be amended in terms of the insurance contract. There are usually time-bar clauses in the insurance contract which extinguish claims under the policy at a time before prescription has completed. A clause can also stipulate that an action must be instituted within a certain period after the insurer has denied liability for loss. The shortening of the time periods has been declared constitutional and not against public policy, depending on the circumstances of a particular case and based on principles of reasonableness and fairness. [Barkhuizen v Napier 2007 7 BCLR 691 (CC)]

SOUTH AFRICA

REGULATORY PRINCIPLES IN RELATION TO CUSTOMERS

QUESTION	ANSWER
28 Are there any regulatory principles relating to the manner in which customers are treated?	Yes, there are three, namely: (i) the Policyholder Protection Rules (PPR) for short-term insurance; PPR for long-term insurance and (ii) the Treating Customers Fairly initiative (TCF). Short-term - PPRs: The PPRs were promulgated in terms of the Short-Term Insurance Act, 53 of 1998 and apply to all new and existing policies (except reinsurance policies). The PPRs aim to, amongst others, ensure the fair treatment of policyholders. A policyholder is considered to be (i) a natural person; or (ii) juristic person, whose asset value or annual turnover is less than the threshold value as determined in terms of the Consumer Protection Act, 2008 (which is currently ZAR2 million). Long-term – PPRs: The PPRs were promulgated in terms of the Long-Term Insurance Act, 52 of 1998 and, as with the PPR for short-term insurance, they apply to all new and existing policies (except reinsurance policies). The PPRs aim to, amongst others, ensure the fair treatment of policyholders. A policyholder is defined as (i) the person entitled to be provided with the policy benefits under a long-term policy in respect of a registered insurer; (ii) in respect of a licensed insurer, the person with whom an insurer enters into a life insurance policy or a non-life insurance policy or such person's successor in title; or (iii) the person in respect of whom a fund, under a fund member policy, insures its liability to provide benefits to such person in terms of the PPRs. TCF: TCF is an outcome-based regulatory and supervisory approach introduced by the Financial Services Board. TCF is designed to ensure that regulated financial institutions deliver specific, clearly set out fairness outcomes for financial customers.
29 How does your regulator apply these principles and are there consequences of breaching these provisions and/or not complying with these principles?	Application of principles that underpin the PPRs and TCF: In terms of the PPRs, policyholders have the right to lodge complaints about non-compliance with the rules with the relevant Ombud. In addition, the Financial Sector Conduct Authority (FSCA) is empowered in terms of the Financial Sector Regulation Act, 9 of 2017 (FSRA) to, inter alia, regulate and supervise the conduct of financial institutions in accordance with the financial sector laws. The FSCA can institute action against financial institutions. Consequences of non-compliance" Apart from the fact that, by breaching the provisions and principles that underlie both the PPRs and the TCF, insurers run the risk of a court or regulator ruling in favour of the insured, there are also other consequences that insurers might face. The FSCA is empowered to take remedial and enforcement action where a financial institution has failed to comply, such as imposing an administrative penalty.
30 Please cite a key decision by your court or regulator relating to the application of these principles.	In recent case law regarding the Covid-19 pandemic and business interruption claims, the courts and relevant regulators have taken a clear stance in favour of the insured, based on the principles of fairness. In relation to the Covid-19 pandemic and the topical business interruption claims, the FSCA has stated that the national lockdown cannot be used as a ground to reject a valid contingent business interruption claim. The FSCA has also, through numerous press releases, urged insurers to bear in mind the principles of fairness and justice when considering whether or not to reject insured's claims. In the case of Guardrisk Insurance Co Ltd v Café Chameleon CC 2021 (2) SA 323 (SCA), the SCA stated that an insurance contract is a "contract of indemnity" and should therefore be interpreted "reasonably and fairly". The SCA recalled Judge Oliver Schreiner's statement, adopted from English law authorities, that no rule in the interpretation of a policy is more firmly established than: "in all cases, it must be liberally construed in favour of the insured, so as not to defeat without a plain necessity his claim to indemnity".

TANZANIA

ABOUT A&K

A&K Tanzania is a leading full-service business law firm based in Dar es Salaam with substantial experience and knowledge of the Tanzanian market. The A&K Tanzania team has significant experience handling sophisticated local and cross-border transactions in practice areas including commercial, employment, corporate, tax, infrastructure, real estate, complex mergers and acquisitions, banking and project finance, capital markets, privatization projects, corporate restructurings, insolvency, mining, energy, telecommunications and competition. A&K Tanzania and ALN Kenya|Anjarwalla & Khanna, one of Kenya's leading law firms, service clients across borders. This collaboration allows for seamless interaction on deals, sharing of know-how and expertise and the secondment of lawyers between firms. A&K Tanzania is a member of ALN, an alliance of leading

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TANZANIA

ESSENTIALIA OF AN INSURANCE CONTRACT

QUESTION	ANSWER
01 What are the essential elements of an insurance contract?	In addition, to the normal contractual requirements of free consent of parties competent to contract, lawful consideration and lawful object, parties should be ad idem on the following: • Existence of an insurable interest; • Compensation for the loss by insurer (sum insured) – The Insurance Act, No. 10 of 2009 restricts an insurer not to, on or after a date prescribed by the Minister, issue or renew a policy of insurance under which the insurer undertakes a liability, the amount or a maximum amount of which is uncertain at the time when the contract of insurance is entered into or renewed; • Payment of a premium by insured (premium); • Occurrence of an uncertain future event which triggers insurer's obligations (insured peril / risk). However, in some instances, payments are dependent on specific events or levels of performance i.e. payment on contingent; and • Utmost Good Faith i.e. both the insured and the insurer should act in good faith towards each other.
02 Please briefly explain each essential element.	Insurable Interest: • An insurance contract must be based on an economic interest as a subject matter that a person can insure. It must be an interest that the insured stands to lose or gain on occurrence of an event. Compensation for Loss: • Indemnity insurance contract – must contain a term stating (i) insurer undertakes to pay; and (ii) the insured is entitled to claim compensation for patrimonial loss suffered. • Non-indemnity insurance contract – is identified when (i) the insurer undertakes to pay; and (ii) insured has an interest deemed worthy of protection. Premium: • Insurance is a method of spreading risk and the premium is a marker and value of what and how much of the risk is spread in a community. Uncertain event: • All insurance contracts have an element of uncertainty. Liability only attaches when the uncertain event occurs. The event is dependent on a peril. Whether or not the peril causes damage is the risk. The transfer of the risk underpins insurance contracts. Utmost Good Faith: • Principle of utmost good faith imposes a duty that all material facts relating to the insurance contract which a party knows must be disclosed. • The insured is required to disclose to the insurer all the defects and disadvantages of the insured item.
03 Is there a term that is mistakenly thought to be essential?	Although insurable interest may not be an essential element for the conclusion of an insurance contract, it must exist at the time of materialisation of the risk insured against, or else the claim will not be payable. When it comes to life insurance, no contract of insurance should be made by any person on the life or lives of any person or persons, or on any other event interest or events in which the person for whose use, benefit or on whose account the insurance made will have no insurance interest; and the insurance made will be considered to be null and void ab initio.

TANZANIA

INTERPRETING INSURANCE POLICIES

QUESTION	ANSWER
04 How are insurance contracts interpreted (i.e. strictly, loosely or a combination of both)?	In Tanzania, insurance contracts are interpreted by judges and courts to implement only the objectively reasonable expectations of the insured. However, once all the rules of interpretation have been exhausted, interpretation is done on the basis of the contra proferentem rule. The rule requires that any clause considered to be ambiguous should be interpreted against the interests of the party that created, introduced, or requested that clause to be included in the insurance contract. The interpretation of insurance policies was discussed in the case of Hassan Rashid vs National Insurance Corporation of Tanzania (Civil Appeal No.39 of 2018) [2019] TZHC 232; (19 December 2019)
05 Does the contra proferentum rule apply? Briefly explain.	Yes, in an instance where all the rules of interpretation have been exhausted but there remains ambiguity then the insurance contract must be interpreted against the drafter (often the insurer). The contra proferentem rule is to be applied only as a last resort when other rules have not provided the required certainty.
06 Is there a particular rule of interpretation that applies to insurance contracts (and is receiving attention in your jurisdiction)?	Apart from the contra proferentem rule, Tanzanian courts apply the principle of interpreting an insurance contract in favour of the insured when an ambiguity arises. This principle is usually applied in conjunction with the rule that limitations and/or exceptions are interpreted strictly. As is the case with the contra proferentem rule, this pattern favouring the insured is applied as a last resort. Any personal, or subjective, expectation of a policyholder which cannot be reasonably supported by the language of the contract is unenforceable. When reading an insurance policy, the words selected by the insurance company are to be interpreted by judges according to their plain meaning. A plain meaning is one which an ordinary person would attach to such words, not the meaning which might be understood by an insurance company executive or an attorney.

EXCLUSIONS

QUESTION	ANSWER
07 What is an exclusion / exception and how is it reflected in a policy?	An exclusion/exception is a case for which the insurance company does not provide coverage under the insurance policy. These are the conditions excluded from the insured event to avoid losses to the insurance company. Exclusion / exception clauses are often used as a tool to narrow the scope of coverage provided in an insurance contract.
08 Who bears the onus to establish that a claim is covered by the insurance contract and who bears the onus to prove an exclusion?	Generally, the insured must establish the insured peril that caused the loss and that the claim is covered by the insurance contract. The insurer must prove the operation of an exclusion of that loss. The insured bears the burden of proving the claim falls within the insuring clause. The insurer bears the burden of proving any exclusions of its liability (i.e. what is not covered in the insurance contract).
09 Are there specific interpretation principle(s) that apply to exclusions? If so, please elaborate	A strict interpretation is adopted to penalty, limitation, or exclusion clauses. In case of an ambiguity, an exemption of liability clause in an insurance contract is to be construed against the insurance company.

TANZANIA

WARRANTIES AND CONDITIONS PRECEDENT

QUESTION	ANSWER
10 What is the difference between a warranty and a condition precedent?	A warranty is a contractual term in which one contracting party gives an undertaking or assurance to another party that specific facts or conditions are presently true or will be true. A condition precedent is a particular type of contractual term which qualifies a contractual obligation by making its enforceability and continued existence contingent on the occurrence of an uncertain future event.
11 Which types of warranties exist in your jurisdiction? (Please include examples)	Affirmative warranties – which relate to the present or the past. A warranty is affirmative if the insured warrants to the insurer the correctness of a representation regarding an existing fact. E.g. an insured warrants that the captain of a ship is in possession of the necessary certification to sail the ship. These are statements regarding a fact at the time the insurance contract was made. Promissory warranties – in terms of this warranty, an insured warrants the performance of a certain act or that a given state of affairs will exist in the future. Promissory warranties therefore relate to the future and are created by directly including a suitable term in the policy contract. E.g. An insured will ensure that all fire extinguishers on the ship are serviced annually. These are statements about future facts or about facts that will continue to be true throughout the term of the insurance contract.
12 How are conditions precedent implemented in insurance? (Please include examples)	A condition precedent is in essence a suspensive condition. The obligation is not enforceable until the occurrence of an uncertain future event. E.g. In a fire insurance policy, an insurer's obligation to pay the sum insured is postponed or only enforceable if the insured's factory burns down.

INSURABLE INTEREST

QUESTION	ANSWER
13 What does insurable interest mean in your jurisdiction?	Tanzania insurance law has defined insurable interest to mean the interest in obtaining insurance for a person or property. A person or an organisation having insurable interest is likely to suffer a loss due to damage or destruction of the insured object or person. The person having insurable interest insures the property or person through an insurance policy which mitigates the risk of a loss.
14 Please provide us with examples of insurable interests.	indemnity insurance – • professional insurance policies non-indemnity insurance – • life insurance, where one spouse has an interest in the life of another spouse.
15 How is insurable interest treated in your jurisdiction?	In Tanzania, in order for an insured to successfully claim under an insurance contract, it must have an insurable interest in the asset insured. The interest does not need to exist at the time the insurance contract was entered into. However, the interest must exist at the time the risk materialises.

TANZANIA

REJECTION OF CLAIMS

QUESTION	ANSWER
16 When can an insurer reject a claim?	Similar to South Africa, an insurer in Tanzania can reject an insurance claim subject to the terms and conditions of the contract. Most common situations where an insurer may reject a claim are: • Damage is caused by a non-insurable event. • Non-disclosure of crucial information at the application or renewal of policy. • Where a condition precedent to the insurer's liability is not met. • Where a warranty is not met. • Where the insured fails to perform a material obligation under the insurance contract. • Where the insured, at the time of the loss, lacks an insurable interest in the property damaged or destroyed. • Where the insured has not notified, claimed or instituted action within the required time.
17 What steps must an insurer take if it intends rejecting a claim?	The insurer must, in clear terms, provide the insured with a notice rejecting the insured's claim. An insurer must accept, reject or dispute a claim or the quantum of a claim under an insurance contract within a reasonable period after it received notification of the claim.
18 Are there certain protections afforded to insureds regarding rejection of claims (i.e. guidelines / rules by an Ombudsman / legislative body or precedent)? Please elaborate.	Yes, similar to the procedures in South Africa, in general an insurance contract provides for the procedures to be used by an insured in the event the claim is rejected by the insurer. The insured may make representations to the insurer. An insured may use the insurer's internal claims escalation and review process if the insurer has unreasonably rejected the claim. An insured may lodge a complaint with the relevant Ombud if the claim is below Tanzanian Shillings 40 million and within the appropriate time limit. Finally, an insured may also institute legal action through the courts to seek compensation in terms of the insurance contract.

TANZANIA

MISREPRESENTATION AND NON-DISCLOSURE

QUESTION	ANSWER
19 What is the duty on an insured in respect of representations and disclosures to its insurer?	An insurance contract is founded on the principle of utmost good faith. The insured is obliged to truthfully and correctly disclose all material circumstances or facts within its knowledge and to give a fair presentation of the risks that are material to the insurer's assessment of the risk under the policy concerned. The general principles of misrepresentation have been codified under the Law of Contracts Act, [CAP. 345 R.E. 2019] and in the Code of Conduct and Ethics for Tanzania Insurance Industry embedded in the second Schedule of the Insurance Regulation of 2009. The material misrepresentation or non-disclosure which induces the insurance contract would occur during the negotiation phase, which would either be (i) before the conclusion of the insurance contract; or (ii) at the renewal of the insurance contract. The duty of disclosure would not ordinarily exist at any other time during the period of the insurance contract.
20 What is the remedy for an insurer when there is a material misrepresentation or a non-disclosure? Please explain.	Misrepresentation or non-disclosure to the insurer automatically renders the contract voidable. An insurer is entitled to avoid the insurance contract, from inception or renewal, and is not compelled but may elect to exercise this right. The consequence of an avoidance is that the status quo prior to the agreement must be restored. What was performed in terms of the insurance contract must be returned (e.g. insured's premiums and any payments by insurer to insured). The High Court of Tanzania (Commercial Division) has in its ruling in the case of Afroil Investment Limited Vs. Reliance Insurance Company (Tanzania) Limited, Commercial Case No. 15 of 2005, where ruled by the Court that the insurer was justified in rejecting the entire claim raised by the insured due to material non-disclosure of facts which made the contract voidable.
21 Does the misrepresentation and/or non-disclosure have to be linked to a claim made by the insured to enable an insurer to rely on the remedy? Please explain.	No. A misrepresentation and/or non-disclosure is not a direct breach of any term of the insurance contract, but a more fundamental issue: whether there was consensus of the parties to enter into the agreement and/or terms of that agreement. Since insurance contracts are entered into by utmost good faith, the fact that an insured may have a valid claim in terms of an insurance contract which may be unrelated to the misrepresentation or non-disclosure is irrelevant. This is because there may not have been an agreement had the insurer been made aware of the misrepresented or non-disclosed facts at the time that the insurance contract was concluded.

TANZANIA

CAUSATION – PROXIMATE CAUSE

QUESTION	ANSWER
22 What is the test for causation?	There has not been any adoption of the tests for causation in either the Tanzanian laws or through its courts. However, Tanzania through the Insurance Act and the National Insurance Policy emphasizes the use of the common law principles of insurance, which include the tests for causation, namely: • Factual causation: cause-in-fact If you remove the act, will the result also disappear? If yes, then we look at step two. • Legal causation: proximate cause - the cause for the loss must be proximate / immediate and not remote.
23 How have courts applied this test?	The Courts in Tanzania have not applied the test for causation. However, the insured peril must be the cause of the loss or damage in order for an insured to recover under the policy.
24 Was causation a point of contention in business interruption claims? If so, please elaborate	No. There has not been any business interruption claims to insurers or courts that we know of or were made available to the public. We are therefore unable to comment whether causation has been brought up as a point of contention in any claims. It should be noted, with the exception of the majority of the hospitality industry in Tanzania being affected by the recent Covid-19 pandemic and international travel, the majority of businesses stayed open, as the Government did not enforce lockdown measures. This in turn has worked in favour of insurers, since there have been no claims raised in relation to business interruptions.

TANZANIA

NOTIFICATION OF CLAIMS, PRESCRIPTION, AND TIME-BAR

QUESTION	ANSWER
25 What should be notified to an insurer and when must this be done?	Although there appears to be no common law or implied duty on the insured to give notice of any kind to the insurer, insurance contracts frequently impose on the insured certain notification duties. Notification of event/occurrence: Insurance contracts (such as an occurrence-based policy) often require the insured to give notice to the insurer of an event/occurrence that may give rise to a claim under the insurance contract. Notification of claim: Insurance contracts may impose a duty on the insured to: (i) submit a formal claim; (ii) provide full and further particulars of the loss; and/or (iii) provide documents and/or proof in support of the claim. It is common in Tanzania for insurance contracts to require the insured to submit notification claim form to the insurer within seven days of the occurrence of the event. Time of Settlement of Claims: The insurer is placed under a strict timeframe under which the settlement of claims can be made to the insured. The insurer must pay the insured claims within forty-five days of the receipt of executed discharge. The commissioner for insurance may extend the time for another period of forty-five days. After the lapse of the extended time, the insurer will be treated as if acting in bad faith. [Section 131 Insurance Act, No. 10 of 2009]
26 What are the legislated time periods for an action to prescribe?	Under the law of Limitation Act, [CAP. 89 R.E. 2019], the causes of action for institution of legal proceedings are provided as follows: • sixty years for suit by or on behalf of the Government; • twelve years for suit to recover principal sum of money acquired by mortgage on land or movable property or to recover proceeds of the sale of land; and • six years for suit founded on contract.
27 Are these legislated time periods capable of amendment by agreement in an insurance contract? Please elaborate.	No, the legislated time periods in Tanzania are not capable of being amended in terms of the insurance contract. Under Section 28 of the Law of Contract Act, [CAP. 345 R.E. 2019], any contract that limits / restricts absolutely any party from enforcing their right through legal proceedings is regarded as void to such extent.

TANZANIA

REGULATORY PRINCIPLES IN RELATION TO CUSTOMERS

QUESTION	ANSWER
28 Are there any regulatory principles relating to the manner in which customers are treated?	Yes, there is an established Code of Conduct and Ethics for Tanzania Insurance (Code of Conduct) embedded in the second schedule to the Insurance Regulations which are made pursuant to Section 139 of the Insurance Act and Regulations 38 and 39 of the Insurance Regulations, The Code of Conduct provides for the standards of professional conduct required of all insurance registrants (insurer / intermediaries / reinsurance) in the performance of their duties with the clients (insured / public). Further, the Insurance Act provides for the institutions that act as the regulators and protectors of the insurance policyholders in Tanzania. These institutions / regulators are: • Tanzania Insurance Regulatory Authority (TIRA): under Section 6 of the Insurance Act, TIRA is provided with the mandate to protect the interests of the policyholder; • Commissioner of Insurance: under Section 11 of the Insurance Act, the Commissioner of Insurance is further mandated with the duty to provide guidance to insurers on how to treat policyholders and mandated to oversee contracts of insurance to be fair to the policyholder; and • Insurance Ombudsman Office of Tanzania: under Section 122 of the Insurance Act, the Ombudsman's office is provided with the mandate to resolve disputes between insurance consumers and insurers. The mandate of the Ombudsman to grant an award on insurance disputes, however it is limited to a maximum of Tanzanian Shillings 15 million.
29 How does your regulator apply these principles and are there consequences of breaching these provisions and/or not complying with these principles?	Under section 123 of the Insurance Act, policyholders have the right to lodge complaints with the relevant Ombud about non-compliance of the Insurance Act and regulations by the insurer, which may include the refusal of claims. The powers of the Ombudsman in determining complaints filed to him are limited to a maximum amount of Tanzanian Shillings 15 million.
30 Please cite a key decision by your court or regulator relating to the application of these principles.	No decision has been made and/or released to the public from local courts with regards to the above.

UNITED KINGDOM

ABOUT LINKLATERS

Linklaters is a leading global law firm, using its expertise and resources to help clients pursue opportunities and manage risk across emerging and developed markets around the world. It builds long and lasting relationships by delivering excellent client service and using its global capabilities to help clients pursue the right opportunities and fulfil their ambitions. Linklaters' global financial regulation group advises on all aspects of regulatory compliance, risk management, enforcement and regulatory transactions. Insurers, banks, investment managers, securities houses, government bodies, exchanges, and trading and settlement systems benefit from the team's experience working with regulators, including the PRA and FCA, in all areas of regulatory structuring, advice and governance, complex cross-border regulatory investigations, enforcement cases, system and control requirements, regulatory and reporting advice and establishing new market participants.

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UNITED KINGDOM

ESSENTIALIA OF AN INSURANCE CONTRACT

QUESTION	ANSWER
01 What are the essential elements of an insurance contract?	In line with basic principles of contract law, there must be an offer (by the insured) and acceptance (by the insurer). Insurance is, broadly, treated as an enforceable contract under which an insurer undertakes: • in consideration of one or more payments (premium); • to pay money or provide a corresponding benefit (sum insured); • in response to a defined event, the occurrence of which is uncertain and adverse to the recipient's interests (i.e. an insured peril). [FCA PERG 6.3.4; Prudential v Commissions of Inland Revenue [1904]] The material terms of an insurance contract are (i) the definition of the risk(s) to be covered; (ii) the duration of the cover; (iii) the amount and method of premium payment; and (iv) the amount payable in the event of a loss.
02 Please briefly explain each essential element.	Premium • Payments made by the insured under their policy. Insurance is a way of sharing – among all policyholders – the cost of losses that are likely to only occur to some (not all) of them. The level of premium reflects the likelihood that performance (i.e. payment of claims) will be required, rather than reflect the value of an insurer's actual performance. Sum insured • The insurer must undertake to pay the policyholder a sum of money or corresponding benefit, when the relevant event has occurred. A contract under which a firm is not contractually required to pay in such a scenario is not a contract of insurance. • Indemnity insurance compensates the policyholder for actual losses suffered (e.g. car and home insurance). Non-indemnity insurance is payable regardless of the actual loss suffered (e.g. life insurance). Insured peril • The event must be uncertain – either in respect of whether it will happen or not; or, if it must happen at some point, the time at which it will happen. • The event must typically be adverse. Generally, this means it will be of a character adverse to the interest of the insured. This is not, however, always the case – for example, in respect of life policies where payment is made for attaining a certain age.
03 Is there a term that is mistakenly thought to be essential?	Insurable interest is not an essential element for the entering into of all types of insurance contract. The position in respect of insurable interest differs between indemnity and non-indemnity insurance, and is the subject of longstanding debate and legal uncertainty (see below). In any event, the insured must, on a practical basis, have an interest in the subject matter of the insurance. This is because such a requirement may be inherent in the nature of the contract (for it to be enforceable), or because it may be stipulated in law as a condition for a valid policy (or both).

UNITED KINGDOM

INTERPRETING INSURANCE POLICIES

QUESTION	ANSWER
04 How are insurance contracts interpreted (i.e. strictly, loosely or a combination of both)?	Insurance contracts are construed according to the principles of construction generally applicable to other contracts. Key principles in relation to insurance include those set out below: • Generally, words are given their ordinary and natural meaning, unless – for example – the context in which they appear requires a different meaning. • Wording will be construed in accordance with sound commercial principles and good business sense. Similarly, wording will typically be construed in a way that avoids unreasonable results. • Terms may be implied if, among other conditions, it is necessary for the efficacy of the contract; but no term will be implied unless it is reasonable. • Words with a technical and recognised meaning in law will, typically, be assigned that meaning. For words defined in the policy (that are also technical legal words), the policy definition will prevail. • The purpose (or commercial object) of an insurance contract, as well as the purpose of a clause and its relation to the contract more generally, is relevant in interpreting clauses in the contract. • Extrinsic evidence may be admissible in order to assist in interpreting an insurance contract – although this is subject to limitations.
05 Does the contra proferentum rule apply? Briefly explain.	Broadly, yes. Where a contractual term is ambiguous, the contra proferentem principle may be applied and the wording construed against the party who drafted it (i.e. the insurer) – in favour of the policyholder. Note, however, that in relation to exclusion clauses, the principle is now viewed as largely obsolete (see below).
06 Is there a particular rule of interpretation that applies to insurance contracts (and is receiving attention in your jurisdiction)?	The contra proferentem rule and its relevance in relation to exclusion clauses has received further attention as part of the recent FCA test case in relation to business interruption insurance and the impact of Covid-19 (see below).

UNITED KINGDOM

EXCLUSIONS

QUESTION	ANSWER
07 What is an exclusion / exception and how is it reflected in a policy?	Exclusions or exceptions are used to define the scope of the insured risk and are included in insurance policies to establish that cover will not be provided in relation to certain risks. Exclusions are typically grouped together in a dedicated section of the insurance contract.
08 Who bears the onus to establish that a claim is covered by the insurance contract and who bears the onus to prove an exclusion?	Generally, the policyholder must prove, on the balance of probabilities: • that their loss was caused by an insured peril; • the amount and extent of its loss (although this is more relevant in relation to indemnity insurance (e.g. home), than it is with non-indemnity insurance (e.g. life); For exclusion clauses, it is for the insurer to prove that a relevant clause applies in such a way as to exclude cover.
09 Are there specific interpretation principle(s) that apply to exclusions? If so, please elaborate	Under the contra proferentem principle, where there is real doubt as to the meaning of a policy term, such ambiguity should be interpreted against the drafting party. In practice, therefore, this would mean that exclusion clauses are interpreted narrowly against the insurer. However, recent cases have established that the principle is of limited use and should not be automatically applied, particularly in relation to exclusion clauses. Broadly, this is because such clauses ought to be viewed as defining the scope of cover (i.e. inherent to the purpose of the policy), as opposed to excluding liability for certain events. This position was recently reaffirmed by the High Court in the FCA test case in relation to business interruption insurance and the impact of Covid-19.

UNITED KINGDOM

WARRANTIES AND CONDITIONS PRECEDENT

QUESTION	ANSWER
10 What is the difference between a warranty and a condition precedent?	Generally, a warranty in insurance is a term under which the policyholder promises that a situation either: • existed prior to the policy coming into force; or • will continue to exist during the life of the policy. Breach of warranty will typically discharge the insurer's liability. However, under the IA 2015 – which abolished the previous rule that a breach of warranty automatically discharges the insurer from liability – from 12 August 2016: • for individual and business policyholders in breach of a warranty, if the breach is remedied before the loss occurs, the insurer will be back on risk (i.e. warranties are akin to suspensive conditions); • for business policyholders, "basis of the contract" clauses have been abolished (such clauses had already been abolished for individual policyholders in 2012). Conditions precedent are policy conditions that allow the insurer to reject claims where they are not fulfilled. Broadly, these may either be conditions precedent to the contract itself, or conditions precedent to liability (see below).
11 Which types of warranties exist in your jurisdiction? (Please include examples)	Warranties may be expressly set out in the policy or implied (e.g. as a matter of law), and may be either: • a warranty of past or present fact – i.e. the policyholder warrants that a state of affairs exists (or does not exist) prior to the policy coming into force. • a continuing warranty – i.e. the policyholder warrants that a state of affairs will (or will not) prevail in future. Warranties of past or present fact may be located on a proposal form, i.e. a declaration that the various statements made by the policyholder are true. An example of a continuing warranty would be where a business policyholder warrants that certain employees do not carry out work without adequate supervision.
12 How are conditions precedent implemented in insurance? (Please include examples)	Conditions precedent are, in effect, suspensive conditions that – if not fulfilled – allow the insurer to reject claims (without the whole contract being necessarily discharged). They may either be: • conditions precedent to the contract itself (i.e. conditions that must be fulfilled before the insurer comes on risk, such as payment of premiums); or • conditions precedent to the insurer's liability (in respect of a specific claim or under the entire policy). Often, conditions precedent will relate to obligations on the policyholder. For example, a condition that the insured will submit a claim within a prescribed timeframe.

UNITED KINGDOM

INSURABLE INTEREST

QUESTION	ANSWER
13 What does insurable interest mean in your jurisdiction?	Broadly, an insurable interest may be viewed as a person's interest in the subject of the insurance arising from a legally-recognised relationship to it. Put another way, the principle requires that a policyholder gains from the ongoing preservation of the subject of the insurance; or would be disadvantaged were it to be lost. Notwithstanding that it does not readily apply in all types of insurance, the following from the Life Assurance Act 1774 is generally considered to be a helpful starting point: "Where the assured is so situated that the happening of the event on which the insurance money is to become payable would, as a proximate cause, involve the assured in the loss or diminution of any right recognised by law or in any legal liability there is an insurable interest in the happening of that event to the extent of the possible loss or liability."
14 Please provide us with examples of insurable interests.	Indemnity insurance Indemnity insurance compensates the insured for actual losses suffered: • indemnity insurance includes personal lines such as motor and home insurance. For example, a car owner or homeowner has an insurable interest in such property, as they would stand to lose financially from loss or damage to it. • similarly, indemnity insurance includes commercial lines such as business interruption insurance (e.g. an owner would stand to lose financially if the business was unable to operate or trade normally). Non-indemnity insurance Non-indemnity insurance provides for lump sum payments to be made when a specific event occurs, regardless of any actual loss suffered. Categories of insurable interest include interests arising out of: • natural affection (for example, as provided for by a life insurance policy); • potential financial loss recognised in law and shown at the time of the contract (for example, key person cover); • statutory provisions.
15 How is insurable interest treated in your jurisdiction?	Broadly, an insured person will be required to possess an insurable interest, either because: • such a requirement is inherent in the nature of the policy for it to be enforceable; and / or • it is required in law as a condition of the policy's validity. The insurable interest principle in English law is complex and ultimately differs depending on the type of cover. Indemnity insurance For indemnity insurance in particular, the precise legal basis for the requirement for there to be an insurable interest is uncertain – a position exacerbated by the Gambling Act 2005. In any event, indemnity policies are governed by the indemnity principle – i.e. a policyholder can only recover what they have lost. For a valid claim, some kind of interest must exist at the time the relevant event occurs – i.e. it is an inherent requirement, given the nature of the cover. Non-indemnity insurance For non-indemnity insurance, there is a statutory requirement for there to be an insurable interest at the time the policy is entered into. Categories of non-financial interest include those set out above.

REJECTION OF CLAIMS

QUESTION	ANSWER
16 When can an insurer reject a claim?	Subject to the terms of the contract, examples of situations where the insurer may reject a claim include where: • the claim falls outside the scope of the policy cover; • the loss is excluded from cover by a specific exclusion clause; • a condition precedent – to risk (e.g. a condition requiring payment of premiums) or to liability (e.g. claims co-operation conditions) – is breached; • a warranty, relevant to the risk, is breached; • the insured fails to perform a material obligation; • the insured lacks an insurable interest – at the time of the loss (in the case of indemnity insurance) or at the time the contract is entered into (in the case of non-indemnity insurance); • there has been a breach of the duty of fair presentation (see below); or • the insured has not notified, claimed or instituted action within the required time.
17 What steps must an insurer take if it intends rejecting a claim?	The insurer must, in clear terms, provide the policyholder with a notice rejecting their claim. An insurer must accept, reject or dispute a claim or the quantum of a claim under an insurance contract within a reasonable period after it receives notification of the claim.
18 Are there certain protections afforded to insureds regarding rejection of claims (i.e. guidelines / rules by an Ombudsman / legislative body or precedent)? Please elaborate.	Insurers are required to have complaints procedures in place that provide recourse for policyholders where issues arise. There are certain requirements that FCA-regulated firms must comply with, including in relation to complaint handling and resolution. Policyholders (broadly, retail customers and the majority of small businesses) who are dissatisfied with how their complaint has been dealt with by the insurer may refer the matter to the Financial Ombudsman Service (FOS). The FOS was established under legislation to provide a scheme under which disputes may be resolved quickly and with minimal formality by an independent person. The FOS is free to use for policyholders. Any insured may also pursue action through the courts.

UNITED KINGDOM

MISREPRESENTATION AND NON-DISCLOSURE

QUESTION	ANSWER
19 What is the duty on an insured in respect of representations and disclosures to its insurer?	The duties on policyholders in respect of representations and disclosures vary, depending whether they are a business or individual, as well as when the policy was entered into, varied or renewed. Businesses (policies entered into, varied and renewed from 12 August 2016) • Broadly, a duty of fair presentation has been introduced by the IA 2015. • Policyholders must disclose all material circumstances that they know (or ought to know); or put the insurer on notice that further enquiries are needed. Individuals (from 6 April 2013) • Broadly, a duty to take reasonable care not to make a misrepresentation has been introduced by the Consumer Insurance (Disclosure and Representations) Act 2012 (CIDRA 2012). • Insurers' remedies are also more proportionate to the policyholder's failings (as described below). Before the IA 2015 and CIDRA 2012, a duty of utmost good faith applied to businesses and individuals.
20 What is the remedy for an insurer when there is a material misrepresentation or a non-disclosure? Please explain.	Remedies for insurers will similarly vary, depending on whether the insurance policy was entered into etc. before or after the more recent legislation (i.e. the IA 2015 and the CIDRA 2012) was introduced. Broadly, the IA 2015 and CIDRA 2012 have introduced a system of proportionate remedies (i.e. to avoid any disproportionate outcomes), as set out below. Individuals (from 6 April 2013) • For individual (i.e. retail) insurance policies, the remedies available to an insurer will depend on the misrepresentation and the individual's state of mind. • If the misrepresentation is honest and reasonable, the insurer must pay the claim. If it is deliberate and reckless, the insurer may avoid the policy (and retain the premiums unless there is good reason to return them). • If the misrepresentation was due to carelessness, remedies depend on whether the insurer would have entered the contract at all (if not, they may refuse claims but return premiums paid) or they would have on different terms (contract taken to include those terms). Businesses (from 12 August 2016) • For businesses, a similar system of remedies applies. • For deliberate or reckless misrepresentations, insurers may avoid the contract and retain any premiums paid. • For neither deliberate nor reckless misrepresentations, remedies are based on what the insurer would have otherwise done (e.g. if the premium would have been higher, this may be offset from a claim). Before the IA 2015 and CIDRA 2012, the general position was that failure by the policyholder to make an appropriate disclosure gave the insurer the ability to avoid the insurance contract.
21 Does the misrepresentation and/or non-disclosure have to be linked to a claim made by the insured to enable an insurer to rely on the remedy? Please explain.	No. However, where the misrepresentation was neither deliberate nor reckless, the more recent requirement for remedies to be proportionate means that the lesser the link, the smaller any remedy for the insurer is likely to be. Similarly, there was no requirement for a link between the misrepresentation / non-disclosure and the claim, before the IA 2015 and CIDRA 2012 – insurers were able to avoid the policy irrespective of any such link.

UNITED KINGDOM

CAUSATION – PROXIMATE CAUSE

QUESTION	ANSWER
22 What is the test for causation?	The policyholder must prove on the balance of probabilities that a peril covered by the policy was a proximate cause of the loss. Insurers will, subsequently, only be liable for losses that are proximately caused by a peril that it provided for in the policy. Note that this test may be expressly modified in the policy – for example, by agreeing that an insurer will only provide cover for loss "directly or indirectly" caused by the peril.
23 How have courts applied this test?	A proximate (or "efficient") cause means the dominant, effective, or operative cause of the loss (i.e. not necessarily the first, last or only cause). In particular, a proximate cause does not need to be the cause immediately before a relevant loss occurred. It has been found that the proximate cause test may be narrower than the "but for" causation test, and – as recently reaffirmed in the FCA's business interruption test case – that the "but for" test can be inadequate (see below). Moreover, it is the case that where there are two proximate causes of loss: • if neither cause is excluded, but one is insured, insurers are liable for the loss; • if one cause is an insured peril but the other is expressly excluded, the exclusion will typically prevail (i.e. insurers will not, in most cases, be liable for the loss).
24 Was causation a point of contention in business interruption claims? If so, please elaborate	Yes. The FCA brought a test case (FCA v Arch) under the Financial Markets Test Case Scheme, with a view to the courts resolving key contractual uncertainties and causation issues arising out of Covid-19-related business interruption insurance claims. The case was appealed to the Supreme Court, which delivered its judgement in January 2021. The test case reaffirmed the test for causation, i.e. that the proximate cause must have made the loss inevitable. It also reaffirmed the position where there are two proximate causes of loss, as set out above, and that there is no reason why such an analysis cannot apply to multiple causes which act in combination to bring about said loss. In relation to business interruption claims, the insurers' view was that it was necessary to show (as a minimum) that the loss would not have occurred but for the insured peril (here, for example, disease within a local geographical area). By extension, they argued that because the outbreak of disease was more widespread, losses would have been the same – irrespective of whether the insured peril occurred. The court ruled that the "but for" test was not determinative and was inadequate in contexts such as this where the insured peril – taken together with other similar uninsured events – results in a loss (even if the insured peril, e.g. the localised cases of Covid-19, alone was insufficient to have caused the loss). The court held that all individual cases of Covid-19 were equally proximate causes of the loss.

UNITED KINGDOM

NOTIFICATION OF CLAIMS, PRESCRIPTION, AND TIME-BAR

QUESTION	ANSWER
25 What should be notified to an insurer and when must this be done?	Insurance policies will typically require the policyholder to notify the insurer within a set timeframe about: • a claim under the policy; • an event or occurrence that may give rise to a claim (in particular, this is the case for "claims made" policies – these are policies that provide cover in respect of claims made by a third party against the insurer). Policies may also include a "claims co-operation" clause that requires the policyholder to provide information requested by the insurer. Such terms are typically conditions precedent to liability. Notifications that are required under the policy to be made immediately should be made with all reasonable speed in the circumstances. Where notifications must be made as soon as possible, policyholders will need to have acted reasonably (again, in view of the circumstances of the loss). For policies where no timeframe is provided, policyholders must notify about a claim etc. within a reasonable time.
26 What are the legislated time periods for an action to prescribe?	There is no dedicated (i.e. insurance-specific) statutory limitation period in respect of making a claim under an insurance policy. Insurance contracts are subject to the limitation period for causes of action founded on breach of contract. Under the Limitation Act 1980, this is six years from the cause of action.
27 Are these legislated time periods capable of amendment by agreement in an insurance contract? Please elaborate.	Yes. Insurance contracts will typically include a notification clause that requires the policyholder to give the insurer notice (in particular, notice about a claim) within a prescribed period. In such cases, a policyholder may lose their ability to claim if they fails to notify the insurer in time. Note that there are other standard time limits that policyholders may need to comply with, and which may relate to their entitlement under an insurance policy. This includes limits in relation to access to the FOS (such as the requirement to refer a complaint to the FOS within six months).

UNITED KINGDOM

REGULATORY PRINCIPLES IN RELATION TO CUSTOMERS

QUESTION	ANSWER
28 Are there any regulatory principles relating to the manner in which customers are treated?	Yes, there are two key aspects of the FCA's Handbook that are relevant here. FCA Principles for Businesses Insurers that are regulated by the Financial Conduct Authority (FCA) must comply with the FCA's Principles for Businesses. These general Principles are binding rules that form the basis of a firm's responsibilities to its customers. There are eleven Principles, including: • Principle 6 (customers' interests): firms must pay due regard to the interests of their customers and treat them fairly. • Principle 7 (communications with clients): firms must pay due regard to the information needs of their clients and communicate information to them in a way which is clear, fair and not misleading. Other relevant Principles include obligations in relation to conflicts of interest (Principle 6), relationships of trust (Principle 9) and protection of clients' assets (Principle 10). Conduct of business rules In addition to the Principles, there are detailed rules governing the conduct of insurance business that aim to promote fair treatment of customers. The FCA continues to actively monitor the insurance market and introduce further measures designed to ensure that customers are treated fairly. Examples of such measures include: • confirmation in May 2021 that it will ban loyalties penalties or "price walking" (i.e. the practice of offering cheaper prices to new customers – typically below the cost-to-serve – which then increase on future renewals) for home and motor insurance; • detailed guidance for life insurers published in December 2016 on the fair treatment of longstanding customers (in particular, closed-book customers).
29 How does your regulator apply these principles and are there consequences of breaching these provisions and/or not complying with these principles?	Application of rules The FCA supervises the conduct of the firms it regulates and requires self-reporting by firms that identify non-compliance with the rules to which they are subject. Consequences for non-compliance Firms may be liable to disciplinary sanctions from the FCA if they breach the rules contained in the Handbook. The FCA has a range of enforcement powers – regulatory, civil and criminal – available to protect customers. These powers include: • issuing financial penalties (i.e. fines) against firms; • making public statements in relation to disciplinary action taken against firms; • suspending firms' ability to undertake certain activities; • withdrawing firms' authorisation.
30 Please cite a key decision by your court or regulator relating to the application of these principles.	In relation to business interruption insurance and the impact of Covid-19, in January 2021 the Supreme Court handed down its judgment in a test case brought by the FCA (as regulator of the defendant insurers) under its Financial Markets Test Case scheme. Broadly, the judgement was positive for policyholders, although it does not mean that all relevant claims will be settled. Among the key points to note: • in relation to prevention of access clauses, cover may be available for partial (and full) closure of premises, and for closure orders that were not legally binding; • in relation to causation, claims should not be reduced because the loss would have occurred in any event as a result of the pandemic; • the majority of sample policy wordings (14 out of 21) were found to provide cover. Insurers, which in many cases are dealing with long-running BI claims from their clients, are expected to adhere to the FCA's Principles for Businesses (and its rules more generally) and handle claims in a clear and fair way.

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