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AN EXAMINATION OF THE LAW RELATING TO INHERENT VICE IN MARINE INSURANCE

An analysis of the Law relating to inherent vice in South Africa for the purposes of establishing tests for the application in instances where the defence of inherent vice is pleaded as an exlusion.

by

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SECTION I

AN EXAMINATION OF THE LAW RELATING TO INHERENT VICE IN MARINE INSURANCE

1. INTRODUCTION

It is proposed in this thesis to analyse the law relating to inherent vice in South Africa and in so doing to develop a range of tests for application in instances where the defence of inherent vice is pleaded as an exclusion.

The way in which it is proposed to canvass the topic for the purpose of developing the tests is to

(a) examine broadly the Marine Insurance Law in South Africa with a view to deciding what law to apply to marine insurance.

(b) examine the relevant marine insurance forms (institute cargo clauses) as read with the policy provisions and thereby study the impact on the exclusion of inherent vice.

(c) interpret the concept of inherent vice through an examination of English case law.

(d) examine the South African cases.

(e) develop and propose tests and guidelines for the application of the concept of inherent vice in the South African context.

2. THE MARINE INSURANCE LAW IN SOUTH AFRICA - A COMPARITIVE EXAMINATION OF THE LAW TO BE APPLIED

Marine Insurance has been defined as "a legal relationship created by a contract whereunder one party (the insurer) in consideration of a promise by the other party (the insured) to pay a premium undertakes to make good the loss of an interest in a carriage venture caused during such venture by an agreed circumstance" (1). A discussion of Marine Insurance Law cannot take place without examining its sources. There is a dearth of South African texts on Marine Insurance and save for certain legal journals which have carried writings on marine insurance from time to time and naturally the more substantive works by Bamford (2) and Gordon and Getz (3) there is nothing much of significance.

It is these texts together with various judicial decisions, legislation and the Roman Dutch and English law that have to be examined in order to understand the concepts and to attempt to formulate conclusions in regard to the law applicable in South Africa.

Although 'marine insurance' has been referred to in South African legislation (4) we do not have, nor have we ever had, legislation encompassing the field of marine insurance per se. On the contrary however, in England the law of marine insurance was codified in 1906 by the passing of the Marine Insurance Act (5).

As a starting point our examination must clearly commence with an historical examination of the statutes which touched on this particular field of insurance.

In 1879 the Cape Parliament passed the General Law Amendment Act, (6)

Section 2 whereof read as follows :

"In every suit action and course having reference to questions of fire, life and marine insurance, stoppage in transition and bills of lading which henceforth be brought in the Supreme Court or any other competent court of this Colony **the law administered by the High Court of Justice in England for the time being** so far as the same shall not be repugnant to or in conflict with any Ordinance, Act of Parliament or other statute having the force of law in this Colony **shall be the law to be administered** by the said Supreme Court or any other Court.

Section 3 went on to state that :

"Nothing in the two preceding sections of this Act contained shall have the effect of giving force in this Colony to any statutory enactment made or passed by the Imperial Parliament **after the taking effect of this Act** unless the same shall be enacted here."

The effect of this piece of legislation was that **insofar as the Cape, the Orange Free State and South West Africa was concerned English law as it**

existed in 1879 was applicable and this was left in no doubt by Buchanan J in Mendelsohn vs Estate Moran (7) when he said : "Section 2 provides that the law administered by the High Court of Justice in England for the time being shall be the law to be administered by the Courts of this Colony in actions having reference to fire, life and marine insurance. **The English authorities are not only instructive but authoritative."**

In an article by D.M. Davis (8) in which he refers to the above case he goes on to examine precisely what authority English decisions had in South African Law and refers to the case of van der Linde vs Calitz (9) in search of the answer. For the sake of brevity the facts will not be repeated here but in that case the Appelate Division was required to deal with the Evidence Statutes (10) which provided that evidence should be admissable or inadmissable as the case might be if this would have been the position on the 30th May 1961. The construction placed upon this provision by Steyn C.J was that the 30 May 1961 formula meant that "the law which until that date applied in the Supreme Court of Judicature (in England) remains applicable with the result that decisions after that date are not of binding force in our Courts (11). As to pre 1961 English law a particular English decision can be departed from if the A.D considered that the House of Lords would have done the same.

The reasoning of Steyn C.J is criticized by Ellison Kahn (12) who although submitting that the reasoning is wrong acknowledges that the decision

represents our law and that one must try and examine its implications and effect on maritime insurance.

As stated above the Cape and Orange Free State embraced the law of England as it was in 1879,(13), prior to the Marine Insurance Act of 1906. Accordingly van der Linde vs Calitz's impact was that decisions of the English Courts in respect of the provisions of marine insurance were of persuasive authority as far as South African Courts were concerned, in particular decisions prior to 1906 in which year the English Law of Marine Insurance was codified.

In Transvaal and Natal Roman Dutch Law applied and there is plentiful authority in regard to Marine Insurance (14) but reference was often had to English Law and in this regard the case of Littlejohn vs Norwich Insurance Society Limited (15) is pertinent which case **accepted that where the Roman Dutch Law is sparse regard must be had to English and American decisions** and where there is a conflict the former is to be preferred to the latter.

In 1977 the Pre-Union Legislation was repealed and it is submitted by D.M. Davis (16) that the effect thereof has not been to achieve uniformity of insurance law but that as from 1977 further developments in respect of the 1879 law of England namely the interpretation by the English Courts of the principles of law which existed at that point in time, should no longer form part of the Cape and Free State law. The 1977 Act could not,

however, Davis submits, and his submission cannot be faulted, have intended to sweep away the existing Cape law (prior to 1977) when it repealed the 1879 Act.

Inasmuch as the Transvaal and Natal always applied the Roman Dutch Law **(with the persuasive authority of English law)** the South African Law of marine insurance developed after 1977 on the basis of our common law, namely Roman Dutch Law. We shall later consider what is meant by Roman Dutch Law.

Further statutory enactments have also given rise to conflict and in this regard I refer to Section 63(1) of the Insurance Act (17) which imposes "Conditions for domestic policies" and which applies to marine insurance (18). Section 63 states that :
The owner of a domestic policy (19) issued after 1 January 1924 shall notwithstanding any contrary provision in the policy or in any agreement relating thereto be entitled to enforce his rights under the policy against the insurer concerned in any Court of competent jurisdiction in the Republic of South Africa and **any questions of law arising from such policy shall be decided according to the law of the Republic of South Africa.**

So, policies issued before 1924 or non domestic policies issued after that date will not be governed by South African Law and the ordinary rules of private international law regarding the proper law will apply. For non domestic policies a South African Court would not be able to use Section 63(1) and it is assumed that the Court

would apply South African conflict of law using the principles laid down in the case of Standard Bank of South Africa Limited vs Efroiken and Newman 1924 AD 171 at 185. "The rule to be applied is that the **lex loci contractus** governs the nature, the obligations and the interpretation of the contract; the **locus contratus** being the place where the contract was entered into except where the contract is to be performed elsewhere, in which case the latter place is considered to be the **locus contractus.** That is, broadly speaking, the rule as it has been adopted. At the same time it must not be forgotten that the intention of the parties to the contract is the true criterion to determine by what law its interpretation and effect are to be governed.... But that also must not be taken to literally for where parties did not give the matter a thought the Courts of Law have of necessity to fall back upon what ought reading the contract by the light of the subject matter and of the surrounding circumstances to be presumed to be the intention of the parties".

Section 63 does not prohibit the inclusion of nor invalidate any choice of foreign jurisdiction and/or law clause but merely creates a right in favour of the owner to override the choice of law clause and have the South African law apply in terms of Section 63.

The latest applicable statute is the Admiralty Jurisdiction Regulations Act 1983 (20) and the pertinent section is 6(1) which must be read with the definition of a maritime claim, in particular Section 1(r) (21).

Section 6(1) reads as follows :
Notwithstanding anything to the contrary in any law or the common law contained a Court in the exercise of its admiralty jurisdiction shall -

(a) with regard to any matter in respect of which a Court of Admiralty of the Republic referred to in the Colonial Courts of Admiralty Act 1890 of the United Kingdom had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement insofar as that law can be applied.

(b) with regard to any other matter apply the Roman Dutch Law applicable in the Republic of South Africa.

In short the position is that because marine insurance was not a head of jurisdiction in either the 1840 Act or the 1861 Act (22) and nor did the Colonial Courts of Admiralty Act 1890 have jurisdiction, Roman Dutch Law must be applied in respect of all claims relating to marine insurance.

In summary therefore, Roman Dutch Law will apply in South Africa in respect of Marine Insurance matters with the following qualifications:

(i) English law as it was prior to 1906 applied until 1977 in the Cape and Orange Free State.

(ii) Roman Dutch Law applied in the Transvaal and Natal at all times with English Law having persuasive authority.

(iii) After 1977 Roman Dutch Law applied throughout

(iv) Section 63 regarding domestic policies enabled owner of policy to override foreign law with "South African Law."

(v) Admiralty Jurisdiction Regulation Act (supra) provides for Roman Dutch Law in maritime claims involving insurance. This has certainly been the strongest attempt to clarify the position and to create uniformity. It is submitted however, that in interpreting legal issues under this Act the Courts will be compelled to look outside the Roman Dutch Law for support, as will be observed from the comments of Trengrove J.A in Blackshaws (Pty) Ltd vs Constantia Insurance Company Limited (23) when he stated:

> "I have not been able to find any South African authority relating directly to the problem under consideration but we have referred by Counsel to a number of English cases which have a bearing on the problem. Although these decisions

> are not of binding force in this Court they are certainly entitled to respect and are of persuasive authority, for there does not appear to be any fundamental difference in the principles of construction of a policy of insurance between our law and the English law."

Therefore, notwithstanding the 1977 pre-union Legislation Act (the Admiralty Jurisdiction Regulation Act did not apply to this case) in practice the Courts have had to look to English Law for assistance. The above case concerned the exclusion of "inherent vice" and will be analysed in detail at a later stage. It is however, safe to say that English Law had a significant impact on the outcome of this case.

As mentioned earlier it is necessary to examine what the Roman Dutch Law that is spoken of really is. Is it pure Roman Dutch Law as propounded by the recognised Roman Dutch authorities (24) or is it simply South African Law ie. the basic principles as established by the old authorities and influenced where necessary by the English Common Law? It is submitted that in practice today the latter.

There is indeed very little Roman Dutch Law as we shall see when we examine the leading case of Mutual and Federal Insurance Company Limited vs Oudtshoorn Municipality (25). This case deals with the duty of disclosure but is also important insofar as sources of law is concerned. As far as the duty of disclosure in our law is concerned it

had always been the case that an insurance contract was one of uberrimae fidei but the majority judgment delivered by Joubert J.A found no room for this principle in our law. He commenced his judgment with an exposition on the law, tracing it back to the sources of Roman Dutch Law of insurance from its origins in the lex mercatoria. The basis of Joubert J.A's judgment is that English law concerning fire, life and marine insurance is no longer binding authority in the Cape Province or in the Orange Free State and that because of the Pre Union Statute Revision Act (26) English Law as it existed in 1879 does not apply and that the South African law of insurance is governed mainly by Roman Dutch Law as our common law (27).

The case concerned a claim arising out of an accident which occured when an aircraft coming in to land at the aerodrome in Oudtshoorn crashed to the ground as a result of colliding while descending with the top of a pole carrying electric power lines. The aerodrome was owned by the Oudtshoorn Municipality and controlled by it. The pole carrying the power lines had been erected by the Municipality in a street immediately outside the boundary of the aerodrome. The owner of the aircraft had sued the Oudtshoorn Municipality for damages by reason of the destruction of the aircraft having shown that the Municipality of Oudtshoorn was in breach of its duty to take proper care for the safety of the aircraft coming in to land at the aerodrome at night and had negligently erected and continued to retain the pole carrying the power line and had

failed to provide such pole with adequate lighting.

The Municipality who held a policy with Mutual and Federal Insurance Company sued the Insurance Company for payment of the amount awarded against it in the action by the owner of the aircraft. The Municipality was successful in the Court a quo and the Insurance Company took the matter on appeal. When it was contended on behalf of the Appellant that the claim should have failed because of non-disclosure of certain material facts namely the close proximity of the power line to the aerodrome which constituted a hazard to aircraft and furthermore that there had been allegations of danger, it was argued on behalf of the Municipality that although in the past there had been fears of dangers relating to the existence of the pole those fears had been allayed.

After a long and detailed anaylsis of the sources of Roman Dutch Law, Joubert J.A accepted the common origin of the Roman Dutch and English law of Marine Insurance (28). He found that both the Roman Dutch and English marine insurance law had their origin in the same medieval Italian **lex mercatoria** which found acceptance not only in de Santernas treatise (28a) and in that of Straccha (28b) (to which Voet (28c) referred as sources of Roman Dutch law of insurance) but also was accepted throughout Western Europe and England in the 16th Century (28d).

Joubert J.A went on to examine the English Marine Insurance Act and likened the phrase "utmost good faith" with its Latin equivalent "uberrima fides" and although the origin of the Latin phrase is

doubtful it would seem that it made its appearance in English Case Law in 1850 (29). Joubert J.A criticised our Courts for having been influenced by English Law in applying the uberrimae fidei principle (30) and concludes (31)

> "I have been unable to find any Roman Dutch authority in support of the proposition that a contract of marine insurance is a contract uberrimae fidei. On the contrary it is indisputably a contract bona fidei".

Joubert J.A does not accept the doctrine of uberrimae fidei and argues that by our law all contracts are bonae fidei (32) and states further that there cannot be any "degrees" of good faith and accordingly (33) concludes

> "there is no room for uberrimae fideis as a third category of faith in our law".

Finally in his analysis of the origin of the law, the judge of appeal opines (34)

> "in my opinion uberrimae fideis is an alien, vague, useless expression without any particular meaning in law.....our law of insurance has no need for uberrimae fidei and the time has come to jettison it."

D.M. Davis (35) submits that Joubert J.A's emphasis upon the need to return to a Roman Dutch Law of insurance was predicated upon two considerations :

(a) the effect of the Pre Union Statute Revision Act (36) was to ensure that Roman Dutch Law

applied throughout South Africa as the essential source of South African insurance law and

(b) the apparently detailed principles of Roman Dutch law of marine insurance are capable of application, with adaptation where necessary to other forms of insurance to meet the requirements of a modern South African society.

In his critique Davis states that although Joubert J.A concedes that both Roman Dutch Law and English Law of marine insurance stem from the same original sources (37), his view is that when it came to adopting the uberrima fides doctrine our Courts accepted the English doctrine without considering the Roman Dutch position, the latter body of law affording no support for the existence of the uberrima fides doctrine.

In his analysis of the law Joubert J.A gives an exposition of Roman Law and the European Law of Insurance but one has difficulty in accepting his argument that the Roman Dutch Law of Marine Insurance must apply because the law he develops is not really Roman Dutch Law but the law of Europe (38).

Joubert J.A argued for a concept of Roman Dutch Law going beyond the Netherlands including Italy, Germany and France ie. all Western European countries claiming that this is the applicable law.

The effect is that whereas the contract of insurance was, until Joubert J.A's judgment,

considered to be a contract of uberrimae fides, Joubert J.A said that this was no longer the case because there is no authority in Roman Dutch Law (39) and therefore the Appelate Division decisions are wrong in applying the principle which was only applied because of the adherance to English Law.

D.M. Davis submits (40) that

> "whilst Roman Dutch principles might be amenable to adaptation to requirements of a modern society it is surely time for our judiciary to grasp the essential point that the Roman Dutch Law is an historically relative body of law in that it developed during a particular period of history and in response to specific socio economic needs."

He goes on to state that

> "to attempt to return to such a body of law rather than building upon that which already exists can serve no other purpose that satisfying some nationalist urge."

Insofar as the doctrine of uberimmae fides is concerned the judgment of Joubert J.A has certainly ensured its demise (41). Joubert J.A's judgment is difficult to reconcile with his acceptance of the dictum from the Privy Council Judgment in Pearl Assurance Company vs Union Government (42) when he says

> "it is a characteristic of Roman Dutch Law as a virile living system of law ever seeking as every such system must to adapt itself consistently with its inherent basic

> principles to deal effectively with the increasing complexities of modern organised society",

but does not accept that such a characteristic should lead to the conclusion that the conditions some 400 hundred years before were considerably different to those of modern society and accordingly that there should be room for the application of the English law regarding insurance matters.

Schalk van der Merwe (43) examines the Mutual and Federal case (supra) and deals with the question of the law applicable to matters of insurance. van der Merwe referred to Getz and Davis (44) who accept that Roman Dutch law is now once more

> "the common source of insurance law throughout South Africa"

but who add with reference to the Cape Act and Free State Ordinance that

> "it is extremely doubtful whether the repeal of these laws will have a tangible effect on the South African law of insurance"

and van der Merwe feels called upon to examine what is meant by the above authors of "the tangible effect".

Van der Merwe acknowledges that our law has been influenced extensively by the English law of insurance and that there is no reason to suppose that the Courts will now go out of their way to reverse previous decisions simply because they

were based on English law, which is expressly stated by Joubert J.A.(45). van der Merwe also notes that the Judge in quoting various European authors extended the historial parameter of our law beyond the Roman Dutch writers proper and that in effect these sources would now seem to be included among what the Courts call "the Roman Dutch Authorities" on Insurance (46). This is in accordance with the view approved by the Court that our common law is not merely the law of the province of Holland as at the end of the 18th Century but rather a European ius commune of the period.

van der Merwe goes on to consider the extent to which aspects of the English law of Insurance may have become part of our common law and acknowledges that the argument in the main advanced by Getz and Davis will probably be shown to be correct. van der Merwe argues, and in support quotes the Pearl Assurance Company case (47), that the Judgment does indeed open new avenues for developing the South African law of Insurance in accordance with the Roman Dutch law of (mostly marine) insurance and of course other principles of Roman Dutch law applicable to contracts of insurance. Thus says van der Merwe the English law of Insurance has now become an important source of comparative law together with other systems of law as the case may demand.

Clearly, the road seems to be open for the application of the principles of the English law of Insurance in appropriate cases where English law will provide assistance in the application of the principles of the contract of insurance and

where the application of Roman Dutch law is inappropriate. Van der Merwe concludes that all this should stand the development of the law of insurance as an integral part of our law in good stead.

In another article by M F B Reinecke and E A Becker of the Rand Afrikaanse Universiteit (48), the authors examine the Mutual and Federal case and in regard to the sources of law applicable suggest that the English law must only be seen as "comparative material" (49).

In a later judgment of the Appellate Division in the matter of Lourens NO vs Colonial Mutual Life Assurance Society Limited (50) the application of foreign legal authorities was considered with regard to an exception clause in a personal accident policy. In interpreting the word "terwyl" in an exception clause in an insurance contract the court observed that the matter had never been considered by our Courts, and proceeded to examine English, Australian and Canadian cases for assistance, all of which cases opted for a literal interpretation of the particular exception.

Notwithstanding a fairly detailed examination of the English and American authorities Boshoff J.A felt constrained to correct any misconception when he stated: (51),

> "Dit dien miskien hier gemeld te word dat dus in die anderhange sak te doen het met die uitlê van 'n kontrak in die lig van die reëls van ons eie reg en nie gebande is duer die beskonings van die Engelse of Amerikaanse reg nie"

Notwithstanding therefore the English and American authorities referred to Boshoff J.A cautions adherence thereto and warns that our Courts are not bound by them and that we must examine our rules.

In this thesis however, it is proposed to deal with the law relating to inherent vice and just as we have seen the tendency away from English law in certain matters, English law is of particular relevance in inherent vice matters decided according to the South African law of Insurance and in particular marine insurance. One should perhaps be reminded again of Trengrove J.A's dictum in Blackshaws case which appears on Page 9 of this thesis.

One can therefore conclude that notwithstanding the decision in the Mutual and Federal case,in regard to marine insurance in particular inherent vice, English law has a significant influence on our law of insurance.

As we have seen above, in theory, our law of marine insurance is Roman Dutch Law but in practice, however, English Law, although no longer binding authority, will continue to be of great persuasive authority in determining the principles of the South African law of marine insurance by virtue of the fact that in South Africa almost exclusive use is made of the Lloyds Insurance forms in the application of the law of marine insurance.

SECTION II

AN EXAMINATION OF PARTICULAR ASPECTS OF THE RELEVANT MARINE INSURANCE FORMS (INSTITUTE CARGO CLAUSES) AS READ WITH CERTAIN ASPECTS OF THE POLICY PROVISIONS WITH A VIEW TO EXAMINING THE EXLUSION OF INHERENT VICE.

In 1779 Lloyds of London passed a resolution at its Annual General Meeting that no marine cargo insurance policies were to be used other than in the standard form approved. This form was later recognised as the standard form of contract and was adopted in Schedule 1 of the Marine Insurance Act, 1906 in England, save that it did not contain the waiver clause which was added in 1874. The form was known as the SG form (1).

The aforementioned Act however, did not become part of our law.

The extent of the protection afforded by the SG form became largely irrelevant with the introduction in 1951 of the Institute Cargo Clauses (all risks) which were added to the SG form and provided the widest cover generally available on goods.

The SG form was often criticised as being archaic, terse and frequently ungrammatical - so much so that many of its provisions would be unintelligable without resort to outside aids.

In 1982 (some two hundred years after its adoption) the SG form was abolished and was replaced with the MAR ("marine") form and new institute clauses (A), (B) and (C) which have been in use since the 1st January 1982. The MAR form has standardised clauses and whereas there was no express choice of jurisdiction clause in the SG form the MAR form states that "this insurance is subject to English jurisdiction".

By comparison clause 19 of the Institute Clauses (A) (B), and (C), the law and practice provision, states "this insurance is subject to English law and practice".

In an article by A George (2) he argues that the trend in the English Courts is to recognise the right of other countries' jurisdiction exclusively to hear cases where they consider themselves siezed of the matter and similarly the trend of international law is to allow more alternative jurisdictions the right to hear international disputes. George argues further that the separation of English law and practice and English jurisdiction into different clauses is an attempt to leave underwriters with some control over interpretation should the jurisdiction clause be deleted or should a foreign Court accept that it can hear disputes arising under the policy notwithstanding the clause contained in the MAR form.

The intention of the MAR form was that the (A), (B) or (C) clauses should be attached. The (A) clauses were intended broadly to replace the old "all risks" clauses and carry on the tradition of the cover as interpreted by the leading case of Gaunt vs British and Foreign Marine Insurance Company (3).

All three sets of clauses are divided into the same eight separate sections, the first section being the risks covered section and clause 1 thereof illustrating the different basic covers. Clause 1 of the (A) clauses makes it clear that it covers all risks of physical loss or damage subject to exceptions. Clause 1 of the (C) clauses covers damage "reasonably attributable" to six clauses of named perils and there are two clauses of peril where the insured has to prove actual causation. The intermediate (B) clauses increase the number of clauses of peril in each category.

We have mentioned above that the MAR form and institute clauses provide for jurisdiction and application of law respectively but how does this relate to the South African perspective and to what extent is Roman Dutch law operative given this practice? The answer is that there are essentially two considerations dealing with this question.

Firstly the provisions of Section 63(1) of Insurance Act (4) are of great significance. The sub section makes it quite clear that notwithstanding a choice of law clause in a domestic policy of insurance the insured is "entitled" to enforce his rights in a South African Court and the law applicable shall be South African Law (5). So even if English Law is the so called proper law of a domestic policy of marine insurance, even if the policy is similar in terms to the English form of the marine policy, English law can be overidden. Indeed there are a number of important cases in which the Court has specifically been called upon to grapple with the situation. In Blackshaws case (supra) Trengrove J.A said (6) in regard to the interpretation about clauses in an insurance policy,

> "although these decisions (ie. English cases) are not of binding force on this Court they are certainly entitled to respect and are of persuasive authority for there does not appear to be any fundamental difference in the principles of construction of a policy of insurance between our law and the English law."

The degree of similarity any such case possesses would naturally depend upon the quality of the judges reasoning and the status of the Court in question.

Secondly in a fairly recent English case the Court was concerned with the proper law of the marine insurance policy couched in terms similar to the standard Lloyds Marine Policy. The particular case was Amin Rasheed Shipping Corporation vs Kuwait Insurance Company (the AL WAHAB) (7) and one of the important aspects of the case was the determination of the proper law of a marine insurance contract having regard to the policy and institute clauses forming part thereof.

The facts of the aforementioned case insofar as they are relevant to this discussion are summarised as follows :

The insured Amin Rasheed Shipping (AR) was a Liberian company which carried on business from Dubai in the United Arab Emirates. AR owned the Al Wahab, a small cargo vessel employed in trading in the Arabian Gulf. This vessel was insured against marine and war risks with the Kuwait Insurance Co. (KIC) which was registered and had its Head Office in Kuwait. On entering a small Saudia Arabian port the vessel was confiscated (and remained thus confiscated) by the Saudia Arabian authorities, apparently owing to the belief that the Master was using the vessel to smuggle

oil from Saudia Arabia to the United Arab Republic. Twice AR gave notice of abandonment of the vessel to KIC and claimed under its insurance policy for a constructive total loss and on each occasion the notice was rejected by KIC.

AR sought to litigate against KIC in the English commercial court and on an ex parte application an order was made by the English Court granting AR leave to serve proceedings on KIC in Kuwait which order KIC sought to have set aside on the grounds that

(a) the English Court had no jurisdiction to grant leave for the service of the writ out of the jurisdiction as the proper law of the contract was not English law but Kuwaiti law and alternatively

(b) that the Court should have exercised its discretion against permitting such service as Kuwait and not England was the appropriate forum for the action to be heard.

The case went to the House of Lords where Lord Diplock (and Lords Roskill, Brandon and Brightman concurred) decided that the proper law of the contract was English law. On the discretion point the Lords upheld Bingham J whose decision emanated from the QBD namely that the English Court had no jurisdiction to grant leave to AR to serve proceedings on KIC in Kuwait. As far as the discretion point was concerned Bingham J thought that if he was wrong and if English law were the proper law he would have exercised his discretion against upholding service in Kuwait.

There were a number of factors in the Al Wahab case which pointed to one of two competing systems being the one with which the transaction between AR and KIC had

its closest and most real connection (8). From our point of view there were two inter related factors that turned out to be decisive namely the state of the Kuwait law of marine insurance (9) and the use by the parties of a policy similar to the English standard form of marine policy (10). Insofar as the former is concerned Lord Diplock thought that it was an important surrounding circumstance that at the time of the formation of the contract there was no indigenous law of marine insurance in Kuwait (the Kuwaiti commercial code was not of much assistance).

As for the reason why in practice Kuwaiti Courts were able in spite of the absence of any local law to try marine cases Lord Diplock explained that they could do so because the Kuwaiti code of conflict of laws provided that in determining the proper law of transnational contract the Courts could take cognisance of the fact that circumstances may suggest that a particular system of law is the proper law.

The fact that Kuwaiti Courts in dealing with Marine insurance disputes have reference to English marine insurance law does not imply that there is no local or municipal law of marine insurance in Kuwait. Thus Goff L J explained as follows

> "I am unable to accept (the) submission that there was at the time of the issue of the relevant policy no marine insurance law in Kuwait. It is true that there was no marine insurance law as such. But there was a perfectly comprehensible basis upon which the Kuwaiti Courts applying Kuwaiti law could and apparently did adjudicate upon disputes in cases of marine insurance. True Kuwaiti lawyers and Courts could and no doubt would have recourse to English law and practice

when analysing the terminology used in policies based upon Lloyds form and might even adopt principles of English marine insurance law : but the mere fact that they did so would not render their decisions any the less decisions on Kuwaiti law....." (11).

As van Niekerk (12) puts it the fact that Kuwaiti marine insurance law may for the sake of argument have been similar in all respects to English (or any other) marine insurance law or that principles have of necessity to be taken over from English law (or any other law) is perfectly compatible with the existence of a Kuwaiti law of marine insurance albeit it not necessarily a distinctive, even a highly developed one.

van Niekerk submits that a distinction has to be drawn between (at least) the following three situations where the English (or any other foreign law) of marine insurance may be relevant, namely

(a) where by legislative enactment English marine insurance law is taken over in whole or in part - in such a case the local Courts would apply English law as (being part of) the local municipal law (13).

(b) where owing to a dearth of local authority in precedents the local Courts follow a comparitive approach and take cognisance of, refer to and where necessary adopt and/or adapt principles of English marine insurance law as an aid in the application and development of local law. (14).

(c) where after applying in an appropriate case the local rules of conflict of laws, English marine

insurance law is held to be the proper law - in such a case the local Courts would apply English law as foreign law.

Lord Wilberforce in his speech accepted the fact that in deciding the issues between the parties a Kuwaiti Court would have regard to English Marine Insurance Law and custom which would be relevant in determining the meaning to be given to the terms of the policy. However, he said that this did not mean that there would in reality be no choice between two different legal systems. The choice remained between English law and Kuwaiti law drawing upon English law (15).

Regarding the use of an English policy form the argument advanced by AR was that the use of the traditional Lloyds policy form strongly indicated that the parties had intended English law to be the proper law as this policy had been interpreted by English authority and they had been given statutory recognition in the Marine Insurance Act, 1906.

In the House of Lords, Lord Diplock was of the opinion that even in the absence of an express choice of English law as the governing law the policy provisions as a whole by necessary implication led to the conclusion that the parties intended their contract to be governed by English law. The fact that the policy form had gained an international acceptance would not change the fact that some of the more obscure provisions of the policy could not be interpreted without reference to the 1906 Act and English traditional interpretations. The policy was made with respect to and could be given effect to only by the application of a particular system of law which in his Lordship's view was the English law of marine insurance.

Lord Wilberforce however pointed out that the form of a contract was an important factor but only one of many to be considered in determining the governing system of law but in this particular case held English law to be the proper law on the basis of the system of law with which the contract has its closest and more real connection and not the basis of the parties mutual intention.

The matter came up for consideration again in the case of Incorporated General Insurances Limited vs Shooter trading as Shooter's Fisheries (16). Galgut A J A who delivered the majority judgment had no difficulty in finding that

> "in interpreting the policies (ie. domestic) the law to be applied is the Roman Dutch law but that English decisions as to the meaning of expressions used in policies are of assistance and are persuasive authority"

(In comparison Blackshaw's case (supra) found

> "there does not appear to be any fundamental difference in principles of construction of the policy of insurance between our law and the English law") (17).

Viljoen JA (in a dissenting judgment) agreed that the appeal should succeed but disagreed as to the law to be applied. The basis for the disagreement was that notwithstanding Section 6(1)(b) of the Admiralty Jurisdiction Regulation Act, 1983, Section 6(5) provides

> "the provisions of sub-section 1 shall not supercede any agreement relating to the system of law to be applied in the event of a dispute".

Viljoen JA says that if the parties agreed either expressly or impliedly that a different system of law is to be applied that agreement should prevail. It went on to state that in English law the system of law to be applied to a contract is referred to as the "proper law of the contract" which was what was considered in the Al Wahab case (supra). Viljoen JA went on to quote Lord Diplock in the Al Wahab case

> "English conflict rules accord to the parties to a contract a wide liberty to choose the law by which their contract is to be governed. So the first step in the determination of the jurisdiction point is to examine the policy in order to see whether the parties by its express terms or by necessary implication from the language used evinced a common intention as to the system of law by reference to which their mutual rights and obligations under it are to be ascertained".(18).

After dealing with the apparent lack of significance of the lex loci contractus and the lex loci solutionis in these types of cases because of the modern communication methods and preferences for payment in international rather than national currencies respectively, Viljoen J.A went on to state that in the instant case a contract was entered into in South Africa and the payment of the premium was to have been effected in South African currency. This he said is unimportant. What is important he said is the form of the policy under consideration and the language in which it has been couched. (19). Viljoen J.A approved of what Lord Diplock referred to as the "highly

idiosyncratic" (20) nature of a contract of marine insurance and the various peculiar concepts contained in the policies which can only be properly understood by reference to the Marine Insurance Act of 1906. Vijoen agreed that even though the policy concerned contained no express provision choosing English law as the system to be applied, nevertheless in the words of Lord Diplock

> "the provisions taken as a whole by necessary implication point ineluctably to the conclusion that the intention of the parties was that the mutual rights and obligations under it should be determined in accordance with the English law of marine insurance" (21).

Viljoen J A concluded that

> "if the other issues had to be resolved I fail to see how it could have been done without applying English marine insurance law as it has evolved around the type of Lloyds policy concerned".(22)

With respect it is difficult to see how having regard to the aforegoing analysis the Court could have found that anything but English marine insurance law would apply to the policies concerned.

The effect of Section 63(1) of the Insurance Act (supra) is to exclude any possibility however, that English law may be applied by a South African Court as the proper law of a domestic marine policy where the assured **insists** otherwise. In such cases therefore South African Courts will have to apply South Africa law of marine insurance which has as its common law Roman Dutch law of marine insurance. English law will no doubt still be of relevance and will in the

appropriate cases have, as we have seen, great persuasive authority. Thus our Courts will no doubt have reference to English authority when interpreting a marine policy similar to the English form of policy.

As J P van Niekerk in his article referred to above concludes

> "it will no doubt be argued that reverting to a system of marine insurance law dating from the 17th and 18th Century was a retrogressive step. Apart from the fact that the law of marine insurance was a highly developed branch of Roman Dutch Law it should be borne in mind that the South African Law of marine insurance is not the Roman Dutch Law of marine insurance; Roman Dutch law is merely our common law. The ability of our Courts, so clearly demonstrated in other areas of our law to adapt Roman Dutch principles and to create a modern South African law of marine insurance should not be under estimated."

To sum up the position would seem to be that where the insured invokes Section 63(1), according to Shooter's case, Roman Dutch Law will be applied but English decisions will be of assistance and of persuasive authority. Of course where the section is not invoked English law will have to be applied by our Courts.

SECTION III

INTERPRETATION OF THE CONCEPT OF INHERENT VICE THROUGH ENGLISH CASE LAW

We have already briefly examined the MAR form and the Institute Cargo clauses A, B and C and the types of cover provided thereby. Clauses 4 to 7 of each of the three sets of clauses deal with the exclusions that limit the cover provided in clauses 1 and 2.

The exclusion of inherent vice to which we shall turn our attention for the remainder of this work has been the subject of considerable interest.

The English Marine Insurance Act of 1906 includes inherent vice as an exception which applies to all policies unless there is a term to the contrary in the policy itself. Of course the Act does not apply in South Africa but the decisions based on the particular section are relevant.

The exception of inherent vice provides that the insurer is not liable for the loss occasioned by any inherent vice in the thing itself eg. spontaneous combustion, disease, decay or fermentation.

Section 55(2)(c) of the Marine Insurance Act of 1906 states

> "unless the policy otherwise provides the insurer is not liable for ..... inherent vice or nature of the subject matter insured"

and this is embraced in clause 4.4 of the Institute Cargo Clauses (A) which excludes liability for loss, damage or expense caused by inherent vice or the nature of the subject matter insured. One frequently finds that clauses 4.2, 4.3 and 4.4 come up together in cases. For convenience the particular clauses are quoted hereunder :

"In no case shall this insurance cover

4.1 .....

4.2 ordinary leakage, ordinary loss in weight or volume, or ordinary wear and tear of the subject matter insured;

4.3 loss, damage or expense caused by insufficiency or unsuitability of packing or preparation of the subject matter insured (for the purposes of this clause 4.3 "packing" shall be deemed to include stowage in a container or liftvan but only when such stage is carried out prior to attachment of this insurance or by the Assured or their servants);

4.4 loss, damage or expense incurred by inherent vice or nature of the subject matter insured.

4.5 .....

4.6 .....

4.7 ..... "

It is no doubt appropriate at this stage to examine the various interpretations that have been placed upon the term inherent vice by the recognized authorities and case law.

In the case of Blower vs Great Western Railway Company (1) Willis J. said

> "by the expression "vice" is meant only that sort of vice which by its internal development tends to the destruction or injury of the animal or thing to be carried".

Arnould (2) states that

> "the underwriter is not liable for that loss or deterioration which arises solely from a principle of decay or corruption inherent in the subject insured or as the phrase is from its proper vice; as when fruit becomes rotten or flour heats, or wine turns sour not from external damage but entirely from internal decomposition".

The authors of Arnould (3) submit that his definition is the best and go on to say that the use in marine insurance of the criterion employed in affreightment cases namely "inability to withstand the ordinary incidents of the voyage" is to be deprecated because such inability may not necessarily be due to inherent vice.

In British and Foreign Marine Insurance Company Limited vs Gaunt (4) the Court was concerned with a case in

which there was a claim under an "all risks" policy and carried out an indepth analysis. The case dealt with the question of wool being shipped from Patagonia to the United Kingdom.

The evidence did not establish how the damage was done but it occurred between the time of shearing of the sheep and shipment at Punta Arenas ie. while covered under the policy. The question arose as to the meaning of "all risks."

It was held that

> "the inference remains that it (the damage) was due to some abnormal circumstance some accident or casualty".

In regard to the Plaintiff establishing his case the Court held

> "the Plaintiff discharges his special onus when he has proved that the loss was caused by some event covered by the general expression and he is not bound to go further and prove the exact nature of the accident or casualty which in fact occasioned his loss."

Lord Sumner said (5)

> "all risks has the same effect as if all insurable risks were separately enumerated..... It would not happen at all if the men employed attended to their duty"

In dealing with the limits to all risks, Lord Sumner said

> "the expression does not cover inherent vice or mere wear and tear or British capture. It covers a risk, not a certainty; it is something which happens to the subject matter from without, **not the natural behaviour of that subject matter being what it is in the circumstances under which it is carried."**

This latter phrase is how Lord Sumner defined inherent vice. Although this definition has some merit, by describing inherent vice as something which "all risks" is not, it is with respect too wide and of no assistance in achieving any certainty.

A more positive definition, by Scrutton, (6) is that

> "by inherent vice is meant the unfitness of the goods to withstand the ordinary incidents of the voyage given the degree of care which the shipowner is required by the contract to exercise in relation to the goods."

Scrutton compares the formulation of Gorrel Barnes L.J. in "The Barcore" (7) in relation to the unfitness of goods to withstand the voyage when he refers to

> ".....its (the goods) own want of power to bear the ordinary transit in a ship".

Scrutton adds (8) that a tendency of the goods to heat, discolour, rot or evapourate or to destroy their packing or the inherent restiveness or phrensy of an animal or defective packing may all constitute inherent vice. We shall see that when we examine the various cases in point, whether inherent vice and defective packing should be treated together or seperately merits careful consideration.

It is perhaps stating the obvious when we say that the object of marine insurance is to provide insurance against the so called "perils of the sea" which includes accidents or misfortunes encountered by vessels plying the oceans.

By illustration Couch (9) says that these perils

> "do not cover loss arising from ordinary circumstances of the voyage or from sea damage or wear and tear which without any extra ordinary circumstances is to be expected."

"Inherent vice" is a peril which exempts an insurer from liablity. Couch describes it as

> "harm to the cargo arising from the inherent nature of the goods".

There must be a causal link between the "vice" and the loss suffered before an insured's claim can succeed. Conversely if there is no such link the claim will fail, ie. there must be a direct cause or link namely application of "the doctrine of proximate cause". However, this doctrine is inapplicable where the cargo suffers from an **inherent vice.** The rationale for this exception to the doctrine of proximate cause is that there is no direct nexus between a period insured against and the loss since "inherent vice" is not regarded as an accident of which sea damage is the proximate or efficient cause". (10)

Certainly one must examine the following definitions to consider to what extent they may assist us in arriving at any conclusion on the issue of defective packing and inherent vice which has been the subject of many debates in the Courts.

In Soya GmbH vs White (11) where Donaldson adapted the definition of inherent vice in Gaunt's case (supra) to read :

> "A loss is proximately caused by inherent vice if the natural behaviour of the goods is such that they suffer a loss in the circumstances in which they are expected to be carried".

It is submitted that this definition could indeed cover the exclusion of defective packaging inasmuch as a loss would be suffered in "circumstances in which they (the goods) are expected to be carried".

Tetley (12) defines inherent vice as

> "one which is an innate or natural or normal quality of the goods. For example it is an inherent vice of flour that it shrinks and loses weight with passage of time".

Although Tetley's view is that inherent vice and defective packing should be treated seperately there may however be room to argue that because in this definition he includes loss of weight (which falls under clause 4.2 of the Institute Cargo clauses) together with inherent vice (which falls under clause 4.3 of the Institute Cargo clauses) by implication defective packing (which falls under clause 4.4 of the Institute Cargo clauses) could also receive the same treatment.

Dover (13) defines inherent vice as

> "some condition or quality of the subject matter which makes it peculiarly susceptible to damage arising from internal causes."

It is submitted that bad packaging cannot fall with the confines of this definition inasmuch as "internal causes" would stand on their own without necessarily being affected by defective packaging.

It is submitted that although none of the variety of definitions are entirely consistent, in substance what seems common, however, is that they focus on the natural behaviour of the goods. Whether or not defective packing falls under this category will have to be canvassed in relation to the various cases which have been decided. It is perhaps appropriate at this stage to examine in more detail therefore the more important English cases and the way that they have dealt with these issues.

Defective Packing

We have already seen that the concept of inherent vice has in certain instances been extended to cover defective packing.

Arnould (14) says that it is a question of construction whether a policy on goods also covers the material in which the goods are packed. If the words of the policy are sufficiently clear no further question can arise. Where however, the words of the policy as Arnould points out are not so clear as to admit of only one construction, the question is one of fact.

In Brown Brothers vs Fleming (15) where the policy was on a consignment of cases of whiskey Bingham J. said

> "the straw in which the bottles were packed and the labels on the bottles are part of the subject matter of the insurance just as are the bottles and the corks."

In this case the straw in which the bottles were packed was subjected to sea water and the labels on the bottles were damaged. Consequently the shipment was sold in its damaged condition. The underwriters were held liable for the loss as the straw and the labels were considered to form part of the subject matter insured.

Arnould (16) submits that by holding damage due to bad packing to be caused by inherent vice is an "unnecessary extension of the meaning of the phrase". There are however, some cases which have been decided running counter to Arnould's view but it is submitted that Arnould's approach is a good one.

In Gee and Garnham vs Whittle (17) seventeen consignments of 112 000 aluminum kettles were insured under an "all risks" policy from Hamburg to the United States. The Institute Cargo Clauses (wartime extention) were incorporated into the policy. Clause 6 of these clauses stated

> "this insurance shall in no case be deemed to extend to cover loss, damage or expense, proximately caused by delay or inherent vice or nature of the subject matter insured".

On arrival some of the kettles were found to be dented and others water stained. Sellers J considered that they were made of very thin metal and that is was quite possible that some of the damage had been caused by

uneven distribution or inadequate provision of wood wool resulting in pressure of one metal part against another during the handling of the goods. Inadequate packing constituted "inherent vice" and accordingly he gave judgment for the insurer who had been sued for a loss under the policy. His Lordship observed

> "in these circumstances I have come to the conclusion that the claim here of the underwriters that the damage in the bulk of the cases was due to the inadequate packing or even before transit started at all has been made out and inadequate packing of course brings the case under the plea of inherent vice in the goods."

The learned judge found that the stains on the kettles had been caused by the use of wood wool which was too wet because it had not been properly seasoned. This too constituted "inherent vice" for which the insurer was not liable.

In the case of F. W Berk and Company Limited vs Style (18). The facts were that a cargo of Kieselgur packed in paper bags was insured for a voyage from Mostagenem North Africa to London against all risks of loss and/or damage from whatsoever cause howsoever arising. The bags burst while being transferred from the ships hold to a lighter. The assured claimed to recover from the underwriters the expenses of rebagging and landing the cargo. The insurers denied liability on the ground that the cargo was packed in defective bags and that this constituted inherent vice for which they were not liable.

The policy incorporated the same clause 6 as was referred to in the case of Gee and Garnham Limited above

In this case the insurers denied liability on the ground that the Kieselgur was packed in paper bags which were defective and were inadequate to withstand the ordinary incidents of the transit in that the seams opened because there was no adhesive or inadequate adhesive matter to keep them firmly closed and the contents secure during ordinary and necessary handling of carriage.

Sellers J gave judgment for the insurers. He said that the subject matter insured was Kieselgur packed in paper bags and that the bags were defective on shipment and observed (19)

> "notwithstanding the affidavit evidence about the bags used and the samples recently sent to the Plaintiff's and produced in Court I found that the (assured) consignment of Kieselgur was packed in faulty and inadequate bags which leaked because they were insufficient to endure the ordinary contemplated handling of carriage. The faults in the manufacture of the bags could be accounted for by a failure in the machine or the processors or by the inexperience or negligence of an operative or operatives concerned with making them; but whatever the cause I find that the evidence establishes that the bags must have been inadequate from the outset."

Inherent Vice

In the case of E D Sassoon Company Limited vs Yorkshire Insurance Company (20) a shipment of cigarettes in cases was insured against the usual risks and also against damage by mould or mildew. The cigarettes arrived mildewed. In answer to the insurance claim the underwriters contended that the policy only covered

damage due to mildew arising from an external cause and not damage caused due to mildew arising from inherent vice in the cigarettes for which damage according to the principle contained in Section 55(2)(c), they were not liable. The Court of Appeal held that the claim must succeed as there was sufficient evidence to show that mildew arose not from inherent vice but from external fortuitous perils covered by the policy. Banks L.J stated

> "the (assured) by their evidence did negative the suggestion that the mischief arose as a result of inherent vice. The learned Judge did not find definitely what the cause of the mischief was but he appears to have been strongly influenced by the evidence of one of the witnesses who suggested the cause of the mischief was condensation on the outside of the tin case which rusted through the tin as I understand it and caused the rusty appearance both on the inside and outside of the tin lining and as a result of that moisture was admitted to the interior of the tin which caused the growth of the spores. The learned Judge did not definitely find that as the cause but he did find in favour of the assured that the two causes which were said to have operated necessarily to reduce the mould or mildew complained of had no existence in fact. Under those circumstances have the (assured) established their case? Have they established that the damage complained of was the result of some fortuitous circumstance and not the result of inherent vice. In my opinion they have." (21).

The question whether the specific inclusion of mildew in the policy had the effect of extending the cover to

loss or damage resulting from any cause whatsoever (including inherent vice) was therefore not decided. It was however pointed out by Lord Atkin that

> "it is quite plain from the words of the Marine Insurance Act Section 55, sub-section 2(c) that a policy may provide,if it is done in express words, for the insurer being liable for losses which are excepted, the ordinary wear and tear, ordinary leakage and breakage and inherent vice from the nature of the subject matter insured. The particular kind of loss, the amount of the loss is one which ..... is a loss which may or may not happen and not one which certainly must happen; if it was a loss which certainly must happen within the voyage I doubt whether it could ever be made properly the subject matter of a policy of insurance. It seems to me conceivable if apt words are used that an assured might cover a loss occasioned by mould which he does not know enough about to know whether it will or will not happen during the voyage and which in fact may happen during the voyage but which may not happen during the voyage" (22).

J P Van Niekerk says that although a policy may validly extend cover to include loss or damage by inherent vice thereby contracting out of the statutory protection embodied in Section 55(2((c) it seems that express words leaving no doubt as to the scope of the cover granted by the policy will have to be employed.

The case of C T Bowring and Company Limited vs Amsterdam Insurance Company Limited (23) concerned insurance of consignments of ground nuts. The particular policy provided

> "to pay average and/or damage from sweating and/or heating when resulting from **external cause** if amounting to three percent on each bag or on the whole".

The facts were that when the goods reached their destination it was established that they had been damaged by heating due to moisture. The assured instituted action and Wright J held that on the evidence the bulk of the damage was due to inherent vice, namely that the heating was due to the excessive moisture content of the goods and was therefore irrecoverable. Wright J said (24)

> "it seems to me therefore that the only explanation of the damage observed at the ports of discharge, the only explanation which fits in with all theories and conditions to be considered is the explanation which meets with the approval of the practical men; and the explanation is that the damage was soley and entirely due to the condition in which the goods were shipped"

A case where the packaging appeared to be adequate but where notwithstanding the adequate packaging damage was caused by water was the case of Whiting vs New Zealand Insurance Company Limited (25) which concerned the shipping in wooden cases of paper hats. The policy covering the goods incorporated a "warehouse to warehouse" clause. When the goods arrived at their point of destination the contents of the wooden crates were found to contain mould. The insurers against whom the action for damage was instituted disputed liablity as they said the damage had been caused by inherent vice.

It was found that the mould was as a result of a fresh water damage sustained by the crates on the quayside before shipment. (There was no damage to other consignments shipped at the same time). Roche J. (26) held as follows:

"That which happened must have happened when they were on the quay before they were carried into the ship or in the lighter. I think there was wet on the quay which affected these cases and from the cases went into the goods themselves in the form of moisture. I do not mean in the form of running water. The wet which effected the cases would set up that moist atmosphere which is shown to encourage the growth of this fungus, mould. Moisture of that sort originated in most of the cases through fresh water. Standing in pools on the quay is a peril which is insured against. Accordingly I hold that the (assurers) are liable for damage occasioned by that cause."

Insurance against Inherent Vice

The case of Overseas Commodities Limited vs Style (27) was the first case of an insurance **against** inherent vice to come before the Court. The case concerned cover on a consignment of tinned meat from France to England which provided insurance against

> "all risks of whatever nature and/or kind. Average irrespective of percentage. Including blowing of tins. Including inherent vice and hidden defect. Condemnation by authorities to take place within three months of the date of arrival in final warehouse in the United Kingdom but not exceeding five months in all from the date of manufacture."

The Court held that notwithstanding the retention in the policy of the standard exclusion of inherent vice in the Institute Clauses it did contract out of the statutory protection. The question to be decided was whether the insurers extension of liability was limited in any way or whether a further peril had been added in addition to inherent vice which the Court had excepted as a cause of the loss.

It was held that the condemnation clause does not entail a separate risk covered but that it qualified the preceding expression of cover against all risks. The assured is therefore merely covered against inherent vice provided that the condemnation took place as specified. Macnair J. concluded (28)

> "furthermore having regard to the peculiar nature of the subject matter - namely a pasteurised and not wholly sterilised pig product - it seems inconceivable that the underwriters should, with their eyes open, have accepted liability for loss by inherent vice developing at any time in the future, since such a product must inevitably, if not consumed within a limited period, suffer loss from inherent vice, for, being perishable, it necessarily contains the seeds of its own ultimate destruction".

Manner of Stowage/Carriage

Tetley says (29) that one must always ask whether the nature of the cargo or the contract of carriage itself requires refrigeration or a certain height of stow or a minimum ventilation or not more than a certain length of voyage.

Thus in respect of a cargo of wet salted fish in the case of Albacora S.R.L vs Westcott and Laurance Line Limited (30) Lord Reid held :

> "It follows that whether there is an inherent defect or vice must depend on the kind of transit required by the contract. If this contract had required refrigeration there would have been no inherent vice. But as it did not there was inherent vice because the goods could not stand the treatment authorised or required".

Hidden defect and inherent vice are not only bound up with the contract but with the care of the cargo and Lord Reid in commenting on "properly" caring for cargo, stated :

> "In my opinion the obligation is to adapt a system which is sound in the light of all the knowledge which the carrier has or ought to have about the nature of the goods."

Insofar as storage is concerned the Court of Appeal followed the above decision in Chris Foodstuffs Limited vs Nigerian National Shipping Hine (31) and held :

> "The evidence does not establish that there was an accepted practice of not stowing a coco yam cargo more than five or six tiers high.... Far from negligence being proved against them the ship owners have proved that they stowed and carried the cargo in accordance with a proper and careful standard".

The logic in the above decision and the principle established cannot be criticized for they are simply in accordance with the dictates of common sense.

Tetley observes that the most common form of inherent vice is a minor inevitable loss in bulk during transport. Because inherent vice is known to the carrier and to the trade, the carrier, in accepting the cargo, must do everything in its power to see that the loss is not exaggerated.

Tetley goes on to conclude that the extent of permissable "freinte de route" (wastage through transport) or loss from inherent vice depends on the facts of the case, the contract of carriage and the practises of the trade.

Where unusual commodities are carried it was held in the case of White and Son (Hull) Limited vs White Star Line Limited (The Hobsons Boy) (32) that the shipper must advise exactly how the shipment should be carried and the carrier must follow the shipper's instructions.

The latest English decision concerning inherent vice is that of Soya GmbH vs White (supra) which commenced in the Queen's Bench Division, went to the Court of Appeals and culminated with the decision of the House of Lords.

The facts were as follows :

Appellant sold 10700 tons of soya beans to Respondent and shipped it in three consignments. When the first consignment arrived it was found to be in a damaged condition. When Respondent saw this he thought it prudent to procure insurance on the remaining two consignments under an HSSC (heat, sweat and spontaneous combustion) policy.

When the second and third shipments arrived they were in a damaged condition and Respondent's loss was in the

order of three quarter million dollars. The underwriters relied on two defences namely :

A. Non disclosure of material facts; and

B. That the proximate cause was inherent vice and that the goods were shipped in such a condition that they could not withstand the ordinary incidents of the voyage to Europe and therefore were able to avoid liability.

The evidence was that the natural characteristic of beans was that if they were shipped with a moisture content of more than 14% there would be inevitable deterioration. The beans in question had a moisture content of 12 to 13% and were in the so-called "grey area".

In the first instance the Court found that there had not been any non-disclosure of material facts. In the Court a quo (33) the defence that the damage was proximately caused by inherent vice (viz. the moisture content of the beans when shipped) was also rejected.

In the Court a quo the policy adopted by the Court was that it was possible for cargo with a moisture content of more than 13% not to suffer damage and since the moisture content was less than 13% it could not be said that the deterioration was the inevitable result of shipping beans with moisture content as stated.

Lloyd J. said (34)

> "the language of the present policy is in my view apt to cover the risk of heating, even if the proximate cause of the damage is inherent vice, provided the moisture content of the cargo was

> within the grey area on shipments; that is to say, within the range where damage may or may not occur..... I would hold that the policy does cover risk of heating proximately caused by inherent vice and that Section 55(2)(c) of the Marine Insurance Act is to that extent excluded."

The Court of Appeal (35) agreed with the finding that the policy in question covered inherent vice and pointed out that heat and sweat were but stages on the way to spontaneous combustion and that spontaneous combustion was the most obvious example of inherent vice.

The heat and sweat were risks and not certainties and the underwriters had accepted these risks and were therefore liable on the policy.

Waller LJ. said (36)

> "In my opinion the words of this policy are clear, it was an insurance against risks which were inherent in the cargo ie. inherent vice. The moisture content on shipping was such that there was a risk of heating, ... it was in the grey area where there was a risk..... Lord Justice Atkin considered that apt words might well cover the risk. In my opinion the words of this policy are such words".

Donaldson L.J said

> "The cause of the loss was the conditions under which the beans were carried. A loss is proximately caused by inherent vice if the natural

behaviour is such that they suffered loss in circumstances in which they expected to be carried."

In the circumstances the damage was due to heating caused by conditions in the beans themselves and some other unknown circumstances and because he took out an HSSC policy it was clear that it was a risk covered against by the Plaintiff. It was a risk accepted by Defendants.

In the House of Lords (40) the Courts view of inherent vice was similar to that of Donaldson L.J's. The Court said the words "HSSC" were merely descriptive of the perils, the words referred to something that could only take place inside the goods themselves. The Court said the HSSC policy affords cover in the event of certain kinds of inherent vice. In spite of the exclusion of inherent vice certain forms can be described by the standard HSSC policy. Donaldson L.J's view permits a claim where one has a known factor (eg heating caused by conditions in the beans themselves) and some unknown factor.

In conclusion it is necessary to briefly summarise the issues discussed in this section.

The various definitions are not of much assistance in creating guidelines for distinguising the concepts of inherent vice and defective packing. There are essentially two cases which support defective packing being dealt with under the heading of inherent vice but it is submitted however, that regard must be had to Arnould who argues that it is a question of construction of the policy whether it covers the material in which the goods are packed and that it is an "unnecessary extension of the meaning of the phrase"

to hold damage due to bad packing to be caused by inherent vice. Furthermore we have seen that policies can provide for various causes of perils, otherwise excepted, and which are uncertain to fall within the parameters of the policy a practice approved of and accepted by J P van Niekerk. There seems to be no criticism of insuring against inherent vice per se.

Consideration has also been given to the mode of transit of the goods having regard to the goods in question as well as the general care of the cargo and the method of stowage, it being acknowledged that the carrier is duty bound to prevent a loss in bulk where this is a known factor.

Finally the Soya case is authority for the proposition that the HSSC policies afforded cover in certain kinds of inherent vice. This case permitted a claim where one has a known factor (eg. heating) and some unknown factor.

SECTION IV

Having now examined the position in English law we must now turn our attention to the current trend that exists in the South African application of the English legal principles pertaining to marine insurance.

The first case with which our Courts were confronted in regard to the exclusion of inherent vice was that of Blackshaws (Pty) Limited vs Constantia Insurance Company (1), the facts whereof are as follows :

The Appellant was a South African printer and lithographer. In 1979 he purchased a printing machine from Norway and effected a policy of marine insurance with the Respondent in Johannesburg to cover the machine for its voyage to South Africa.

The Respondent's liability under the contract specifically excluded loss, damage or expense caused by inter alia inherent vice.

The subject matter insured was described in the policy as "second hand printing machine packed into containers".

When the machine was unpacked in South Africa it was found to have been extensively damaged. The Appellant alleged that the damage had been caused by the movement of various parts of the machine in the containers and crate as a result of defective packing. The Respondent

contended on exception that the damage had been caused by **inherent vice, namely defective packing** and was therefore excluded from the insurance policy.

In the Court a quo Vos J refused to accept the view expressed by Arnould (2) namely that the inclusion of defective packing within the concept of inherent vice is an unneccessary extention of the meaning of inherent vice. He held that the defective packing of the machine amounted to inherent vice and the subject matter insured and that as this was alleged to be the cause of the damage the particulars of claim did not reveal a cause of action.

D.M Davis (3) submits that Arnould's view is persuasive because it is not for the Courts to extend the range of exclusions from liability under a contract which is prepared by the Insurer and he cites the **contra proferentem** rule in support of his argument ie. the party who is responsible for the drafting of the contract is bound by the strict words thereof. Davis goes on to say that the basis for rejecting Arnould's submission would appear to rest upon the interpretation given to the concept of inherent vice by the Courts.

When the matter came before the Appellate Division it dealt with the question of whether defective packing constituted inherent vice within the meaning of a policy of marine insurance.

We have already considered the question of the law applicable and following the case under discussion it has been concluded that the law of England is to be applied (4). This is a prime example of the significant part played by English case law in the sphere of marine insurance in South Africa and insurance law in general.

In support of this approach Trengrove J.A's statement on page 9 of this work is apposite.

The Court reviewed a number of English authorities and cases on the definition of the phrase "inherent vice" (which were dealt with in section III) and the definition by Scrutton (4a) was considered as well as examples of conditions constituting inherent vice. The Court accepted that Scrutton's definition appeared to be in line with the "ordinary" meaning of the phrase "inherent vice" namely

> "a fault defect, blemish or imperfection..... fixed, situated or contained in something - in a physical sense" (5).

In analysing the principles the Court went on to review the English cases, both of which we examined earlier on in this work namely Berk's case (6) and Gee's case (7).

In both these cases the QBD held that defective packing amounted to inherent vice. The Court in support of this view referred to a number of English authorities (8) the two opposing views having been propounded by Arnould (9) and Tetley (10). Arnould's view has already been discussed earlier on and Tetley's view is that defective packing and inherent vice are not synonomous because article 4(2) (11) distinguishes between them.

Trengrove J.A then proceeded to discuss Donaldson L.J's disagreement with the above two authors in the case of Soya GmbH vs White (12), a case on which he relied heavily. The facts of this case appear on page 49 hereof. After dealing with Donaldson L.J's adaptation (13) of Scrutton L.J's definition in Sassoon's case (14), Trengrove J.A stated :

> "It seems to me to be both right and natural that the concept should be treated similarly in the context of both carriage by sea and marine insurance and in this respect I disagree with the learned editors of Arnould. I also disagree with their view that to regard the unfitness of the packing of goods as constituting inherent vice is an unjustifiable extention of the concept. The subject matter of the insurance includes the material in which the goods are packed. A bagged cargo is wholly different from a bulk cargo and it would be absurd to contend that where a bagged cargo ends the voyage as a bulk cargo the subject matter insured has suffered no loss". (15)

Trengrove J.A concluded

> "I am satisfied that in this instance the defective packing of the machine constituted "inherent vice" in the subject matter insured. As a result of this defect the subject matter was rendered "perculiarly susceptible to damage arising from internal causes" (17)

Tetley and Arnould's views have thus not been accepted by our Courts who have favoured the interpretation of inherent vice to include defective packing. It is submitted that there is indeed a distinction between inherent vice and defective packing and with respect it is suggested that the view of Tetley and Arnould is a preferable one although their view as we have noted above does not find support with the English cases.

The other case involving inherent vice which confronted our Courts was that of Bethlehem Export Company (Pty) Limited vs IGI Limited (18). In this case Counsel for the Plaintiff is shown up in a rather unfavourable light.

It was alleged that the Defendant insured the Plaintiff against all loss of, deterioration of or damage to asparagus shipped by Plaintiff whilst in transit from the receiving depot of the South African airport until delivered to the consignee at the airport of destination whilst the policy was of force and effect (19). The Plaintiff further alleged that while the policy was of force and effect it shipped 232 cartons of asparagus from Jan Smuts Airport to Frankfurt Airport which asparagus deteriorated whilst in transit. The Plaintiff alleged further in answer to a request for further particulars that the condition of the asparagus on shipment was perfect and that in the course of transit the asparagus became dry and slightly brown. The Plaintiff further alleged that this should not have occured in transit, that it is unaware of the cause of the deterioration and when during the transit deterioration occurred (20).

The scope of the cover was defined by Defendant in its plea as

> "insured against all risks including deterioration in terms of the Institute Frozen Food clauses (excluding frozen meat) - full conditions insofar as they apply" (21).

The Defendant denied that in terms of the policy the Plaintiff was insured

"against all loss of, deterioration of or damage to asparagus shipped by the Plaintiff"

as alleged and stated that on a proper interpretation of the policy the Institute Frozen Food clauses were applicable only to frozen cargo and that the said clauses were not applicable to the asparagus which is the subject matter of Plaintiff's three claims inasmuch as such asparagus was not frozen cargo. (22)

The Court was not impressed by Plaintiff's main argument. Phillips A.J said that Plaintiff relied on the "insured interest" clause of the policy and submitted that it clearly implied that the asparagus which was consigned on each occasion was fresh as opposed to frozen or pickled. (23)

Defendant's Counsel submitted that the issue was not whether the policies on a proper construction covered the Plaintiff in respect of deterioration of fresh asparagus. The policy does cover against deterioration of non-frozen asparagus if it is caused by a casualty in terms of the all risks clause. But it was not Plaintiff's case that the all risks cover was applicable and there was no allegation that the deterioration was caused by a casualty namely an external and fortuitous event as would have been necessary if the claim had been based on the all risks clause (24).

In reply Plaintiff's Counsel radically altered his stance by attempting to now include his claim under the insurance policy issued and in order to attempt to remedy his bad pleading stated that the Defendant itself had pleaded on the basis of an all risks policy.

Phillips A.J remarked (25) that he was unable to see why the plaintiff should have omitted to state what should have been the crucial allegation in his case, namely that a casualty had caused the asparagus to deteriorate.

However, the Court chose to deal with the question of whether the deterioration of the asparagus had been caused by a casualty.

After reviewing some of the authorities Phillips A.J quoted from Arnould (26) where it is stated that the insured may discharge the onus of showing on the probabilities that the loss was caused by a casualty ie. an external and fortuitous event by showing that

(a) the goods were shipped sound;

(b) that they arrived damaged; and

(c) that the damage is of such a kind as to raise a presumption of some external cause.

Then the burden is on the underwriter to prove that the loss in fact occurred in some way for which he is not liable. As to (c) it is essential for an insured who relies on a change in the condition of the goods to show that the change was not due to the natural behaviour of the subject matter. (27)

After a detailed examination of the evidence lead and the authorities available the Court concluded that the Plaintiff did not discharge the onus of proving that the deterioration of the asparagus was caused by a casualty and that Plaintiff should fail in its action against the Defendant.

It is important to examine why the Court came to such a conclusion ie. why inherent vice is the direct opposite to external and fortuitous events, the proof of which is necessary for the all risks aspect of a claim.

Phillips A.J said

> "All the evidence indicates that asparagus goes brown and dry (and eventually rots) when it deteriorates due to natural causes. Accordingly on the facts alone the Plaintiff has not discharged the onus of proving
>
> > **that the change was not due to the natural behaviour of the subject matter**
>
> as was said in The Galatia (28)..... The evidence in fact goes much further and points positively to the cause not having been a casualty".

In this case the incidence of deterioration is quite considerable namely four out of fourteen consignments or approximately twenty-nine percent of the total.

In coming to its conclusion the Court referred to Gaunt's case (29) and Sassoon's case (30) where goods were damaged by water and mildew respectively from external sources which damage could only have come from that external source.

This case illustrates that the onus on the insured is a more difficult one to discharge in the case of perishables.

In conclusion Phillips A.J said that

> "in my opinion the requirement of Lord Sumner in Gaunt's case..... and the requirements in all the cases that have followed it have not been satisfied. In the first place the evidence of the Lloyd's surveyors as to the cause of the deterioration and as to the fact that in all three cases there is no evidence of any irregularity to the outside of the cartons. In the second place the obvious inference that on the 27 September 1981 the other consignment on the same aircraft was unaffected. Thirdly all available evidence points to the fact that the nature of the deterioration observed by the surveyors eg. browning, drying out is really how asparagus naturally behaves when it has ceased to be fresh for inherent reasons.
>
> In other words there was no external event which caused the result ie. there was no casualty and the damage was caused by inherent vice."

This case therefore seems to be a guideline as to on whom the onus lies and how it can be discharged.

It now only remains having analysed the two major South African cases in detail to extract from them and the English authorities and cases guidelines for the application of the concept of inherent vice in the South African context.

SECTION V

Tests and guidelines for the application of the concept of inherent vice in the South African context.

Having canvassed the concept of inherent vice insofar as South African and English law is concerned, it is patently clear that insofar as South African law is concerned there is no clear authority on the concept and that English law has been resorted to by the South African Courts in almost all decisions.

We have already noted that Section 63(1) of the Insurance Act is of paramount importance in relation to contracts of insurance.

There may be some instances where, as in the case of Amin Rasheed Shipping Corporation vs Kuwait Insurance Company (the AL WAHAB)(supra), there is no choice of law clause nor jurisdiction clause nor arbitration clause, and, there may be others where one or more of these clauses form part of the contract, in which event the provisions of Section 63(1) are applicable.

In the former case our Courts have not been confronted with such a situation insofar as Marine Insurance Law is concerned. However, in England the AL WAHAB case, which was considered by the House of Lords, canvassed the situation and is of considerable assistance. It is

submitted that the findings of this case will be applied where in similar circumstances our Courts are called upon to decide this issue. This point is not made baldly and finds support in the judgment of Viljoen A.J in Shooter's case (supra). Although the judgment is a dissenting one it is submitted that it is sound in law and in accordance with the dictates of common sense.

The facts of the AL WAHAB case are dealt with earlier in this thesis and are not repeated. Whether the English Court had jurisdiction to entertain the action brought by the Insured against the Insurer turned on whether the insurance contract was "by its terms or by implication governed by English law". The two points that arose in the action were

(a) whether under English choice of law rules the proper law of the insurance contract was English law or the law of Kuwait; and

(b) if the proper law was English law whether in all the circumstances of the case it was appropriate that the English Courts should in its discretion exercise jurisdiction to determine the dispute.

The two decisive factors however, turned out to be the state of the Kuwait law of marine insurance (there was no indigenous law at the time of the policies) and the use by the parties of a similar policy form to the English standard form of the marine policy.

In an article by Stone (1) considering the AL WAHAB case he says

> "The decision in the Amin Rasheed now establishes that the use of the form which originated in England is a strong, indeed decisive indication of an implied choice of English law, even if the form is commonly used for contracts otherwise unconnected with England, where the contract is of a kind which involves legal concepts perculiar to contracts of that kind, and the foreign law which might otherwise be applicable has not yet developed a set of detailed and ascertainable rules designed to make sense of contracts of that kind so that it is only by reference to English law that a sensible and precise construction of the contract can be provided. It is submitted that a decision to the contrary would have been almost perverse"

In Shooter's case Viljoen J.A expressly supported the issues dealt with in Stone's article. (2)

It can therefore be concluded that where there is no choice of law or jurisdiction clause English law will have to be applied where there is no indigenous law of the particular country at the time of the policy if the policy is of a similar form to the standard English policy.

Where however, Section 63(1) applies and the Insured elects to enforce his rights in terms of the sub-section then South African law applies. As stated in Section I this South African Law is really Roman Dutch Law onto which has been grafted the persuasive authority of English law in determining the principles of Marine Insurance.

Where of course no such election is made English Marine Insurance Law will have to be applied on the assumption that the jurisdiction clause and law applicable clause provide so.

Much of the debate in our Courts has been on whether inherent vice includes defective packing or whether they are two separate exclusions. The former being supported by the English Courts (and accordingly the South African Courts) and the latter view being held by Arnould and Tetley.

When the question of inherent vice came before our Courts in the case of Blackshaw's (Pty) Limited vs Constantia Insurance Company (supra) and Bethlehem Export Company (Pty) Limited vs IGI (supra) English law was accepted as the body of law applicable to the exclusion of inherent vice.

It seems as though because of the lack of support for the views of Arnould and Tetley in the Courts those arguing for the separation of the treatment of the two concepts will have to satisfy themselves with perhaps only rigid tests for use by the Courts in the application of the principles.

Although there is considerable merit in the views of Arnould and Tetley it is difficult to quarrel with the view of Trengrove J.A in Soya's case (supra) when he stated

> "a bagged cargo is wholly different from a bulk cargo and it would be absurd to content that where a bagged cargo ends the voyage as a bulk cargo the subject matter insured has suffered no loss" (3)

How should our Courts approach the defence of inherent vice? Should the approach be different for perishables as opposed to non-perishables? Are the test different for inherent vice and defective packaging? These are but a few of the issues which have from time to time called for discussion.

It is submitted that the view of Alan Rycroft (4) is of great assistance when he examines the Bethlehem case and the case of Premier Wire and Steel Company Limited vs Maersk Line (5), (the latter case having been decided some fifteen years earlier) for the purposes of summarising the steps involved in proving loss and establishing inherent vice.

Rycroft states that the insured bears the onus of proving that the loss or damage has been due to a peril insured against and he does this by showing:

(a) that the goods were shipped in a sound condition. A clean bill of lading does not always overcome this burden (cf Tetley @ 223);

(b) that they have arrived damaged;

The aforegoing obligations found favour and were accepted in the Premier Wire case (supra) and in the Bethlehem case (supra).

(c) that the damage raises a presumption of some external cause;

This presumption arises from the decision in Gaunt's case (supra) where it was held in regard to the meaning of "all risks" that "the inference remains that it (the damage) was due to some abnormal circumstance some

accident or casualty". In further support of this presumption regard should also be had to the passage from Sassoon's case (supra) quoted on page 43 hereof in which the evidence supported the claim of the damage having been caused by "external fortuitous perils" covered by the policy.

(d) that the change in the goods was not due to the natural behaviour of the goods;

This element emerged in the Bethlehem case and illustrated that the onus is a heavier one in the case of perishables than in the case of non-perishables.

(e) that the external cause is a loss covered by the policy.

Simply put where there is no cover for the loss in the policy there is no claim. In this regard Soya's case should be born in mind where an HSSC policy afforded cover in the event of certain kinds of inherent vice. Donaldson L.J's view is that a claim under these circumstances is permitted where one has a known factor (eg. in the Soya case heating caused by conditions in the beans themselves) and some unknown factor.

Once the assured has satisfied the aforegoing Rycroft says the underwriter then bears the onus of proving by a preponderance of probability that the loss is attributable to inherent vice. The underwriter must go beyond proving an uneventful/incident free voyage and must actually establish inherent vice.

Having regard to the definition by Scrutton on page 36 which was accepted by the Court in Blackshaw's case (supra) the ship owner will have to establish in

attempting to prove inherent vice that he exercised a degree of care in relation to the goods.

This view if bolstered by Tetley who says that one factor in discharging the onus would be to show that proper care was taken of the goods on the voyage. In this regard different considerations will naturally apply for perishables and non-perishables and the words of Lord Reid (6) in the case of Albercore S.R.L. vs Westcott and Laurance Line Limited (supra)) are opposite when he says that the kind of transit required by the contract is important namely that refrigeration is only necessary if it is required by the contract.

Rycroft concludes by stating that if the probabilities are equally balanced leaving the Court in doubt, the party on whom the onus rests will fail to prove his case. It is noted that this is in accordance with the normal rules of evidence.

It is hoped that should the exclusions of inherent vice and defective packaging call to be dealt with by our Courts in future that not only will the Courts see fit to adopt the view of Arnould by refusing to extend the meaning of inherent vice to include defective packing but also that the Courts will formulate a comprehensive set of guidelines based on the English authorities and case law for assistance in dealing with these exclusions and that regard will be had to aforegoing analysis in doing so.

FOOTNOTES

SECTION I

1. Bamford BR - Law of Shipping and Carriage in South Africa.
   Quoting GR 3.24.1, Voet 22.2.3, vd Kessel TH 312, vd Linde 4.6.1.

2. See 1 supra.

3. Gordon and Getz - The Law of Insurance

4. Admiralty Jurisdiction Regulations Act 1983.

5. 6 Edi VII C 41

6. Act 8 of 1879

7. 1912 CPD @ 692

8. Marine Insurance - A consideration of important aspects of cargo insurance - South African Insurance Law Journal Volume 7 1983 No. 2

9. 1967(2) SA 239(A) @246-7

10. The Criminal Procedure Amendment Act 92 of 1963 and the Civil Proceedings Evidence Act 25 of 1965.

11. @ 246.

12. 1967 (84) SALJ 328-300.

13. See note 5 supra in particular Section 2 and Section 3.

14. Says Davis quoting in particular Grotius Interdinghe tot de Hollandsche Rechtsgeleerdheyd. Van der Keesel Theses Selectae Juris Hollandici et Zelandici and van der Linden Rechtsgeleerd Practicaal en Koopmans Handboek.

15. 1905 TS 374 @ 378

16. Supra 8

17. Act 27 of 1943.

18. "marine business" means the business of insuring persons against -

    (a) loss of or damage to any vessel including a barge and dredger; or

(b) loss of or damage to goods during their conveyance by land, air or water and whether inclusive or exclusive of loss of or damage to such goods while they are being stored, treated or handled in connection with such conveyance or intended conveyance; or

(c) loss of freight for any such conveyance; or

(d) any other loss in connection with any vessel or any such goods or freight against which an Insurance may be lawfully effected;

provided that for the purposes of this act the expression "marine business" shall not include;

(i) any transaction in connection with the policy lawfully issued before the commencement of this act whereby the Insurer concerned insured any person against any such loss or damage as aforesaid in connection with the conveyance of goods otherwise then by water; if the insurer is not registered under Section 3 or 4 for the purpose of carrying on marine business or;

(ii) the business of insuring travellers against loss of or damage to their luggage if such business is carried on independantly of and not in conjunction with marine business; or

(iii) the business of insuring persons against any such loss or damage as aforesaid in connection with the conveyance of goods otherwise then by water if the insurer concerned has before engaging in such business obtain from the Registrar permission in writing to carry on such business as an insurance business other than marine business and the Registrar has not withdrawn that permission.

19. "domestic policy" means any policy issued anywhere upon an application made or presented to a representative of the insurer concerned (or to any person on behalf of such a representative) at a place in the Republic not being a life policy which is subsequent to the date of issue thereof being made payable at a place outside the Republic at the request of the owner and in respect of which the owner has also agreed in writing that it shall not be regarded as a domestic policy for the purposes of this act but includes any life policy issued outside the Republic which has subsequently

been made payable in the Republic at the request of the owner provided the owner has also agreed in writing that it shall be regarded as a domestic policy for the purposes of this act.

20. Act 105 of 1983.

21. "maritime claim" means -
(R) any claim relating to marine insurance or any policy of marine insurance including any claim by or against any association, society or mutual insurance organisation concerned mainly with the protection and indemnity of its members in respect of any maritime claim.

22. Act 3 & 4 Vic c 65, 1840 & 24 & 25 Vic c 10 1861

23. 1983(1) SA 120(A) @ 126.

24. In Mutual & Federal vs Oudtshoorn Municipality (Supra) @ 429 E-F "The more well known .... Linden."

25. 1985(1) 419(AD)

26. Act 43 of 1977

27. 430 G

28. @ 431 (b) to (e)

28a Petrus de Santerno - De Assecurationibus et Sponsionibus (1554)

28b Benevenutus Straccha - De Assecurationibus et Sponsionibus (1554)

28c 22.2.3

28d @ 428 (f)

29. @ 431 (i)

30. @ 432 (a)

31. @ 432 C

32. @ 433 (B)

33. @ 433 D

34. @433 E - F

35. 1985 SAILJ 9 "The Roman Dutch Mist over the duty of disclosure."

36. Supra 25.

37. Indeed as Davis points out so was the link that van der Linde 4.6.1 cites and uses J A Parks work on marine insurance, 1787 as well as J Wesketts Complete Digest of the Theory and Practise of Marine Insurance (1781). He also translated Park into Dutch (JG Kotze "The History of Roman Dutch Law (1910) 27 SALJ @ 211).

38. @ 428 F : The reception of the Italian Law Merchant including the law of insurance occured throughout Western Europe and England during the 16th Century (Holdsworth op cit vol 8 (2nd Edition) @ 273-285)

    @ 429 G : It has been pointed out furthermore that our common law is not what is usually regarded in the strict sense as Roman Dutch Law (that is the law of the province of Holland or even of the Netherlands) as it had developed at the end of the 18th Century but rather a use **ius commume** of this period. This view no doubt particulary true of the Mercantile Law in general is confirmed by the fact that Dutch Jurists when dealing with insurance law made copious reference to the works of authors from other European countries" (quoting the South African Maritime Law and Maritime Insurance : Selected Topics (1983) Dillon and van Niekerk.

39. 432 C

40. Supra 27

41. @ 433 : "In my opinion uberimmae fides is an alien vague useless expression without any particular meaning in law ..... our law of insurance has no need for uberrimae fides and the time has come to jettison it."

42. Reported in 1934 AD 560 @ 563.

43. 1985 (48) THRHR 456 "Insurance and good faith : exit the uberrimae fides - enter what?

44. Gordon & Getz on the South African Law of Insurance

45. @ 431 (b) to (e)

46. @ 432 (f) to (g)

47. Supra 35

48. In the TSAR 1985 @ 86 "Die Openbaringsplig by Versekering; uberrimae fides oorbort".

49. top page 88 1st paragraph.

50. 1986(3) 373 AD

51. @ 389 C-D

SECTION II

1. Arnould in a footnote in his book 'Law of Marine Insurance and Average' 16th Edition-Vol 1 @ 18 says that the meaning of "these cabalistic letters" was long obscure. Messrs Wright and Foyle however in their history of Lloyds had now finally proved that they stand for "ship and goods" deriving from a form of policy devised for insurances of both ship and goods appended to the Stamp Duties Act of 1795 (35 GEO C63).

2. Lloyds Maritime Law Quarterly - 19 - Antony George: "the new institute cargo clauses" at 438.

3. (1921) 2 A. C. 41 at 47 viz. "where all risks are covered by the policy.....the plaintiff discharges his special onus when he has proved that the loss was caused by some event covered by the general expression and he is not bound to go further and prove the exact nature of the accident or casualty which in fact occasioned his loss".

4. No 27 of 1943 (as amended)

5.

6. @ 126 G

7. (1982) 1 Lloyds Rep 638 QBD; (1983) 1 Lloyds Rep 235 CA; (1983) 2 Lloyds Rep 365 HL.

8. J P van Niekerk : The Proper Law of a Marine Insurance Contract - The Al Aahab case. MBL vol 6 1984 @ 89 - 90.

9. Lord Diplock @ 369 regarded this as a "crucial surrounding circumstance.

10. Donaldson M.R regarded this as "a single factor of of a very considerable weight" @ 238 whilst May L J thought the weight to be attached thereto by the fundamental question in this case" @ 243.

11. @ 247

12. @ page 9 of his article.

13. This was the situation in the Cape and Orange Free State until 1977.

14. This it is suggested may to an extent be the position in South Africa at present.

15. @ 373 : there is nothing unusual in the situation where under the proper law of a contract resort is had to some other system of law for purposes of interpretation in that case that other system

becomes a source of the law upon which the proper law may draw. Such is frequently the case where a given system of law has not yet developed rules and principles in relation to an activity which has become current or where another system has from experience built up a coherent and tested structure. In such a case proper law is not applying a "conflicts" rule (the main fact being no foreign element in the case" but merely importing the foreign product for domestic use).

16. 1987(1) 842 AD (on appeal in the matter of Shooter t/a Shooter's Fisheries vs Incorporated General Insurance Limited 1984(4) SA 269 D.

17. @ 126 H

18. @ 863 I - J

19. @ 864 F

20. @ 864 G

21. @ 865 G - H

22. @ 865 I

SECTION III

1. (1872) LRCP 655@ 662
2. Law of Marine Insurance and Average 16th Edition Vol. 1 @ 782
3. Sir Michael Mustill and Jonathan C B Gilman
4. (1921) 2AC 41 @ 57
5. @ 57
6. Scrutton on Charter Parties and Bills of Lading 19th Edition @ 226
7. (1896) P. 294 @ 297
8. @ 227
9. Couch on Insurance para 43.87
10. Carver Carriage by Sea 12th Edition (vol. 2) para 682.
11. (1982) 1 Lloyds Rep. 126 (CA)
12. William Tetley QC Marine Cargo Claims 2nd Edition.
13. Dover, A Handbook of Marine Insurance (8th Edition) @ 172
14. @ Section 309
15. (1902) 7 Com Cas 245
16. @ Section 782
17. (1955) 2 Lloyds Rep 562 QBD
18. (1955) 2 Lloyds Rep 382 QBD
19. @ 387
20. 1923 16 Lip Rep 129 CA
21. @ 130
22. @ 133
23. (1930) 36 Lil Rep 309 KBD
24. @ 324

25. (1932) 44 Lil Rep 179 KBd

26. @ 180

27. (1958) 1 Lloyds Rep 546

28. @ 560

29. Page 220 Marine Cargo Claims 2nd Edition W Tetley QC.

30. (1966) 2 Lloyds Rep 53 @ 59

31. (1967) 1 Lloyds Rep 293 @ 299

32. 47 LI rep 207.

33. 1 Lloyds rep 491(QBD) 504

34. @ 504

35. 1982 (1 Lloyds rep 136) CA

36. @ 141

40.

SECTION IV

1. 1983 (1) SA 120 (A)

2. See page 40, 4th paragraph

3. Marine Insurance - A consideration of important aspects of Cargo insurance : SAILJ vol 7 1983 No.2

4. See Section I

4a On page 36 of this thesis

5. Oxford English Dictionary - "vice" and "inherent"

6. See footnote 18 Section III

7. See footnote 17 Section III

8. @ 128 H

9. See footnote 2

10. See footnote 12 Section III

11. Of the Hague Rules which are the Brussels Convention of 1924 relating to bills of lading. The general principle of the Rules is that they apply to Contracts of Carriage covered by a bill of lading Article 4(2) which reads as follows :

"1 Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from :

(a) .....
.....
(m) wastage in bulk or weight or any other loss or damage arising from inherent defect quality or vice of the goods.
(n) insufficiency of packing."

12. See footnote 11 Section III

13. See page 51 hereof - last paragraph

14. See footnote 20 Section III

15. @ 129 C

16. @ 129 E

17. For the origin of this latter phrase see the definition of inherent vice by Dover - A Handbook of Marine Insurance (8th Edition) at page 171.

18. 1984(3) 449 (W)
19. @ 450 A
20. @ 450 D
21. @ 450 H - I
22. @ 451 A - B
23. @ 451 C
24. @ 451 H - I
25. @ 452 F
26. Paragraph 833 a page 704
27. @ 453 H - I
28. [1979] 2 LI Rep 450 QB
29. @ 458 I
30. @ 454 G - H.

SECTION V

1. The proper law of a marine insurance policy - Lloyds Maritime Law Quarterly August 1984 (Part 3) page 438

2. @ 863 F

3. 1969 (3) SA 488 (c)

4. The burden of proving "inherent vice" South African Insurance Law Journal 1984 Volume 8 No. 3.

5. 1969 (3) 488

6. @ page 48 of this thesis.