Knowing your own vices…

There are many "common" phrases in marine insurance policies; however, if the ramifications of these "common" phrases are not completely considered, there is the risk of an insured not being covered.

Every now and then, a court is committed to deciding a dispute which requires interpretation of phrases from standard marine insurance policies such as the Institute Cargo Clauses ("ICC"). One such phrase is the exclusion of an insurer's liability where loss or damage is caused by "inherent vice or the nature of the [cargo]".

Over the years, there have been relatively few cases in the South African jurisdiction dealing with inherent vice. A recent case in the English and Welsh Court of Appeal dealt with the issue.

The lengthy case of the oil rig named "Cendor MOPU" highlighted the interpretation debate around the exclusion of "inherent vice" in the ICC (A) policy (otherwise known as an "all risks" policy) of 1 January 1982. According to this policy, all risks or loss or damage to the subject-matter insured were covered with the exclusion that "in no case shall this insurance cover loss or damage or expense caused by inherent vice or nature of the subject matter".

The claimants purchased the oil rig and arranged for its transportation on a barge with its leg elevated above the deck from the United States of America to Malaysia around the Cape of Good Hope. Upon experiencing rough weather during the journey around the Cape of Good Hope, three legs of the oil rig broke off at various intervals.

The claimants decided to claim against their all-risks policy but the insurers refused to pay, alleging that the proximate cause of the loss was the "inherent vice" in the legs of the oil rig – i.e. it was known beforehand from marine surveys that the legs would take metal fatigue and possibly break off.

The question for the court was whether the proximate cause of the damage to the oil rig was from the rough weather ("perils of the sea") or the "inherent vice" of the oil rig. The appeal court clarified that something internal did not need to be the sole cause for the "inherent vice" exclusion to apply in any given situation. However, the phrase "inherent vice" could be described as:

> *…the risk of deterioration of the goods shipped as a result of their natural behavior in the ordinary course of the contemplated voyage without the intervention of any fortuitous external accident or casualty.*

In other words, if it could be established that there was an unexpected external accident or anomaly, the exclusion may not apply. On the facts of this situation, it could be established that there were extraordinary, not ordinary, weather conditions and wave actions, for the voyage, which amounted to "leg-breaking wave[s]". Furthermore, that because of this wave action breaking off the first starboard leg, the second and third legs of the rig were placed at greater risk of breaking off. None of the breaking was bound to occur and it was therefore a risk against which the claimants were insured, caused by the "perils of the sea" as opposed to the inherent vice of the oil rig.

In the South African context, there has not been much debate around the definition or interpretation of “inherent vice” in exclusionary clauses of marine insurance policies.

One of the few South African cases on this issue was heard in the Supreme Court of Appeal in 1983. It was a fairly simple case about a printing machine, damaged during shipment from Norway to South Africa. Unsurprisingly, the policy provided that loss proximately caused by inherent vice, in this case, defective packaging, would not be covered.

Marine insurance is an inevitable part of the import and export of cargo. Whilst we have all seen the wording of the various policies on many occasions, it may be worthwhile to review the consequences of the policies on the transport of particular types of cargoes.