A Critical Examination of Developments in the Regulation of the Insurance Industry in Botswana

Thabo Fiona Khumalo*

ABSTRACT

A vibrant and well-regulated financial services sector is one of the factors that lead to the sustainable development and economic viability of a country. The non-banking financial services sector is one of the largest sectors in the services industry in Botswana. The insurance industry is a major part of the non-banking financial services sector. Regulation of the insurance industry has evolved since independence. At independence, the industry was directly controlled by Government. It is now regulated by an autonomous body responsible for overseeing the entire non-banking financial services sector. The paper traces and assesses this development. It argues that autonomous regulation of the insurance industry is more appropriate for supervision, monitoring and surveillance of the industry. It is a notable improvement in the regulatory environment, but some problems and challenges that need to be addressed still remain.

1. INTRODUCTION

The regulation of the Botswana insurance industry has changed dramatically since independence. Developments in the regulation of the insurance industry to some extent mirror developments in the corporate laws of Botswana. The insurance industry is part of the financial services sector which is instrumental in facilitating growth of the economy, and if properly regulated, can be the means to diversify the economy and assist in the attainment of sustainable development goals.[1] The financial services sector in Botswana is broadly divided into banking and non-bank financial services provided by non-bank financial institutions (NBFIs). The NBFIs sector includes all institutions that

* Lecturer, Department of Law, University of Botswana.

1 Sustainable development is defined as "Development that meets the needs of the present without compromising the ability of future generations to meet their own needs". See Report *of the World Commission on Environment and Development: Our Common Future*, (Brundtland Report), United Nations, General Assembly, document A/ 43/ 427, 4 August 1987, Chapter 2, p. 54, para. 1.

are not banks, but are involved in finance, although in some instances this may involve provision of some services provided by banks.[2]

A review of the regulation of the insurance industry provides insight into how regulation is used as a tool in the achievement of some government policies.[3] Developments in the laws governing the insurance industry indicate a policy shift by government away from direct regulation to indirect regulation. Important policymaking powers have been delegated to independent technocratic bodies, expected to take decisions on the basis of professional needs and not political reason.[4] Regulation has been used as a tool for the restructuring and reorganisation of the insurance industry. It has also been a means of enhancing competition and market forces.[5] The first part of this article will discuss the importance of regulating the insurance industry. The second part discusses historical developments in the regulation of the insurance industry in Botswana. Part three reviews the regulatory framework for the insurance industry in Botswana. Part four outlines the achievements in prudential regulation. Part five is the conclusion on the achievements in insurance regulation.

2. IMPORTANCE OF REGULATING THE INSURANCE INDUSTRY IN BOTSWANA

Insurance is the mechanism through which certainty is created by the spreading of risk within a community.[6] This spreading of risk is achieved by having all

2 Section 2 of the Non-Bank Financial Institutions Regulatory Authority (NBFIRA) Act, 2006, (No. 2 of 2007, (Cap 46:08), indicates that a "non-bank financial institution" means any of the following: "(a) an asset manager; (b) an administrator of a pension or provident fund; (c) a person operating a central securities depository; (d) a collective investment undertaking that is an investment company with variable capital; (e) a person operating a collective investment undertaking other than one described in paragraph (d); (f) a custodian; (g) a finance or leasing company;(h) a friendly society; (i) an insurance agent; (j) an insurance broker; (k) an insurer; (l) an international insurance firm; (m) an investment adviser; (n) a management company for a collective investment undertaking; (o) a member of the insurance industry; (p) a micro lender; (q) a pension or provident fund; (r) a securities dealer; (s) the operator of a securities exchange; (t) a trustee of a collective investment undertaking or a pension or provident fund; (u) a financial group; (v) a person prescribed for the purposes of this definition; and includes such an institution that provides financial services to persons outside Botswana."

3 G. Kaboyakgosi, M. Sengweketse M and T. Balule (eds), *Industry Regulation in Botswana*, Gaborone, Lentswe La Lesedi, (2013), p.1.

4 T. Christiansen and P. Laegreid, "Agencification and Regulatory Reforms" in T. Christiansen and P. Laegreid (eds.) *Autonomy in Regulation: Coping with Agencies in the Modern State,* Edward Elger, (2006), pp. 8-48.

5 I*bid.*

6 M.F.B. Reinecke, J.P. van Niekerk and P.M. Nienaber, *South African Insurance Law*, Lexis Nexis, Durban, (2013), p.3.

those persons who are exposed to a similar risk contributing to a fund which is shared by the members in the event of the risk insured against occurring.[7] If a member is exposed to a risk as described in the contract, funds are given to that member to alleviate or limit the amount of exposure to that risk.[8] The limitation of risk through the availability of insurance makes it possible for people to embark or engage in activities that involve risk such as starting a business or expanding an existing one.[9] Insurance also serves a wider purpose of creating a pool of financial resources that are available for investment purposes.[10] Insurance, therefore, helps to create an environment necessary for growth and diversification of the economy. However, the benefits of insurance are underpinned by an effective regulatory system.[11]

The discovery of diamonds in 1966, combined with good governance and prudent economic and fiscal management has led to exponential growth of the Botswana economy.[12] The Gross Domestic Product of the country has grown consistently by rates above five per cent per annum over the past decade, making Botswana one of the fastest growing upper middle income economies in the world.[13] The financial and business services sector has also grown dramatically in line with the growth of the economy, surpassed only by mining and government services in terms of size.[14] Further, the industry has also experienced a lot of financial and functional integration.[15] This growth has been matched by the increasing complexity of the financial instruments that are now being created by the industry. It has become progressively more difficult to determine the nature of a financial product *a priori*.[16] In some instances, it is difficult to determine whether a financial product is a pension, an investment

7 *Ibid*.

8 *Ibid*.

9 *Ibid,* p. 2

10 V. Salomon, "The Circulation of Wealth, Emergent Models of Financial Intermediation for Innovative Companies: From Venture Capital to Crowd Investing Platforms", Universite de Neuchatel, Working Paper 8 – 2014/ E, at https://www.unine.ch/files/live/sites/maps/.../WP_8_2014_Salomon.pdf (accessed on 26 June, 2016).

11 See *Registrar of Insurance v General Insurance Botswana (Pty) Ltd*, [2006] 1 BLR 99 (HC), which involved liquidation of an insurance company but members were without any security .

12 The World Bank, "Country Overview Botswana", http://www.worldbank.org/en/country/botswana/overview (accessed on 25 June 2016).

13 *Ibid*.

14 Organisation for Economic Co-operation and Development (OECD), *African Economic Outlook*, https://www.oecd.org/dev/emea/40573959.pdf (accessed on 25 June, 2016).

15 R. Dale, S Wolfe, "The Structure of Financial Regulation" *6 (4) Journal of Financial Regulation and Compliance*, (1998)), pp. 326-350.

16 *Ibid*.

product or an asset management product. In other cases, insurance products are hybrid combinations of these. There are now ownership linkages between the different providers of financial services. Other areas of integration have presented themselves in the cross selling of financial products.[17] It is now possible for consumers to purchase a variety of financial products at a single location, for instance, one can purchase a pension, asset management investments, life cover and savings from the same place.[18] Financial integration combined with the complexity of the financial products has created an environment where it is difficult to determine the laws that apply to a particular service.[19] This environment lends itself to opportunistic and fraudulent behaviour which breeds all sorts of conflict. This environment demands a regulatory approach that focuses on consumer protection. The term consumer is used broadly to include the protection of policyholders and investors.[20]

The nature of the insurance industry creates information asymmetries. Information asymmetries occur in industries where it is not possible for consumers to make informed decisions based on disclosure alone, such as insurance.[21] This is because the risk that is posed by insurance companies is uncertain and long term.[22] This is compounded by the fact that ordinarily policyholders and investors do not have the skills, resources and information necessary to fully assess the financial risk that insurance companies present.[23] Moreover, even in instances where policy holders and investors have performed their due diligence and ascertained the risk, they are not in a position to influence investments strategies of the insurer. The insurer may change its investment strategies after policy holders and investors have been bound by contract. Unfortunately, all contracts and agreements concerning the insurance industry occur in an environment of information asymmetry, where only the insurer has definitive knowledge of the risk involved. The role of the regulator in the insurance industry is to provide certainty through the mitigation of the risk posed by insurance

17 D.T. Llewelyn, "Institutional Structure of Financial Regulation: The Basic Issues" Paper presented at a World Bank Seminar, *Aligning Supervisory Structures with Country Needs*, Washington DC, 6-7 June 2006.

18 *Ibid.*

19 *Ibid*.

20 Dale and Wolfe, *op cit*., p.330.

21 J. Carmichael, "Overview of the Policy and Regulatory Frameworks for NBFI's", paper delivered at a Regional Seminar on Non-Bank Financial Institution Development in African Countries, Mauritius, 9-11 December 2003.

22 Dale and Wolfe, *ibid*.

23 *Ibid.*

companies. [24]

The similarity of financial products makes definitive classification of these products is all but impossible. This creates problems of regulatory arbitrage. Regulatory arbitrage occurs when financial institutions are in a position to choose how to classify their products and thereby choosing their regulatory system.[25] Financial institutions may choose to use the classification which has the lowest levels of regulation. For example, Medical Aid was not considered a form of insurance before the promulgation of the NBFIRA Act and was not subjected to the same levels of regulation as other insurance products. This situation was also compounded by the fact that the regulators themselves were unwilling to extend the ambit of their authority.[26] This created two problems: firstly, there were gaps in regulatory jurisdiction, which left some institutions not being fully regulated; secondly, their competitiveness was affected because of the lack of regulatory neutrality.[27] This occurred because institutions providing products similar to insurance, which were not regulated as insurance products, had a competitive advantage over insurance institutions whose products were regulated. Robust regulation of the entire insurance industry is therefore essential to ensure the integrity of financial markets. This calls for regulation of the market as a whole and not just the bilateral relationship between financial institutions and their customers.[28] This is achieved through prudential regulation, conduct of business regulation, regulation of competition and ensuring the integrity of payment systems.[29] The insurance regulator focuses on prudential regulation and conduct of business regulation, as effective tools against the types of risks that are created by NBFI's and can be used to promote financial stability.

24 M.T. Cappucci, "Prudential Regulation and the Knowledge Problem: Towards a Paradigm of Systemic Risk Regulation", 9 *Virginia Law and Business Review*, (2014), pp.1-41.

25 D. T. Llewellyn, *op. cit*.

26 Section 2 of the NBFIRA Act provides that "insurer" means a person "who undertakes liabilities by way of insurance (including general insurance, life insurance and re-insurance), whether or not as a member of an association of underwriters, and includes a person operating a medical aid fund".

27 Republic of Botswana, *National Competition Policy for Botswana*, Ministry Of Trade And Industry, Gaborone, (July 2005), at p. 3, para. 3.1 defines competitiveness as distinct from competition and as referring to "the ability of two or more entities to offer products and services whose quality and prices compare favourably with those of competitors in specific market segments."

28 Dale and Wolfe, *op. cit*. p.330.

29 World Bank, "Country Overview Botswana", at http://www.worldbank.org/en/country/botswana/overview (accessed on 25 June 2016).

3. HISTORICAL DEVELOPMENT OF INSURANCE REGULATION IN BOTSWANA

The capacity or ability of the State to regulate the insurance industry has increased in the last 50 years. At independence, there was no specific law that governed the insurance industry. The industry was regulated under various laws. The first Act to specifically deal with the insurance industry was the Insurance Act, No. 21 of 1969, which was repealed and replaced by the Insurance Act, No. 12 of 1979. This was replaced by the Insurance Industry Act, No. 21 of 1987, which was also repealed and replaced by the Insurance Industry Act, No. 10 of 2015. This is the regulatory law currently in force. This section will briefly highlight major milestones in the regulation of the industry achieved under these pieces of legislation and the NBFIRA Act, 2006.

Prior to the passing of the first Act, the insurance industry did not have a specific regulator to oversee its operations. The first Act, the Insurance Act of 1969, created the office of the Registrar of Insurance.[30] When this office was created, the Registrar was a single individual performing specified administrative functions. The Insurance Industry Act of 1979 increased the powers and functions of the Registrar.[31] The functions of the Registrar were expanded to include inspection and supervisory functions. The Registrar was also empowered to act as an advisor to the Minister in the formulation of rules affecting the insurance industry. These clarified functions necessitated an increase in the number of persons to be appointed to the Office of the Registrar. The Minister was authorised to appoint other members of staff to the Office of the Registrar.[32] The Insurance Industry Act, 1987, went further and recognised the specialised functions that the Registrar performed by adding qualification requirements for a person to be appointed as a Registrar.[33] A specific budget was created for the office of the Registrar, and the Registrar was now expected to provide annual reports on the conduct of his affairs.[34] The creation of a specific budget for the Registrar of insurance was a positive development because it ensured that the Registrar had the resources necessary to perform his functions. An advisory Board was created to assist the Registrar in the fulfilment of his

30 Section 4, Insurance Act, 1969.
31 Section 4, Insurance Act, 1979.
32 Section 3(3), Insurance Act, 1979.
33 Section 3, Insurance Industry Act, 1987.
34 Section4 (3) Insurance Industry Act, 1987.

functions.[35]

Between 1969 and 2007 the regulation of the NBFIs sector was segmented, and the use of Registrars was not peculiar to insurance. Other actors in the NBFIs sector each had their own regulators with specific legislation assigned to them such as the Registrar of Pensions.[36] Both the Registrar of Insurance and Registrar of Pensions were under the Ministry of Finance, and they performed their advisory and regulatory functions through the Minister. Established under different pieces of legislation, these Registrars did not necessarily communicate or collaborate with each other. Each Registrar necessarily focused on the sector and mandate conferred by the enabling legislation. This led to fragmented regulation. The advantage of this system is that it allowed for specialisation to occur within the offices of the Registrar. Whilst the industry was still small and segmented, this regulatory approach was suitable. At that time, regulation of these apparently different types of financial services was guided by different objectives. However, the fact that the Registrar was directly controlled by the Minister of Finance allowed for political interference to occur. The Registrar was not truly independent since appeals could be made to the Minister who was in a position to overrule the decisions of the Registrar.

The regulation of the Insurance Industry was bolstered by the passing of the NBFIRA Act in 2007.[37] This Act created a unified regulatory system that governed all NBFI's including the insurance industry.[38] This signalled a departure from a regulatory approach that focussed on specific sectors, to one that focused on the nature of the functions performed.[39] NBFIRA is a semi-autonomous body that regulates all NBFIs.[40] It is semi-autonomous because it has some autonomy but is not totally independent as the Minister is still responsible for its activities.[41] NBFIRA is a statutory corporation, with perpetual succession, and capable of suing and being sued in its own name, and with the powers that all body corporates have.[42]

The establishment of NBFIRA is an important policy shift by

35 Section 4 (2) Insurance Industry, 1987.

36 K.N. Bojosi, "An Appraisal of the New Legal Framework for the Regulation of Non-Banking Financial Institutions In Botswana", 14 *UBLJ*, (2012), pp. 29-52.

37 The Act finalised and tabled in Parliament in 2006, but passed as Act No. 2 of 2007. It is in Chapter 46:08 of the Laws of Botswana.

38 Sections 6 – 10 of the Act.

39 Section 50.

40 T. Christiansen and P. Laegreid, *op. cit*. p. 12.

41 Section 10.

42 Section 6.

Government in the regulation of the financial services sector. Important policymaking power has been delegated to an independent technocratic body with political leeway.[43] Tasks which were previously viewed as political such as controlling the power of the market, ensuring fair competition, protecting consumers and directing policy are now being performed based on professional grounds and are no longer susceptible to political expediency.

In its operations NBFIRA uses a hybrid system. Whilst there is consolidated supervision of the entire NBFIs sector, there are separate regulators for the individual streams.[44] There is recognition that the services offered by insurance companies are specialised, and that with consolidated regulation insurance still requires specialised attention. Consolidated regulation of all NBFIs closed the jurisdictional and regulatory gaps that were present when there was fragmented regulation. The creation of NBFIRA has created greater administrative efficiency and capacity than that which previously existed under direct regulation. This has brought uniformity and regulatory neutrality which is good for competition, because there is a common set of standards for institutions that perform the same functions. However, there is the danger that such an integrated regulatory system may not fully recognise the fact that there are major differences between insurance and other regulated non-bank financial services. Appropriate attention may not be given to the differences between some of the non-bank financial services.[45] This consolidation has seen the regulator being burdened with too many functions, which may affect his ability to operate effectively. The benefits of the regulator having regulatory authority have not been fully utilised and the regulator has so far not issued binding regulatory codes. The regulator would appear to be functioning through soft law and persuasion.

4. THE REGULATORY FRAMEWORK FOR THE INSURANCE INDUSTRY IN BOTSWANA

Regulation of the insurance industry is primarily aimed at ensuring the financial soundness of the industry.[46] The overall intention is to make insurance a more

43 Christiansen and Laegreid, *op. cit*.
44 Bojosi *op. cit*., at p. 34.
45 Currently NBFIRA provides one set of rules for all prudentially regulated entities.
46 World Bank and International Monetary Fund (IMF), *Financial Sector Assessment, A Handbook*, Washington, (2005), p. 173. Also available at https://openknowledge.worldbank.org/handle/10986/7259.

reliable instrument for the provision of certainty and the harnessing of funds for investment. Regulations are primarily government imposed, although industry can self-regulate. The Minister plays a regulatory and a supervisory role with the assistance of NBFIRA.

From the perspective of the regulatory philosophy of the insurance industry, insurance regulation can be divided into two main categories, namely, prudential regulation and conduct of business regulation. Prudential regulation broadly refers to regulation that focuses on the safety and soundness of financial institutions.[47] This term is often used to refer to policy goals that aim to promote financial stability and avoid systemic risk. Prudential regulation is based on the principle that good processes produce favourable outcomes for consumers and the market. This type of regulation is premised on the assumption that prudential behaviour can be achieved through statutory intervention and the belief that the market cannot be left to its own devices.[48] Further, without prudential regulation the insurer would be tempted to transfer its risk to the policyholder, who would be left unprotected. The function of prudential regulation is to maintain an efficient, fair, safe and stable market for the benefit of policyholders and investors.[49]

If prudential regulation is not properly managed, it can lead to the insurer being under financial pressure, affecting its ability to pay policyholders. In complex industries such as insurance, regulations need to be proactive to achieve the goals of consumer protection and preserving sanctity of the industry. Prudential regulation focuses on the areas of initial licencing, supervision and the regulation of capital solvency requirements.

Conduct of business regulation, on the other hand, focuses on the risk that is inherent in the business model of insurance. Insurance business is conducted in an asymmetrical environment which forces the insured to rely primarily on information provided by insurance institutions when entering into

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47 D.T. Llewelyn, "Institutional Structure of Financial Regulation: The Basic Issues" Paper presented at a World Bank Seminar, *Aligning Supervisory Structures with Country Needs*, Washington DC, 6-7 June 2006.

48 This philosophy underpins the following laws, which affect or apply to all financial services: the Banking Act; the Bank of Botswana Act; the National Clearance and Settlement Act; the Companies Act and the Companies Regulations; the Financial Reporting Act; the Financial Intelligence Act; and the Competition Act.

49 International Association of Insurance Supervisors (IAIS), *Issues Papers on Group- wide Solvency Assessment and Supervision*, Basel, (2009), p.17.

a contract.[50] This creates opportunities for unscrupulous conduct. Conduct of business regulation seeks to regulate conflicts of interest that can be created and the manner in which the products are sold. Conduct of business regulation focuses on limiting the potential for conflict of interest. Conflict of interest is limited through regulations which prohibit a certain calibre of individuals from entering the insurance industry and by regulating the ownership structure of the insurance industry.

Conduct of business regulation assists in the early detection of issues that can affect the financial strength of the insurer. Poor management of prudential risk can lead to conduct of business risk because the insurer is under financial pressure. If the ownership structure of insurers and other providers of financial services is not regulated, it could lead to incentives to sell policyholders products that they do not need. This is done through cross selling of products to the same market. This has wider implications going beyond the individual institution and could affect the sustainability of the industry as a whole.[51]

Although conduct of business was regulated under the first Insurance Act of 1969, it is now a key issue in Part VII of the Insurance Act, 2015. It is more extensively regulated in this Act. Achievements made in Botswana over the years in respect of both prudential and conduct of business regulation are discussed below.

4.1 Thematic Achievements in Prudential Regulation

4.1.1 Granting the Regulator the Power to Regulate Directly

Under the Insurance Act, 1969, the regulator could not independently make policy decisions affecting the industry. In the Insurance Act, 1979, the Registrar only played an advisory role to the Minister. The NBFIRA Act gives the Regulatory Authority the power to act independently.[52] The Regulatory Authority is also granted the power to promulgate rules that facilitate prudential regulation.[53] Whilst the Minster has the authority to regulate through statutory instruments, the Regulatory Authority has the power to make rules to guide the

50 T.O. Yusuf, "Brokers Incentives and Conflict of Interest in the Control of Opportunism," 12 *Journal of Financial Risk*, (2011), pp. 168 – 181.

51 IAIS, *Issues Paper on Conduct of Business Risk and its Management*, p. 8.

52 Section 8 of the NBFIRA Act.

53 Section 50.

industry.[54] This allows the Regulatory Authority to respond to the needs of the industry as and when developments occur. Increased agility is important and necessary because new products are developed and introduced at an alarming speed as the economy grows. Existing rules quickly become obsolete or out of step with market requirements.[55]

Prudential rules are not just for insurance service providers, but for all NBFIs that require prudential regulation, regardless of the manner they have chosen to classify their products. This closes the regulatory and jurisdictional gap that had existed when the rules passed affected only the insurance industry.[56] The Regulatory Authority through the exercise of professional discretion can designate an institution as one that requires prudential regulation. In this way, NBFIs which previously would have fallen out of the ambit of sector specific regulations can be embraced by the regulations.[57] This has reduced opportunities for regulatory arbitrage and has brought order to the market by making competition fairer through the creation of regulatory neutrality.[58] However, since these rules apply across-the-board, there is the danger that the nuances of the insurance industry may not be taken into account.

4.1.2 Expansion of Supervision and Enforcement Powers of the Regulator

Supervisory powers determine the effectiveness of the regulator, and investigatory powers are one of the tools available at the regulators' disposal. In the Insurance Industry Acts of 1969 and 1979, the Registrar's supervisory powers did not include the supervision of insurance companies. The supervisory authority was limited to insurance brokers and agencies that specialise in the handling of insurance claims.[59] The Insurance Act, 1969 only provided for periodic investigations into the financial position of life insurers, which left General Insurers unsupervised.[60] In terms of these Acts, investigations could

54 Section 50(4). The rules created are valid for a period of 90 days.

55 R.K. Abrams and M. Taylor, "Issues in the Unification of Financial Sector Supervision," IMF Working Paper WP/00/213, (2000), p.13, at http://www.fep.up.pt/disciplinas/pgaf924/PGAF/

56 *Ibid* p.8.

57 E. Hüpkes, M. Quintyn and M.W. Taylor, "The Accountability of Financial Sector Supervisors: Principles and Practice," IMF Working Paper WP/05/51, (2005), p.13, accessed on 26 June 2016 at https://www.imf.org/external/pubs/ft/wp/2005/

58 *Ibid.*

59 Section 4(f), Insurance Act, 1979.

60 Section 34, Insurance Act, 1969.

only be carried out with the authority of the Minister.[61] This created delays in the process and did not allow for the problem to be resolved quickly. Investigations were carried out in terms of the Commissions of Inquiry Act.[62] The Insurance Industry Act, 1987 was the first to include powers relating to superintendence of the activities of insurance companies, allowing the Registrar to oversee their activities. These supervisory powers, over the insurance industry as a whole, were expanded under the NBFIRA Act, to include all prudential issues concerning the industry.[63] These surveillance powers are more autonomous under the NBIFIRA Act. The creation of NBFIRA has thus limited the possibilities of political and industry interference in the supervision and investigation of insurance institutions.[64] In most cases, political intervention takes the form of forbearance through allowing institutions to continue to breach regulations unpunished.[65]

Allowing the Regulatory Authority to decide unilaterally who to investigate without political interference is positive action in terms of protecting consumers.[66] The NBFIRA Act outlines the investigation powers of the investigators, which powers supplement the authority granted in the Commissions of Inquiry Act.[67] This is a positive development because these powers are tailored for the peculiarities of the financial services sector. The centralised nature of the Regulatory Authority creates an environment for information sharing of whatever has been discovered during investigations. Thus, problems that have a bearing on the insurance industry that present themselves in another NBFI can be remedied. The NBFIRA Act requires compliance with all financial services laws and not just the Insurance Act. This is a positive development in that infractions which may not necessarily be of insurance laws can now be addressed.

Supervisory power without the authority to enforce regulation limits the effectiveness of regulation.[68] In terms of the Insurance Acts of 1969 and

61 Section 26 (1), Insurance Act, 1979.
62 See section 26 (2) of the Insurance Act, 1979 and the Commissions of Enquiry Act, Cap. 05:02, Laws of Botswana.
63 Section 49 of the NBFIRA Act.
64 M. Quintyn and M.W. Taylor, "Regulatory and Supervisory Independence and Financial Stability", IMF Working paper WP/02/46, (2002), p. 17 at https://www.imf.org/external/pubs/ft/wp/2002/wp0246.pdf, (accessed 26 June, 2016).
65 *Ibid.*
66 Section 54 of NBFIRA Act.
67 Section 57 of NBFIRA Act.
68 Quintyn and Taylor, *op cit*. at p. 17.'

1979, the only enforcement powers available to the Registrar were to deregister an institution.[69] In terms of these Acts, a person could be liable for breach of the conditions in the Act only if convicted of an offence. This meant that the power to enforce was the purview of the criminal justice system.[70] This situation was problematic because culpability requirements for proof of wrongdoing are higher for criminal conduct. This meant that wrongful acts that did not rise to the level of criminality or warrant cancellation of registration went unpunished. The fact that the power to enforce lay with another institution also limited the effectiveness of regulation.[71] The Insurance Industry Act, 1987 was the first Insurance Act to give the Registrar the power to enforce regulations.[72] This Act created offenses that were punishable by the Registrar.[73] The Act created civil enforcement measures through the introduction of rules - based systems of sanctions and interventions. The rules were detailed; clearly indicated what was expected of the insurance firms; and stated the effects on non-compliance.[74] This limited and guided the use of discretion by the regulator, making regulation more transparent. Allowing the Registrar to punish infractions also provided for quicker and more efficient enforcement of the rules.

The NBFIRA Act also has detailed enforcement provisions, encompassing fines, administrative penalties and other civil enforcement measures.[75] The tools for the regulation of the industry have been greatly increased. The Regulatory Authority, for example, has *locus standi* to initiate actions in court. It may do so on behalf of any person who has suffered loss as a result of the failure of a regulated entity to comply with the regulations.[76] This is a positive development through which those lacking the wherewithal to purse redress may be assisted. But these enforcement and supervisory powers could have been further extended, for example, by the creation of an ombudsman for insurance. The other drawback is that provisions on *locus standi* still entail application of the delictual system, which is expensive. In some instances the amounts in dispute are small when compared to the costs of litigation, and

69 Section 17 of the Interpretation Act, (Cap. 01:04) provides that "Where an enactment confers power to grant a licence, authorization or permit, the power includes power to revoke, suspend or amend the licence, authorization or permit."

70 Section 85, Insurance Act, 1979.

71 Quintyn and Taylor, *ibid*.

72 Section 128, Insurance Industry Act, 1987. Cap. 46:01, Laws of Botswana.

73 *Ibid*.

74 Quintyn and Taylor, *ibid*.

75 Sections 77 – 80 of the NBFIRA Act.

76 *Ibid*.

consumers may not be willing to pursue redress.

4.1.3 Improvements in Licencing Requirements

Since independence, the insurance market in Botswana has been open to all who wish to enter the market, provided that they meet registration and licensing requirements. Licencing requirements ensure the stability of the financial system by the restricting entry to those with capacity and other means. These requirements screen potential insurers to prevent those that do not have the relevant professional qualifications, financial skills and moral authority from entering into the market. All those whose business can be defined as insurance must be registered. Insurance business is defined to include any undertaking to provide policy benefits, which include general insurance, life insurance and reinsurance.[77] The denial of a licence is subject to judicial review, which limits its potential use for protectionism.[78]

Two aspects or registration or licensing of an insurance undertaking should be underlined. These are registration for the purpose of granting legal capacity, and registration for the purpose of enabling the conduct of insurance business. The Insurance Act, 1969 was only concerned with the latter, the granting of permission to conduct insurance business in Botswana.[79] It was sufficient for the applicant for registration to prove that it was registered as an association or as a body corporate in the country where its head office was situate.[80] An entity could be authorised to conduct insurance business in Botswana without the concomitant requirement for establishment of corporate legal personality under the laws of Botswana.[81] This was untenable and an anomaly, because insurance business could be conducted in Botswana by an entity that strictly did not have legal capacity under the laws of Botswana. This anomaly was addressed by the Insurance Industry Act, 1987, which imposed acquisition of corporate legal personality in Botswana as a precondition for authorization to conduct insurance business in Botswana. It required that an

77 Section 2, Insurance Industry, 2015.

78 Licencing requirements in international trade law are non- tariff barriers or measures that can be used to limit access to the market. However licensing requirements for purposes of prudential regulation are legitimate and permissible in international trade law.

79 Section 5, Insurance Act, 1969.

80 Section 12 (1) (d) (i), Insurance Act, 1969.

81 Prior to the amendment of the Companies Act, it was not necessary for foreign companies to be registered in Botswana.

insurance undertaking should be registered in terms of the Companies Act of Botswana, and have its principal office in Botswana.[82] This also addressed the issue of regulatory jurisdiction. There is no doubt that an entity with Botswana legal capacity falls to be regulated under the laws of Botswana for its Botswana operations.

The terms "registration" and "licensing" had specific meanings and were applied in a peculiar manner under the Insurance Acts of 1969 and 1979. Registration had a generic meaning, referring to entry of an undertaking on a register kept by the Registrar of Insurance. Registration meant that the Registrar was aware of the existence of the undertaking, whether or not it was carrying out any business. Licensing, on the other hand, was permission granted to the undertaking to perform a function. It was therefore possible for an undertaking to be registered without being licensed. Insurance Acts of 1969 and 1979 did not require registration to be renewed. The Insurance Industry Act, 1987 was the first to require annual registration of the insurer.[83] Whilst the term used in this Act was registration, it had a licensing effect. The NBFIRA Act introduced the term licensing. The Insurance Industry Act, 2015 also uses the term licensing, and the term registration is no longer used. The introduction of annual licensing requirements has allowed the Regulatory Authority to conduct compliance regulation, in that the regulator can verify compliance with the laws annually. The suitability of the registered entity to operate can thus be more frequently reviewed. This could possibly play a role in preventing the collapse of insurance businesses.[84]

Prior to the establishment of NBFIRA, licenses were granted by the Minister through the office of the Registrar. NBFIRA is now responsible for the granting of licences and for the setting of the terms and conditions thereof.[85] This is a significant improvement of the regulatory process. There are, however, several issues that need to be addressed. First, there is need for review and clarification of the terminology. Should the process be regarded as registration or licensing? Second, the process of annual licensing increases compliance

82 Section 16 Insurance Industry Act, 1987.

83 Section 16A, Insurance Industry Act, 1987.

84 The collapse of General insurance Botswana may have been avoided if the Registrar had the capacity to verify the financial soundness of insurance companies. This happened at a time when the Registrar already had authority for annual licencing. See *Registrar of Insurance v General Insurance Botswana (Pty) Ltd*, [2006] 1 BLR 99.

85 Sections 46 and 48 of NBFIRA Act.

costs for businesses.[86] The process is also susceptible to abuse, if renewal of a licence is not a formality for suitable service providers. It is not clear under the Act whether renewal of a licence would be automatic if everything was in order. Licencing procedures where approval to enter the market are granted at the discretion of the regulatory authority are susceptible to abuse and can be used as a non-tariff barrier to enter the market.[87] It also not clear whether the Regulatory Authority has capacity and wherewithal to repeatedly vet the suitability of service providers.

4.1.4 Introduction of Capital and Solvency Requirements

The structure and the complexity of the insurance industry necessitate the establishment of solvency requirements for the protection of consumers. These are to ensure that the insurer has the financial capacity to pay current and future policy holders.[88] An insurance company is deemed to be solvent if it can fulfil its obligations towards policyholders in most foreseeable circumstances.[89] This requires insurance institutions to have more assets than liabilities.[90] Solvency is achieved through a combination of capital requirements and solvency margins. Capital requirements are expressed in terms of minimum capital. Minimum capital requirements represent the minimum level of capital that an insurer is supposed to have in order to assure the market of financial soundness.[91] The solvency margin is the amount of capital that is in excess of the liability of the insurance company.[92] The insurer has to maintain a solvency margin at all times to ensure that whenever a policyholder seeks to claim the insurer is in a position to pay. The function of prudential regulation in relation to solvency is to ensure that the insurers are solvent. This is through the establishment of solvency margins by the regulator and through rules that empower supervisors

86 Increased compliance costs through repeated licensing contribute to the rise in the cost of doing business.
87 UNCTAD, *International Classification of Non-Tariff Measures, 2012 version*, UN, New York and Geneva, (2015), p. 27
88 IAIS, Sub–Committee on Solvency and Actuarial Issues, "On Solvency, Solvency Assessments and Actuarial Issues" An IAIS Issues Paper, 2 December 1999, p. 14 accessed on 29 June 2016 at http://www.actuaries.org/CTTEES_INSREG/Documents/IAIS_Issues_Paper.pdf
89 IAIS, Solvency & Actuarial Issues Sub-committee, "Principles of Capital Adequacy and Solvency," Principles 5, January 2002, pp. 3-4, accessed on 26 June 2016 at http://amf.gov.al/pdf/publikime2/edukimi/sigurime/Principles ...
90 *Ibid.*
91 *Ibid*, p. 8.
92 *Ibid*, p. 10.

to gauge the financial status of insurers.

Solvency is regulated at market entry through minimum capital requirements. If the capital falls below the minimum, there would be automatic intervention and investigation by the Regulator or a license would not be granted. A paid up share capital of R100 000. 00 (One hundred thousand Rand) was the first capital entry requirement introduced under the Insurance Act of 1969.[93] Paid up share capital represents the amount of money that has been paid by shareholders to the Company. It is the sum of money which should be available for the company to meet its liabilities.[94] Not all insurance providers were initially required to comply with these requirements. Insurers already established in the country were not required to provide proof of capital adequacy.[95] It was also not necessary to have the paid up share capital in Botswana. It sufficed if the insurer was registered in a foreign country and had met the paid up share capital requirements of that country.[96] External companies operating in Botswana were in this respect not properly or fully regulated under Botswana's law. Further, the paid up share capital was not available in Botswana.

Subsequent Acts refrained from prescribing capital requirements in the parent statute. The Minister was empowered to do so through subsidiary legislation. This brought about some regulatory flexibility. The Insurance Industry Act, 1987, by requiring insurance companies to be registered in term of the Companies Act of Botswana, also ensured that paid up capital was available in Botswana for purposes of Botswana insolvency administration. This was another notable improvement to the regulatory framework. NBFIRA now has the authority to prescribe the paid up capital. Amounts can thus be readily varied and adjusted in line with industry experiences and developments. Paid up capital, however, is not an adequate measure of solvency and needs to be supplemented by statutory solvency regimes.

The first statutory requirements for solvency were introduced under the Insurance Act of 1969, and were based on a fixed ratio approach. In a fixed ratio system, solvency is expressed in the form of a ratio which is prescribed in legislation. The insurer was deemed to be solvent if its assets exceeded its

93 Section 13 of the Insurance Act, 1969. The South African Rand was Botswana's currency before the Pula was introduced on 23 August 1976. See http://www.bankofbotswana.bw/content/2009110912000-history-of-the-pula.

94 P. L. Davies and S. Worthington, *Gower and Davies' Principles of Modern Company Law*, 9th ed., Sweet and Maxwell, London, (2012) p. 272.

95 Section 12 (2) (b) of Insurance Act, 1969.

96 Section 12 (2) (a) of Insurance Act, 1969.

liability by R100 000 or one-tenth of its premium income in the preceding year, whichever was greater.[97] The fixed ratio was supplemented by the requirement that Insurance Institutions have a minimum figure of R100 000.00. This type of solvency regime has the advantage that it is simple and easy to calculate. It was suitable at a time when the regulator did not have the institutional capacity to use more sophisticated methods of determining solvency.

The Insurance Act of 1979 brought flexibility by authorising the Minister to set solvency requirements through subsidiary legislation. The solvency requirements were part of entry requirements. For the purposes of registration of an insurance company, there was an additional requirement for the insurer to show that it had the prescribed margin of solvency.[98] Paid up capital was no longer the sole measure of the solvency for purposes of company registration. This made the solvency requirements at entry more robust. The solvency regime was further amended by the Insurance Industry Act of 1987, which introduced the obligation that a percentage of the solvency funds be invested in Botswana, which proportion was increased in the Insurance Industry Act, 2015.[99] The requirement that the solvency capital be invested in Botswana was a fulfilment of the investment potential of insurance. Insurance is meant to ensure that funds are available for investment purposes, and if this pool of resources is outside the country, the benefits of insurance obviously are not enjoyed in Botswana.

Botswana has now moved from a statutory solvency regime that used a fixed rate ratio system as a means of determining solvency to a risk based system.[100] This is an improvement because a risk based system allows a supervisor to take into account a lot more variables when assessing the solvency of an institution. The solvency of an institution can be assessed individually and, depending on the risk profile of an institution, solvency requirements can be tailor-made. Solvency ratios can also be forward looking and not merely based on historical data, on a one size fits all basis. The strengthening of the solvency requirements thus effected has gone a long way in ensuring the sanctity of the Insurance Industry, not just for the protection of policy holders, but the protection of the market as a whole.

97 Section 13 of Insurance Act, 1969.
98 Section 9 (1) (b) of Insurance Act, 1979.
99 Section 30 of the Insurance Industry Act, 2015.
100 Sections 28 and 29 of the Insurance Industry Act, 2015.

4.1 Achievements in Conduct of Business Regulation

General conduct of business in Botswana is regulated through various Acts, such as the Companies Act,[101] Trade Act,[102] Industrial Development Act[103] and Competition Act.[104] As regards insurance services, regulation of conduct of business started with intermediaries, and was later extended to include other insurance service providers. Regulation of conduct of business focuses on management issues as well as ownership structures of insurance institutions. Ownership linkages can create conflict of interest and create barriers to good conduct. After the creation of NBFIRA, there is now increasing focus on limiting the risk that may arise from ownership structures in insurance. This is attempted through disclosure requirements. There must be disclosure of any person that owns 20 per cent or more of an insurance institution, whether the company is registered in Botswana or not.[105] Once these linkages are known, they can be controlled by the Regulatory Authority. The Regulator can then decide whether additional surveillance is needed, and can address issues of competition, among others. This is important given the cross ownership that exists within the financial services sector. NBFIRA also regulates conduct of business risk. Thus, there is harmonization of rules and guidance, which allows for the rules to be applied consistently and coherently.[106] This is a recognition of the fact that conduct of business regulation and prudential regulation merge and feed into each other. However, there are disadvantages to having these housed in the same institution. There is the danger that the regulator could fail to recognise that regulatory approaches for these two types of regulation are different. This could lead to the regulator focusing excessively on one or the other type of regulation. Further, the regulatory mandate for the different approaches may not be clear, and this could lead to the regulator not performing at optimum levels.

Management errors have been minimised through the introduction of minimum qualification requirements for principal officers of insurance

101 Chapter 42:01, Laws of Botswana.
102 Act No. 5 of 2004.
103 Act No. 3 of 2007.
104 Act No. 17 of 2009.
105 See NBFIRA, "Requirements for Licensing of an Insurance Company", accessed on 29 June 2016 at http://www.nbfira.org.bw/sites/default/files/INSURANE...pdf .
106 D.T. Llewellyn, Institutional Structure of Financial Regulation: The Basic Issues" Paper presented at a World Bank Seminar, *Aligning Supervisory Structures with Country Needs*, Washington DC, 6-7 June 2006.

companies. This has been used to limit inappropriate behaviour. The Insurance Act of 1969 only required international insurance companies to appoint a principal officer who was ordinarily resident in Botswana.[107] The Insurance Industry Act of 1987 not only required every insurance company to appoint a principal officer, but also required that principal officers, controllers and managers should be persons with sufficient business and insurance knowledge and experience.[108] The Insurance Industry Act of 2015 further requires that the Regulatory Authority should approve the appointment of principal officers in insurance institutions.[109] This limits risk by prohibiting management of insurance business by unqualified persons. Whilst this is commendable, it does not go far enough. The Regulatory Authority could go further and promote more transparency by indicating persons who would be disqualified from holding specified positions in insurance business, as is done for intermediaries. Currently, the suitability requirements are governed by the Companies Act, which sets out the requirements for directors of companies generally.[110] These provisions do not affect managers that are not directors. Given the specialised nature of insurance, it would be necessary to have specific qualifications for principal officers of insurance companies. This is important because management failure in the case of an insurance company potentially has more devastating effects than failure of an insurance broking company, but intermediaries are more tightly controlled.

4.2.1 Reducing Technical Risks

Since independence there has been no legislative regulation of technical risk posed by insurance products. This is risk linked to the technical or actuarial basis of calculation of premiums.[111] If it is not properly managed, this type of technical risk presents itself in the form of insurance institutions selling products that are not financially sound.[112] In regulating technical risk, there is a need to ensure that there is a balance between the independence of the insurance companies to conduct their business and the need to protect members of the

107 Section 15 (1) of Insurance Act, 1969.
108 Section 16 (d) of Insurance Industry Act, 1987.
109 Section 16 (1) (b) of Insurance Industry Act, 2015.
110 Section 130 of the Companies Act, Cap. 42:01, Laws of Botswana.
111 IAIS, Sub–Committee on Solvency and Actuarial Issues, "On Solvency, Solvency Assessments and Actuarial Issues" An IAIS Issues Paper, 2 December 1999, p. 12.
112 *Ibid*.

public.[113] This could be achieved by inserting in legislation a requirement that premiums for new businesses should be sufficient, reasonable and based on actuarial assumptions.[114]

Government in Botswana has previously tried to exert some control over premium rates. The passing of the Motor Vehicle Insurance Fund Act of 1987 was as a result of Government and the insurance industry being unable to agree on premium increases for third party insurance cover.[115] Government created a fund from which adequate third party cover could be provided. The fund was not made up of contributions from policy holders, but derived from a levy on fuel. Government in this way skirted the issue of regulating technical risk, to ensure that insurance cover is adequate and reasonable. This, however, is still a regulatory issue that needs to be adequately addressed.

4.2.2 Regulating Conduct of Business Risk Caused by Intermediaries

Insurance business is largely conducted through the use intermediaries.[116] The term intermediary is broad and includes insurance agents or insurance brokers. The function of intermediaries is essentially to solicit business for the insurer.[117] Intermediaries are paid by insurers, by way of commission or a mixture of a salary and a commission. The commission paid is directly proportional to the amount of business the intermediary solicits for the insurer.[118] There is, therefore, a corresponding relationship between products sold or services provided by the insurer and amounts to be earned by the intermediary. This may place an intermediary in a conflict of interest situation when dealing with the insured. The intermediary's duty of care towards the insured may conflict with his interest to maximize earnings by assisting the insurer to sell more products. An intermediary could misrepresent or over extol the services or products the insurer will sell. This type of risk is exacerbated by information asymmetries inherent in the insurance business. A potential policyholder is

113 See *Registrar of Insurance v General Insurance Botswana (Pty) Ltd*, [2006] 1 BLR 99 (HC).

114 P. N. Takirambundde, "Comparative Aspects of the Legal Framework for the Control of the Insurance business in Botswana and Swaziland," Vol. 3 No. 1 (1983) *PULA: Botswana Journal of African Studies*, pp. 15 – 28.

115 C.M. Fombard **"**Compensation of Victims of Motor Vehicle Accidents in Botswana: An Appraisal of the MVA Fund Act Scheme**",** 43 *Journal of African Law,* (1999), pp. 151-183.

116 Reinecke, van Niekerk and Nienaber, *op cit*. p.509.

117 *Ibid*.

118 T.O. Yusuf, "Brokers Incentives and Conflict of Interest in the Control of Opportunism," 12 *Journal of Financial Risk*, (2011), pp. 168 – 181.

totally dependent on the intermediary as regards information on the nature of insurance cover available.[119] There is scope for opportunistic behaviour on the part of an intermediary, who stands to gain from misrepresentation of insurance products or similar unconscionable practices.[120] The problem is exacerbated by relationship between insurers and intermediaries. It is not a typical agency relationship,[121] under which the insurer, as a principal, would be accountable for the conduct of the agent/ intermediary. An insurer strictly is not under an obligation to control the conduct of an intermediary, although he/ she/ it stands to benefit from a contract unscrupulously organised by the intermediary.[122]

Risk that stems from unscrupulous conduct by intermediaries could be mitigated through licencing requirements for intermediaries. These can be used to limit entry into the business by persons with character traits or histories suggesting dishonesty or other moral lapses. The Insurance Act of 1969 did not do so. It was mainly concerned with mere registration of persons to act or practice as intermediaries.[123] The Insurance Act of 1979 improved the regulations and provided rules disqualifying persons from acting as intermediaries if they were insolvent or had issues involving dishonesty.[124] The Insurance Act of 1987 further strengthened the regulations by extending disqualifications or restrictions to officers or persons employed by intermediaries.[125] These requirements were further improved by NBFIRA through the introduction of competency requirements for intermediaries that ensured that only qualified persons could provide these services. The Insurance Industry Act of 2015 has added to the regulatory framework a requirement that an intermediary shall disclose to the prospective policy holder any commission or remuneration likely to be received from the insurer in the event that the prospective policy holder enters into the contract.[126]

The other area of risk for consumers arising from use of intermediaries relates to ownership linkages between intermediaries and insurers. Intermediaries linked to insurers may be directed to sell unsound products and increase cross selling. Restriction or regulation of ownership linkages may keep some

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119 *Ibid.*
120 *Ibid.*
121 Reinecke, Van Niekerk and Nienaber, *op. cit*. p.508.
122 H. Meran and R.M. Stulz, "The Economics of Conflicts of Interest in Financial Institutions" 85 *Journal of Financial Economics volume* (2007), pp. 267-297.
123 Section 29 of Insurance Act, 1969.
124 Section 35 of Insurance Act, 1979.
125 Section 51of Insurance Act, 1987.
126 Section 71 of Insurance Industry Act, 2015.

intermediaries honest and ensure primacy of their duties and responsibilities towards consumers in their dealings with insurers. NBIFIRA has placed a limit of 5 per cent ownership between an insurer and a broker, whether this is directly or indirectly held. Further, no person is allowed to be employed by both an insurer and a broker in the capacity of a manager, controller, director or principal officer.[127]

NBFIRA has further created a consumer compensation scheme, under which policy holders swindled by unscrupulous intermediaries may seek recompense. In the absence of such a scheme redress may be available for affected policy holders by taking action in delict.[128] This is a complicated, time-consuming and costly course of action, which would be beyond most consumers seeking redress on a simple insurance arrangement.[129] There is also the criticism that compensation schemes create a moral hazard,[130] by removing incentives for consumers to be more responsible.[131] However, when balanced against the fact that this is limited to that segment of the industry that has direct interaction with policy holders, the benefits outweigh the risks.

Further measures could still be taken to improve consumer protection in the insurance industry. The creation of the office of an Ombudsman for the resolution of issues relating to the industry is one such improvement. The office would provide an alternative forum for the resolution of insurance disputes, in a more cost effective, efficient, informal and fair way.[132] This would remove some of the disputes from the normal court system, which is perceived as largely biased against policy holders.[133] The role of an ombudsman goes beyond dispute resolution. The office could provide a forum for the regulator to monitor and track trends in the industry and obtain data that might be required for litigation and other purposes. This could facilitate both proactive and reactive regulation of the industry.

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127 NBFIRA, "Requirements for Licensing of an Insurance Company", *op cit*.

128 Fombard *op. cit.* at p.6? describes delict as that branch of the law that is concerned with compensation for civil wrongs, and notes that not all civil wrongs can be compensated.

129 *Ibid.*

130 In economics, moral hazard occurs when one person takes more risks because someone else bears the cost of those risks. See https://economictimes.indiatimes.com/definition/moral-hazard.

131 IAIS, "Issues Paper on Policyholder Protection Schemes", October 2013, accessed on 26 June 2016 at: http://hb.betterregulation.com/external/Issues%20Paper%20on%20Policyholder%20Protection%20Schemes%20-%2017%20Oct%2013.pdf .

132 T. Cohen, "The Insurance Ombudsman – An Alternative Dispute Resolution Forum for the Insurance Industy," 8 *S. Afr. Mercantile L. J.* (1996) p. 252.

133 *Ibid.*

The office of the ombudsman could be created as a self-regulatory organization in terms of section 58 of the NBFIRA Act.[134] The industry should be encouraged to self-regulate, initially through the creation of office of an insurance ombudsman. The office can also be created as part of NBFIRA's regulatory architecture. Whichever way the office is created, an additional task that it could be entrusted with is monitoring and policing unfair terms in contracts of insurance. Contents of insurance contracts are largely unregulated by statute and fall to be regulated under the common law.

5. CONCLUSION

This paper has discussed historical developments in the regulation of the insurance industry in Botswana over the past 50 years. The first part dealt with the importance of regulating the insurance industry in Botswana. It underscored that due to the exponential growth of the economy of Botswana, there is a need for an effective regulatory framework for the insurance industry in order to foster risk mitigation by individuals and businesses. This in turn creates a conducive environment for investment, which leads to economic growth.

The paper shows that over time vast improvements have been made in the regulation of the insurance industry in Botswana. The most notable development was the shift from direct control by Government to regulation by a semi-autonomous entity, through the creation of NBFIRA. With the enactment of the Insurance Industry Act, 2015, further improvements were made in prudential regulation and conduct of business regulation. This is more conspicuous in the following areas: supervisory and enforcement powers of the regulator; licensing processes; capital and solvency requirements; and conduct of business regulation in relation to insurance intermediaries.

It can, therefore, be concluded that the regulation of the insurance industry has improved in line with growth in the industry, and the legislature has over the years managed to adapt to the economic needs of the business environment and to create a platform for exponential growth. However, it should be noted that there is still room for improvement in insurance regulation, especially in respect of conduct of business regulation in the area of technical

134 In South Africa the Financial Advisory and Intermediary Services (FAIS) Act, 2002 created the office of the Ombudsman for Financial Services providers which acts as an overseer and regulator of Ombudsman who are self regulating.

risk with respect to insurance cover. The paper contends that technical risk regulation has not been adequately addressed in the past 50 years. The paper contends furthermore that NBFIRA should exercise its powers under the Act by promulgating various legal instruments in a legally binding manner to enhance its supervisory role for transparency and ease of access. These changes would go a long way in enhancing the regulatory framework for the insurance industry in Botswana.