NORTON ROSE FULBRIGHT

The Big Read Book series Volume 8
Marine Insurance

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Dear reader

Welcome to Volume 8 of the Big Read Book series. This one deals with marine insurance.

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Introduction

This book is designed to give its readers an overview of the South African law of marine insurance. The focus will be on marine cargo insurance because the vast majority of marine insurance policies underwritten in South Africa are for cargo. However, the general principles reflected in this book apply equally to hull and machinery policies and other marine asset policies as well as to marine liability policies.

The scope and complexity of marine insurance is such that a devout student would need to refer to the numerous excellent texts on South African marine insurance and, because most marine insurance policies are subject to English law, an even wider range of books on English marine insurance law. A summary of this nature simply cannot cover all of the complexities, but the topics dealt with cover the more common issues and problems encountered by the South African marine insurance industry. In accordance with the modern habit of disclaimers, please do not use this summary as legal advice on any of the many complex principles that apply to South African marine insurance law.

Sources of South African law

For as long as the authors have been practising marine insurance law, there have been calls for South African legislation to be promulgated to resolve the uncertainties in areas of the law and to bring practice in line with the modern requirements of those involved in marine trade. The initiative has been driven by Norton Rose Fulbright and the Association of Marine Underwriters of South Africa who have been trying to persuade the government that South Africa needs a marine insurance act, but at the moment that appeal is falling on deaf ears.

The South African law of marine insurance has its roots in Roman Dutch law which forms part of the common law of South Africa.

Most practitioners recognise that the sources and principles of Roman Dutch law of marine insurance are difficult to determine, have obviously not kept pace with the developments of marine insurance, and many principles are untested by our courts. This makes it difficult for practitioners to advise clients on the South African law effects of the terms and conditions of marine insurance agreements. Helpfully, subject to the comments below, most policies of marine insurance in South Africa are governed by English law and practice and the many well-established principles of that regime. This is the case even though a policy may provide that any disputes will be heard in South Africa.

Precedents

The doctrine of precedent provides that a ruling made by a court on a question of law will be applied to the accepted facts of future cases except in certain circumstances such as where the principle applied is obviously wrong or needs to be developed. This is particularly so now that the South African Constitution has empowered the courts to develop the common law to realise the spirit and purpose, as well as the specific requirements, of the Constitution.

Constitutional Court judgments are binding on all courts including the Supreme Court of Appeal. The Supreme Court of Appeal judgments are binding on all lower courts and the lower courts' judgments ought to be followed in the other courts of equal standing unless clearly wrong in the court's opinion.

Legislation

In addition to the Roman Dutch principles and precedents, marine insurance is governed by the Insurance Act of 2017, the Short-term Insurance Act of 1998 (STIA) and the Admiralty Jurisdiction Regulation Act of 1983 (AJRA). The former Act deals mainly with the administration and regulation of the non-life insurance industry. The STIA contains provisions that deal with the effect of any non-disclosure or misrepresentation that will be relevant to any marine insurance agreement and the conduct of an insured under such an agreement.

Rail and transport insurance may also be applicable to marine claims. The Insurance Act requires insurers to be licensed to carry on marine insurance business, which covers loss or damage resulting from the possession, use or ownership of vessels used in or on water, canal, dam, lake or sea.

The AJRA provides that claims arising out of or relating to a contract of marine insurance will be regarded as maritime claims, and accordingly subject to the provisions of that Act. Any such claim must be brought before a South African High Court exercising its admiralty jurisdiction. This includes the inland High Courts where the marine insurance contract has been concluded there.

Governing law

Marine policies typically incorporate selected Institute Cargo Clauses (ICC). These standard clauses include a term that states that the policy is subject to English law and practice. This does not however prevent South African courts applying the provisions of South African statutes particularly those relating to the protection of the insured.

The Supreme Court of Appeal dealt with this question in the *Representative of Lloyds and Others v Classic Sailing Adventures (Pty)* Ltd 2010 (5) SA 90 (SCA) dispute under a hull and machinery policy which clearly stated that it was subject to English law and the jurisdiction of the South African courts. The court held that preference should be given to dealing with a material non-disclosure in terms of the South African legislation rather than the approach taken under the English Marine Insurance Act of 1906.

South African insurance laws govern all marine insurance policies, and are wide enough to cover the storage of goods for extended periods prior to or following transit which is a common provision in marine cargo policies.

The Consumer Protection Act of 2008, has created a legal framework governing the relationship between the suppliers of goods and services and the protected consumers, but does not apply to marine insurance contracts because they are regulated by the STI and accordingly exempt in terms of the definition of “services” contained in the Consumer Protection Act.

Formation of a marine insurance contract

South African law and the Constitution recognise that parties are free to contract on any terms they see fit provided they are not illlegal or contrary to public policy. A contract is formed when the parties have reached agreement, in writing or otherwise, as to its material terms.

The Insurance Act of 2017 describes a non-life policy as any arrangement in terms of which a person in return for a premium undertakes to meet insurance obligations to pay or provide benefits to the policy holder or beneficiaries on the happening of an unplanned or uncertain event.

Typically, a marine insurance policy will contain the following express or tacit terms:

- The insurer will indemnify the assured for its losses;
- The assured will pay a premium;
- The insurer’s obligation to indemnify is dependent on the occurrence of an uncertain or unplanned event; and
- The insured must have an insurable interest in the subject of the insurance at the time of its loss.

The last requirement is what separates insurance contracts from wagers and this will be dealt with further below.

Insurable interest

An insured can have an insurable interest in the subject matter of the insurance – as the seller or purchaser of goods, as a bank financing the goods or as a bailee, just to give a few examples.

A common feature of the insurable interest requirement is seen in many marine insurance policies which seek to provide cover where there is a loss prior to the insured having the real legal interest in or to the goods or assets. These so-called honour clauses are routinely honoured by insurers.

As with other insurance policies, there is an obligation of good faith on the part of the insured when negotiating the conclusion of a marine insurance policy and pursuing claims under it. This creates a particular challenge for marine insurers where they are entirely in the hands of the insured when it comes to a description of the assets and the likely risks that they will face during the period of the policy. The insurer often only knows what it has insured after the risk has eventuated or, in the case of cargo policies, after the voyage has been completed.

In the *Mieke* case (Lloyds & Others v Classic Sailing [2010] ZASCA 89), the Supreme Court of Appeal made it clear that where there has been a material misrepresentation or material non-disclosure which induces the insurer to enter into or renew the contract, the insurer is entitled to declare a policy to be void from its inception. But, in order to do so, the insurer bears the onus of proving that the misrepresentation / non-disclosure:

- Was made by the insured or their agent such as the insured's broker;
- Related to a material fact of which the insured had or should reasonably have acquired knowledge; and
- Induced the insurer to enter into the contract or induced it to do so on material conditions or for a premium that would not otherwise have agreed to.

The notion of insurable interest is one that is flexible under South African law and it does arise from time to time under marine policies. These issues usually arise out of confusion regarding the terms of the contract of sale where the place of delivery, the transfer of risk of loss or damage to the goods, or the circumstance of the loss make it difficult to establish who had insurable interest at the time of the loss. These problems could be solved, certainly in cargo policies, if insureds are more diligent in the use of standard trading terms such as Incoterms 2020 in their sales contracts.

A workable definition of insurable interest in South African law is found in *Littlejohn vs Norwich Union Fire Insurance Society* 1905 TS 234 in which the court held that:

> "[T]he principle to be deduced from these cases appears to be this: if the insured can show that they stand to lose something of an appreciable commercial value by the destruction of the thing insured, then even though they have neither a *jus in re* (real right) *nor a jus ad rem* (personal right) to the thing insured, the interest will be an insurable one."

Numerous cases dealing with this issue indicate that, in general, the South African courts take a broad approach as to whether or not someone has an insurable interest as long as they are not enforcing a wager or other contract contrary to public policy. It is generally accepted that the insured has to show that they will suffer some commercial (not necessarily financial) loss because there is a legal basis in terms of which they will suffer a loss.

Although the problem may seem academic, it does have practical application in common circumstances in marine insurance. The first is the so-called honour clause discussed above. The second is when an insured has to identify which party is on risk where goods are lost or damaged during transit. This is done by reference to the sales contract which may often consist merely of an exchange of emails and an invoice. Insurer and insured must ensure that the seller and buyer properly understand the terms of the sale and, in particular, understand where risk of loss or damage in the goods passes from the seller to the buyer. We routinely encounter cases where the insurers pay a party a loss and it transpires this party had no insurable interest in the goods.. As a result, the payment is seen, in law, not as an indemnification and accordingly insurers may not have any rights of recourse against the party causing the loss because the insured has no rights if it had no insurable interest at the time of the loss and consequently nor does the insurer (unless the rights of recourse are contractually ceded or assigned to the insurer).

It has been suggested that in order to create certainty on a question of insurable interest, the South African parliament deal with this in legislation. It is not clear whether this would cover the two practical problems outlined above which are better dealt with by ensuring that the insured is aware that there will only be cover if the contract vested the insured with the insurable interest at the time of the loss.

Cargo policies often include the phrase "lost or not lost" which is recognised as providing an indemnity for goods that, unbeknown to the insured or the insurer, have already suffered loss or damage when the contract of insurance is concluded. At the time of contracting, the goods are regarded as being "held covered". The South African and English courts have adopted a similar approach to hold that an extended warehouse-to-warehouse clause does not entitle the insured to recover for a loss during a period when it had no insurable interest unless a policy is underwritten on a "lost or not lost" basis.

Good Faith

The current legislation confuses the status of the "good faith" requirement by including a section that provides:

> "A non-life policy whether entered into before or after the commencement of this Act, shall not be void merely because of provision of law, including a provision of this Act, as being contravened or not complied with in connection with it."

Despite the broad drafting employed in this provision, it seems unlikely the courts will ignore the principle of good faith and compel insurers to honour contracts concluded with the intention to commit fraud.

The law in this area is complicated in that it seems to distinguish between non-disclosure prior to formation of a contract, during the period of the contract and at the time of renewal. Insurers have tried to deal with this by requiring, in the contract, full disclosure of all relevant provisions.

Section 53(1) of the Short-term Insurance Act provides:

> "Notwithstanding anything to the contrary in a short-term policy contained, whether entered into before or after the commencement of this Act,

- The policy shall not be invalidated;
- The obligation of the short-term insurer thereunder shall not be excluded or limited;
- The obligations of the policy holder shall not be increased, on account of any representation made to the insurer which is not true, whether or not the representation has been warranted to be true, unless that representation is such as to be likely to have a material effect on the assessment of the risk under the policy concerned at the time of its issue or at the time of any renewal or variation thereof."

Validity of contract

As with all insurance contracts, in order for it to be enforceable, our law requires that the contract is not prohibited by legislation or common law. This relates to the conclusion of the contract, the application of the Constitution, the purpose of the contract and the parties' conduct under the contract. Common law provides that all contracts contrary to public policy or good morals are either illegal or unenforceable. This principle is illustrated in the decision in *Lion Match Co. Ltd v Wessels* 1946 OPD 376 where a claim for payment for timber was held to be unenforceable as the seller did not have the required timber harvesting permit. A policy covering a ship used by the insured for smuggling drugs would accordingly not be enforceable.

These requirements have raised a number of challenges in the last decade in relation to the payment of ransom in piracy matters. This can arise either directly under a hull & machinery policy claim where the owners of a ship are called on to pay a ransom, or indirectly under a cargo policy where shipowners have paid a ransom for the ship and cargo and attempt to recover a contribution towards the latter from the cargo interests by declaring general average. The shipowners argue that they have paid a ransom in order to obtain the return of the ship, crew and cargo thereby saving the entire maritime adventure. This is a payment to the benefit of all parties who must then, in terms of the principle of general average, pay a pro-rata contribution to the shipowner in accordance with the value of their interest in relation to the value of all interests covered by the ransom payment.

Under English law whether such payments would be contrary to public policy was clarified by the Appeal Court in *Masefield AG vs Amlin Corporate Member Limited (the "Bunga Melati Dua")* [2011] 1 Lloyd's Rep 630. The vessel was carrying the Appellant's cargo of biodiesel on a voyage from Malaysia to Rotterdam when she was captured in the Gulf of Aden by Somali pirates. Approximately a month later the appellant abandoned the cargo to insurers, which abandonment was rejected. The vessel, crew and cargo was released approximately two weeks later on payment of ransom by the shipowner. On delivery, the cargo had missed its market and had to be stored for a year during which time it lost approximately 50 per cent of its value. Insurers rejected the Appellant's claim that the cargo was an actual or constructive total loss at the time of abandonment and raised a number of issues for consideration by the Court.

The Appeal Court found that:

> "Then, it is to be observed that there is no legislation against the payment of ransoms, which is therefore not illegal…it would seem to follow that it cannot be against public policy, in the strict sense, to pay a ransom."

The court further held that:

> There is something of an unexpressed complicity between the pirates, who threatened the liberty but by and large not the lives of crews and maintained their ransom demands at levels which industry can tolerate; the world of commerce, which has introduced precautions but advocates the freedom to meet the realities of the situation by the use of ransom payments; and the world of government, which stops short of deploring the payment of ransom, but stands aloof, participates in protective naval operations, but on the whole is unwilling positively to combat the pirates with force. Mr Williams described it as a "fragile status quo". In this morally muddied waters, there is no universally recognised principle of morality, no clearly identified policy, no substantially incontestable public interest, which could lead the courts, as matter stand at present, to state that the payment of ransom should be regarded as a matter which stands beyond the pale, without any legitimate recognition. The only elements of conflicting public interest which push and pull in different directions, and have yet to be resolved in any legal enactments or international consensus as to a solution, save that of wary watchfulness, the deployment of naval resource as a form of law enforcement or policing operation, and the regard for a comprehensive approach seeking to address political, economic and security aspects in a holistic way."

In finding for the appellant, the court held that the payment of a ransom was not a bribe as contemplated under the English Bribery Act of 2010. In response, in England, the Terrorism Act of 2000 provides that the payment by an insurer under an insurance contract is an offence if it is made in response to a demand made wholly or partly for the purposes of terrorism and the insurer knows or has reasonable cause to suspect that the money needs to be handed over in response to such a demand. This implies that under English law payments of a ransom that will not be used for terrorism are permitted.

There is no South African decision on this issue, but our view has been that certainly the payment of general average by cargo insurers where the contribution is wholly or partly due to a ransom reasonably paid by shipowners to avoid a greater loss, and payment of the ransom itself by insurers is not contrary to public policy and accordingly not unlawful.

Open cover, policies and certificates

The vast majority of marine insurance policies issued in South Afria, whether asset or liability insurance, are based on longstanding standard forms such as the Institute Cargo Clauses (ICC). Within this category, the vast majority of cargo is insured against the risks and on the terms set out in the ICC(A) clauses generally referred to as the "all risks clauses".

The significant advantage of using longstanding forms is that the clauses have usually been the subject of judicial interpretation in various common law jurisdictions. This produces clarity. Any certainty is often undermined by the inappropriate mixing and matching of forms designed to deal with specific risks of a particular client which inadvertently introduce conflicting cover and exclusion clauses.

Commonly, cargo insurance is placed for a period covering all declared shipments over, for example, a year. Cover on a particular shipment is triggered by declarations made under these open policies, with those declarations often only having to be made after the cargo has been delivered, even if it is lost or damaged.

In the logistics sector a practice had developed of logistics companies and transporters offering tick-the-box cover to their customers which sometimes creates problems of double insurance. The South African regulator of the Financial Sector Conduct Authority considers that this is only allowed if the offeror being the logistics company or transporter is a licensed intermediary. It is outside the scope of this summary to deal with possible solutions but insurers are providing cover on the basis of the transporter being an agent of necessity or a bailor.

When it comes to the interpretation of policies in general, the Supreme Court of Appeal in *Centriq Insurance Company Limited v Oosthuizen* [2019] ZASCA 11 held that insurance policies are contracts like any other. The provisions must be construed having regard to their language, context and purpose and a commercially sensible meaning must be preferred. This requires a court to ascertain the intention of the parties. That intention is to be gathered from the language used which, if clear, must be given its ordinary effect. This involves giving the words used their plain, ordinary and popular meaning unless the context indicates otherwise. Any provision which purports to place limitations upon a clearly expressed obligation to indemnify must be restrictively interpreted. It is accordingly the insurers' duty to ensure that particular risks it wishes to exclude and any exclusions and liability on the part of the insurer must be plainly spelt out. In the event of a real conflict or ambiguity based on the plain meaning of any terms, the *contra proferentem* rule will apply. This requires a contract to be interpreted against the party who drew it up which normally would be the insurer as the drafter of the policy.

The following principles can be extracted from the Centriq decision:

- The analysis of the insurance policy's object is aimed at what the parties must have intended having regard to the words they used in the light of the document as a whole and the factual matrix in which they concluded the contract;
- Provisions which place a limitation on the insurer's obligation to indemnity are usually restrictively interpreted;
- Exclusion clauses, like other clauses, must be interpreted in accordance with their language, context and purpose with a view to achieving a commercially sensible result;
- The literal meaning of words in the contract must yield to a fair and sensible application if the literal meaning is likely to produce an unrealistic and unanticipated result which is at odds with the purpose of the policy;
- Courts are not entitled, simply because the policy appears to "drive a hard bargain" to lean towards a construction more favourable to an insured than the language of the contract, properly construed, permits; and
- It is not for the courts to construe exclusions in favour of the insured simply because it considers them to be unfair or unreasonable.

Warranties, exclusions, conditions and other terms

Under South African law, a distinction is drawn between the essential or material terms of a contract on the one hand and the non-material or subsidiary terms on the other.

A breach of an essential term gives the innocent party the option of treating the whole contract as being cancelled from the date of cancellation.

The breach of a non-material term only entitles the innocent party to claim damages.

The position is similar under English law, but the terminology can result in some confusion. This is because under English insurance law, a warranty is a fundamental term and a condition may be a lesser term but the outcome is the same as under South African law.

In terms of section 53 of the Short-Term Insurance Act, a policy shall not be invalidated, the obligations of the insurer shall not be excluded or limited and the obligation of the policy holder shall not be increased on account of any representation made to the insurer which is not true, whether warranted or not, unless the representation is such as to be likely to have materially affected the assessment of the risk under the policy.

All marine insurance policies include exclusions relating to the nature of the risks and the nature of the insured asset.

Typically however, where the insurance is on an all risks basis, the insured, when lodging a claim with the insurer, must show that he has suffered a loss covered by the policy. The insurer is then entitled to reject the claim and bears the onus of proving that the insured is not entitled to indemnification under the policy because the loss or damage was not caused by a risk insured against or falls within one or more of the exclusions. As in any other insurance contract, a prudent insurer will, in responding to a claim, set out clearly all of the bases upon which the loss is excluded. This is to ensure that the insurer complies with its obligations to promptly notify the insured of its decision not to indemnify the insured and provide full details of the basis of that decision. This is dealt with in Volume 2 of the Big Read Book series.

Causation

Under South African law, in order to establish a claim, the insured must establish that there is a factual causal link between the loss covered and a risk insured failing which the claim will not succeed. A classic test for determining factual causation is the “but for” test which entails examining all the possible causes in determining which one was most closely linked, in fact, to the loss.

By way of example, cargo is damaged while temporarily stored in a warehouse which catches fire when a security guard in the neighbouring warehouse falls asleep smoking. The cargo is being stored while repairs are effected to a ship damaged by heavy weather because the shipowner failed to timeously provide weather reports to the crew because it had spent the money on a new sports car instead of weather forecasting equipment.. Each one of these events on their own survives the “but for” test, but the factual cause closest to the loss is the fire and not the shipowner’s midlife crisis, the absence of weather reports, the security guard’s nicotine addiction or fatigue.

Once the factual cause has been established, the courts then require the insured to establish that one of the factual causes was in fact a legal cause. For the insurer to be liable there must be a sufficiently close link between the factual cause and the loss or occurrence for that cause to be the legal cause of the loss. The test for establishing this is known as the “proximate cause” test. A proximate cause is one proximate in efficiency, not in time and must be determined by applying common sense in order to give effect to and not defeat the intention of the parties.

The appeal court was faced with questions of causation in *Incorporated General Insurers vs Shooter t/a Shooter’s Fisheries* 1987 (1) SA 842 (A) dealing with a claim for the loss of a trawler. The trawler was detained in Mozambique by the authorities for unlawful fishing. The skipper and engineer were arrested, convicted and fined, but the fine was not paid and the Mozambique authorities sold the trawler. The arrest and impounding of the vessel was a peril insured against, but the loss from the failure to pay a fine was not.

The court held that:

> "No difficulty arises when one cause only has to be consideed. The difficulty arises when there are two or more possible causes. In such a case, the proximate or actual or effective cause (it matters not which term is used) must be ascertained and that is a factual issue."

The court then went on to hold that:

> "In my view, the confiscation did not result from the arrest of the trawler, it resulted from the failure to pay the fine. That failure was therefore the proximate cause of the confiscation of the trawler. The fact that the insured was unable to pay the fine is irrelevant. The issue is not their ability to pay the fine. The issue is what caused the confiscation. That, as we have seen, was the fact that the fine was not paid. That was not a peril covered by the risk clause."

The English courts in a series of decisions culminating in *Global Process Systems Inc vs Syarikat Takaful Malaysia Berhad (the Cendor Mopu)* have emphasised the need to focus on causation. In this case, the oil rig Cendor Mopu was being transported from Texas to Malaysia on a barge and was insured on the ICC(A) clauses (which covered loss by perils of the sea) and which included an exclusion from cover for any "loss, damage or expense caused by inherent vice or nature of the subject matter insured". After temporary repairs at Saldanha Bay to the rig, the barge proceeded to sea where, during heavy weather, the legs on the rig broke off and fell into the sea. Insurers rejected the claim on the basis that the cause of the loss was the weakness of the legs themselves which constituted inherent vice and that the claim was accordingly excluded under the policy. Shipowners claimed that the loss was caused by a peril of the sea.

The Supreme Court concluded that:

> "The approach of the insured seems to me to have the virtue of simplicity. The sole question in a case where loss or damage is caused by a combination of the physical condition of the insured goods and conditions of the sea encountered in the course of the insured adventure is whether the loss or damage is proximately caused, at least in part, by perils of the seas … If that question is answered in the affirmative, it follows that there was no inherent vice, thereby avoiding the causation issues that arise where there are multiple causes of loss, one of which is an insured risk and one of which is an uninsured or exclude risk."

The effect of this is that irrespective of the original condition of the insured asset, where the action of the weather has played a part in causing the loss, the loss will be covered. The effect is that if there are two competing perils, one of which is covered and the other excluded or uninsured, underwriters are obliged to indemnify the insured for its claim.

The above test relating to proximate cause has been expanded by the decision of the UK Supreme Court in relation to FCA's Covid-19 non-damage business interruption insurance test case. In *Financial Conduct Authority vs Arch Insurance (UK) Limited & Others* [2021] UKSC 1 the court held that cases involving multiple concurrent causes, all of which contribute to a loss which would not otherwise have occurred, causation was not a pure question of fact, but depended on context. The court held that it was *"sufficient to prove that the interruption was a result of government action taken in response to cases of disease which included at least one case of Covid-19 within the geographical area covered by the clause".*

The court went on to say that there is nothing which *"precludes an insured peril that in combination with many other similar uninsured events brings about a loss with a sufficient degree of inevitability from being regarded as a cause – indeed as a proximate cause – of the loss, even if the occurrence of the insured peril is neither necessary nor sufficient to bring about the loss by itself."*

The South African Supreme Court of Appeal has followed the same approach in *Guardrisk Insurance Company Limited vs Café Chameleon CC* [2021] (2) SA 323 SCA and in *Santam Limited vs Ma-Afrika Hotels (Pty) Ltd and another* [2021] ZA SCA 141.

Although the latter cases dealt with business interruption cover as a result of the pandemic, they will affect future decisions regarding liability under insurance policies. Along with the Cendor Mopu they confirm that if a loss arises as a result of an insured peril in combination with other uninsured or excluded perils, underwriters will be obliged to indemnify the insured for its claim.

All risks under cargo polices

Most marine cargo policies incorporate the ICC (A) which provides cover for all risks subject to exceptions which may be amended in the policy either by introducing further exceptions or by removing or ameliorating the exceptions. In the absence of the ICC, an insured must bear in mind that insurance cover is provided for fortuities and not for inevitabilities. If the loss was caused solely by an inherent vice in the cargo, it would not be covered as it was not caused by a fortuity but by an inevitability.

In *Volcafe Limited vs Compania Sud Americana De Vaporessa* [2018] UKSC 61, the UK Supreme Court had to consider who between the contractual carrier and the cargo owner had a burden of proving that a cargo of containerised bagged coffee was damaged either by inherent vice or negligent preparation of the containers. The court held that in order for the carrier (and by analogy the insurer) to rely on the inherent vice exception, the carrier must show that it either took reasonable care of the cargo but the damage occurred nonetheless, or else that whatever reasonable steps might have been taken to protect the cargo from damage would have failed due to its inherent propensities. Provided the insured takes reasonable steps to protect the cargo from its inherent nature, its claim under the policy will not be excluded by operation of the inherent vice exclusion.

The South African courts require the insured to prove that the loss was covered by a risk insured against under the policy. The onus is then on the insurer to bring itself within the meaning of one of the exclusions or limitations. In *Bethlehem Export Company (Pty) Ltd vs Incorporated General Insurance* 1984 (3) SA 449 (W) the court was asked to consider whether damage to a consignment of air freighted asparagus was covered by a policy. Various theories were advanced by the insured as to possible causes of the deterioration in the condition of the cargo. In rejecting the claim, the court held 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 kind as to raise a presumption of some external cause. Then the burden is on the insurer to prove that the loss in fact occurred in some way for which it 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."

Duration of the insurance

The majority of cargo insured under the ICC has cover that continues "during the ordinary course of transit". In *Fedsure General Insurance Limited vs Care Free Investments (Pty)* Ltd [2002] 1 All SA 379 (A), the appeal court held that:

> "…a delay or interruption which, objectively viewed, is not part of the usual and ordinary means of effecting transit, and which is occasioned by some collateral purposes, will disturb the ordinary course of transit. Accordingly, loss occurring within the period of such delay or interruption will not be covered by the policy. The reason is not that the insurance has come to an end (for it remains in existence), nor that the transit has come to an end (for the journey is not yet finally over), but simply that the insurance pertains to the ordinary course of transit and what is outside the ambit of that course cannot, logically, be within the cover."

The ICC clauses further provide that transit terminates:

> "on completion of unloading from the carrying vessel or other conveyance in or at any other warehouse or place of storage, whether prior to or at the destination named in the contract of insurance which is assured or the employees elect to use either for storage other than in the ordinary course of transit or for allocation or distribution …"

The effect is that if the insured, at any stage during the ordinary course of transit, elects to store the goods, for example, at a warehouse in Durban while waiting for the market to pick up for the goods, that is not in the ordinary course of transit and goods will not be covered.

In the theatre of today's logistics networks, the insured often has no idea exactly how the goods are going to get, for example, from Yokohama to Johannesburg. The large logistics operators and container lines often use hub ports with feeder vessels carrying the containers either to or from hub ports, some of which may be based nowhere near the final intended destination. The container from Yokohama to Johannesburg may end up in a hub port in Dubai and then another hub port at Ngqura before being carried by a feeder vessel to Durban for transport by rail or road to Johannesburg. Provided this routing is in the ordinary course of transit, the goods enjoy cover for the entire extended voyage on a number of vessels even if, 20 years ago, the container would have been loaded on a ship in Yokohama which discharged it in Durban for transport to Johannesburg by road or rail.

If however the insured elects, after the contract has been concluded, to change the voyage or store the goods, and this is not as a result of a decision by the carrier, the policy will cease to provide cover from the time of that change.

Claims and losses

In the absence of a contractual time bar, the default time within which a claim must be advanced under the policy is three years from the event in accordance with the Prescription Act of 1969. This limit applies even if the contract is subject to English law if the action is instituted in the South African courts. This is because, under South African law, the question of prescription is dealt with by the law of the country where the claim is advanced rather than the law of the contract. The time within which the claim must be brought generally commences from the date of the loss. In order to protect the claim, the insured has to serve a summons on the insurer.

The insured bears the onus of proving its loss, the terms of the contract and the fact that the loss falls to be indemnified under that contract.

The contract will determine the basis upon which the loss is to be calculated whether it be asset insurance such as hull and machinery or cargo insurance or liability insurance, such as that held by a warehouse owner or transporter. In the latter case, the extent of liability is always limited to the insured's own liability to the ultimate claimant. So, for example, if the warehouse operates in terms of standard trading conditions which exclude all liability for loss or damage to the cargo, the effect of this is that the insured warehouse operator is not liable and accordingly the insurer does not have to respond to the claim under the policy.

Interest and costs

A claim under a marine insurance policy is subject to the Admiralty Jurisdiction Regulation Act of 1983 (AJRA). Section 5(2)(f) provides that a court may in the exercise of its admiralty jurisdiction "make such order as to interest, the rate of interest in respect of any sum awarded by it and the date from which interest is to accrue, whether before or after the commencement of the action, as to it appears just."

There is an apparent conflict between this provision and that contained in the Prescribed Rate of Interest Act in terms of which the Minister of Justice declares, from time to time, the rate of interest to apply on unliquidated damages.

In the only admiralty case on this point, the mv *Seajoy* 1998 (1) SA 487 (C), the court felt that it was obliged to apply the default interest rate, then at 15.5 per cent per annum as set out in the Prescribed Rate of Interest Act.

This decision has not been followed in other admiralty cases dealing with claims under repair, sales and employment contracts where those claims were sounded in so-called hard currencies. In those cases, the courts have typically awarded interest at a rate by reference to the then prevailing international currency rate which has historically always been much lower.

The majority of policies do not deal with the question of interest and a practice has developed in terms of which insurers, if paying interest, do so from the date of submission of the claim or date of commencement of proceedings rather than from the date of the loss.

Under South African law, the general rule is that parties can only claim legal costs (absent a contractual provision to the contrary) from the date on which proceedings are commenced and by reference to a court tariff which covers approximately 60 per cent of the actual legal costs incurred.

Total loss of cargo and abandonment

Where there has been an actual total loss of the cargo or ship, the insured is entitled to full indemnification under the policy, and on receipt of the payment is entitled to elect to abandon whatever is left of the subject matter to the insurer. The insurer has the election as to whether or not to accept this abandonment to avoid bearing the clean-up costs.

This problem arises in circumstances such as a ship that ran aground on the Eastern Cape coast carrying a full cargo of bagged maize. The cargo became wet damaged during the grounding and had no value. More importantly however, the owner of the cargo was obliged, under the Wreck and Salvage Act and possibly under the National Environmental Management Act, to dispose of the cargo. If the insurer accepted the abandonment it would then become liable for the costs of disposing of the cargo. In that case the question became academic as the sea solved the problem by causing extensive damage to the ship as a result of which all of the maize ended up washing out of the ship. Had that not occurred insurers would have had to reject the abandonment.

Partial loss

The vast majority of marine insurance policies are valued polices which include a basis of valuation clause that either reflects an agreed value or provides a formula for calculating it. This means that the insured value under the policy is taken as being the declared or calculated value even if that is subsequently found to be more or less than the actual value of the goods. Unlike in some non-marine insurance policies, claims under marine polices are not reduced by the application of the principle of average where a claim is reduced if the declared value is more or less than the actual value. The only exception to this is if the insured value is so different from the actual value to constitute fraud.

In calculating the loss, the insured has to take into account any residual value of the damaged ship or cargo. The exception to this is that the insured is entitled to the reasonable cost of repairs to the vessel in which case the value insured under the policy only becomes relevant if the cost of those repairs exceeds that value.

The insured who is entitled, under the policy, to the CIF value of the goods plus 15 per cent may well be indemnified to a greater amount than can be recovered by the insurer acting under rights of subrogation under the contact of carriage.

In addition to the right to indemnification based on the value of the asset, most marine insurance policies include the right of the insured to recover, from a third party, sue and labour charges which are usually determined in the policy. Sue and labour charges would include the cost of re-packing damaged goods, additional handling or stevedoring charges and disposal costs on damaged goods with no value. This provision, if reflected in the policy, which it typically is, would include any amounts paid to salvors under, for example, a Lloyds Open Form salvage contract.

In addition, all marine cargo insurance policies in South Africa oblige the insurer to indemnify the insured for any contribution that has to be made in general average. General average is one of the oldest principles applicable in maritime law in terms of which all the parties to a common maritime adventure share pro rata in any expenses or sacrifices incurred by one of them in order to save the entire adventure. In most cases it arises where a shipowner incurs expenses relating to salvage of the ship which has run aground or caught fire and port of refuge expenses of the other parties whose property has been saved as a result of the shipowners' efforts. This typically means that the cargo owners, owners of the containers and the time charterers who own the fuel have to pay a percentage of the ship owners' expenses pro rata to the value of their own property.

Although this is an arcane concept of shipping law, the South African market is called to make GA contributions on around two or three casualties a year. Historically, these contributions were typically below 10 per cent of the insured value. In unusual circumstances however, they could be as much as the entire value of the cargo.

The latter happened in a recent case where a ship carrying South African insured cargo ran aground near Hong Kong. A significant percentage of the cargo on the ship was damaged during the grounding and subsequent re-floating attempts. The re-floating exercise lasted several months and the GA adjusters determined that the costs of the re-floating exercise exceeded the value of the sound cargo that was saved plus the residual value of the ship. In that case, the GA contribution would have exceeded the value of the cargo but, contractually, the insured and insurers were only obliged to pay 100 per cent of the insured value.

Subrogation and double insurance

In line with the general development of both English and South African law, the doctrine of subrogation is well developed. This legal principle means that once the insured has been indemnified, insurers are subrogated to all of their rights of recourse without any further formal requirements. In terms of the principle of subrogation, the insurers, once they have indemnified the insured, effectively step into the shoes of the insured and are entitled to pursue recovery for the loss against any third party who would be liable for the loss to the insured. In marine policies this typically means that the insurers indemnify the owners of cargo damaged on board a ship and then sue the ship for the loss suffered. It is however a common practice in marine (and other) insurance for the insurer to require completion of a subrogation form which includes an undertaking by the insured to provide every assistance to the insurers by way of documents and witnesses in order to pursue any recovery against third parties.

Importantly, when exercising its subrogation rights, the insurer must pursue both the insured and uninsured losses suffered by the insured. This issue ought to be specifically canvassed in the policy as issues of litigation costs and the division of any settlement or judgement will inevitably arise otherwise.

A subrogation form can be used to extend the obligations of the insured set out in the policy when it comes to recovery. It is critical that underwriters ensure not only that the policy properly follows the parties on risk in a sales contract, but also that the subrogation form is completed by the correct party. This is becoming more problematic as logistics practices develop. An insurance policy is often held and administered by a parent company which subcontracts its logistics arrangements to a subsidiary which in turn sub-contracts with warehouse operators and transporters for the benefit of other subsidiaries, for example in China and Zimbabwe, who are actually selling and buying the insured product. In those circumstances, the parent company may sign the subrogation form even though it was not on risk for loss to the cargo and is not a party to any of the contracts of carriage.

A practice has developed in some other common law countries in terms of which insurers, having indemnified the insured, exercise rights of subrogation but also require the insured to cede or assign their claims to them. This is to avoid problems created by the insured subsequently going into liquidation which would then require the named plaintiff in the recovery action to be substituted by the liquidators which triggers the right on the part of the defendant to demand security for costs. It is only worthwhile considering this in very significant claims and on the basis insurers then understand they have to institute proceedings in their own name.

In marine insurance in South Africa, unlike in England, the insurer is only entitled to retain a recovery to the extent it has indemnified the insured. Any excess has to be paid to the insured.

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