despite having admitted that the shipowners' case was strong. He reached the decision in accord with commercial sense. Given that virtually all charterparties are concluded by fixture recap, the judgment is of high importance, stretching beyond the confines of the particular clause and charterparty at issue. Any term not agreed in the fixture recap but reflected in the pro-forma charterparty or standard terms can be considered as complementary (unless directly contradictory) and therefore be used in case of dispute.

The case highlights the significance of including a provision in fixture recaps that the terms in the latter will take precedence over incorporated pro-forma or standard terms, if disputed. Alternatively, it is submitted that some fairly simple modifications in drafting would help avoid the confusion resulting from language; such as '25,000 mtns pwwd SHINC (Super Holidays excluded Even if used/Unless Used). Superholidays as per Bimco Calendar of General Holidays', and 'O/WISE .....C/P TO BE LOGICALLY AMENDED AS PER ABOVE MAINTERMS'.

There is no universally recognized definition of 'Super holidays' and usual practice appears to be either to abide by the practice of the port in question, or to define the concept in the charterparty itself. In the arbitration, all three arbitrators accepted that 'SHINC' *per se* would normally include Super holidays.

BIMCO does not recognize the concept of Super holidays. Its web site (*www.bimco.org*, accessed 16 Jan 2010) has the following to say on the subject 'BIMCO is not aware of a universally acknowledged definition of a "Super Holiday" and it is a term the implication of which may be obscure even to those who invented it.' BIMCO also provides the following terse warning on the subject of Super holidays clauses in their current undeveloped format: 'Parties agreeing to that provision will land themselves in trouble' and goes on to point out that parties have thus 'agreed to a provision that cannot be implemented in practice and they may thus be heading for a nice dispute.' Indeed.

Yiannis Almpanoudis

Global Process Systems v Syarikat Takaful Malaysia Berhad [2009] EWCA Civ 1398

Marine insurance – inherent vice

Global Process Systems (GPS) were owners of the oil rig *Cender MOPU*, which was being transported from Texas to Malaysia via the Cape of Good Hope. The rig was carried above deck with its legs elevated 300 feet in the air. Syarikat were the owners' insurers. The insurance policy incorporated the Institute Cargo Clauses (A) 1982, providing cover on an 'all risks' basis. During the voyage, fatigue cracking occurred as a result of repeated bending of the rig's legs. This was caused by the motions of the barge, which consequently brought about the loss of the starboard leg, followed rapidly by the loss of the other remaining legs. For the further facts, see the first instance judgment reported at [2009] 2 Lloyd's Rep 72, reviewed by *Georgiou, KS* (2009) Vol 9 *STL* 5-6.

Initial observations

Given the lack of definition of inherent vice in the Marine Insurance Act 1906, the definition provided by Lord Diplock in *Soya v White* [1983] 1 Lloyd's Rep 122 was accepted by both parties. Disagreement arose however, in relation to its interpretation.

Waller LJ rejected the submissions of Ms Blanchard, counsel for the appellants (and also editor of *Arnould's Law of Marine Insurance and Average*, 17th ed. 2008) regarding Moore-Bick J's judgment in *Mayban General Insurance v Alston Power Plants* [2004] 2 Lloyd's Rep 609.

Referring to Donaldson LJ in *Soya v White* [1982] 1 Lloyd's Rep 136 and the 17th edition of *Arnould* 22-26, Waller LJ confirmed that the exception of inherent vice was the same in both carriage by sea and marine insurance.

Waller LJ also held, contrary to Ms Blanchard's submission, that there was no contradiction between *NE Neter & Co Ltd v Licenses and General Insurance Co Ltd* [1944] 4 All ER 341, where Tucker J held that 'it is clearly erroneous to say that because the weather was such as might reasonably be anticipated there can be no peril of the seas' and Moore-Bick J's conclusion that if 'conditions encountered by the vessel were no more severe than could reasonably have been expected, the conclusion must be that the real cause of the loss was the inherent inability of the goods to withstand the ordinary incidents of the voyage' (emphasis added). It is hard to accept this analysis. Reviewing the authorities, Tucker J held that 'I think it is clearly erroneous to say that because the weather was such as might reasonably be anticipated there can be no peril of the seas. There must, of course, be some element of the fortuitous or unexpected to be found somewhere in the facts and circumstances causing the loss'. Tucker J subsequently applied his reasoning to the facts of the case, concluding that 'such an element exists when you find that properly stowed casks, in good condition when loaded, have become stove in as a result of the straining and labouring of a ship in heavy weather.' A factual analysis thus is imperative to determine some 'fortuitous element', rather than an over-assumptive conclusion of inherent vice.

Waller LJ agreed with Ms Blanchard, that an evidential rule stating that, absent exceptional weather being shown to have occurred, the loss must be attributed to inherent vice, would be incorrect. Yet, Lord Justice Waller did not regard this as the outcome of the *Mayban* decision. Nonetheless, it is submitted that

the test in *Mayban* was undoubtedly incorrect, and it is fortunate that a narrower test was accepted here (see below).

Further review of the authorities led to consideration of the following: 1) whether *Arnould's* view, that a cause was due to inherent vice if something internal was the sole cause, was supported by authority; and if not, 2) in which circumstances inherent vice remains a cause, despite other outside causes; the precise definition of perils of the sea being fundamental in that regard. The Judge noted 'these questions may well be intertwined since, if perils of the sea is a cause, that may show inherent vice was not and vice versa'. An additional concern was whether both could be a proximate cause, and the result that such a finding would produce. What followed was a painfully extensive regurgitation of an article by Professor Howard Bennett (2007 LMCLQ 315) with little commentary along the way.

The definition of inherent vice

Legal analysis aside, what did Waller LJ actually decide? The following extracts have been taken from the judgment:

1) 'inherent vice can be a cause even though some outside agency such as motion of the waves has contributed causally to the loss.' [56]
2) 'inherent vice would be the sole cause where any other outside causative factor did not amount to a peril insured against.' [56]
3) 'inherent vice may not be a proximate cause if there is an eventuality or accident from without that causes the loss.' [57]
4) 'it would appear difficult to have concurrent causes where one candidate is inherent vice.' [57]
5) 'It is only if a peril insured against is not a proximate cause that inherent vice can be the sole and proximate cause.' [57]

On an initial reading, it seems as though points 1 and 3 directly conflict; it is unlikely that this was intentional. It is tentatively submitted that, at point 3, the Judge intended to hold that any damage caused by inherent vice may be overlooked if some external accident subsequently caused the remainder (and importantly, the greater part) of the damage. This inference is developed from the differences in the language used to describe an external cause; 'some outside agency' versus 'an eventuality or accident from without'. The external cause in point 3 is clearly meant to have a more significant impact than that in point 1.

The accuracy of Waller LJ's statement illustrated at point 4 is also debatable. Without the addition of 'proximate', the statement is open to attack. Inherent vice by its very nature requires a concurrent 'cause' to take effect – this concurs with point 1. This cause may be a change in temperature that causes condensation or the motion of a barge that causes metal fatigue in its cargo's legs. In the instant case, had the rig been elevated in the air and not moved, the fatigue cracking would not have taken place. On the contrary, difficulties clearly arise where there are concurrent proximate causes, one of which is inherent vice, as accurate determination of culpability is hard to achieve.

Point 5 is in effect the same as point 2. The following conclusion can thus be drawn: if there are potentially two proximate causes of loss, one being inherent vice and one being a peril that is not covered by the insurance policy, the exclusion of inherent vice will succeed and an insured's claim fail. This is obvious, without inherent vice, the claim should still fail as the risk would not be covered. However, it seems as though the 'basic rules' have changed. In para [32] of the judgment, Waller LJ restated the previously accepted basic rules. If there are two proximate causes one of which is covered by the policy and one of which is not but it is not excluded, the policy must respond. If however, there are two proximate causes, one of which is covered and one of which is expressly excluded, the policy does not respond. By simple use of the word 'only', the Judge has seemingly reversed the latter rule; it is only when the proximate cause of loss is not covered by the policy, that inherent vice will be considered as the sole and proximate cause. A co-existent proximate cause that is covered by the policy thus has the effect of ousting the exclusion clause. Without a doubt, this was not the intention of the insurers.

The correct test for establishing inherent vice

Waller LJ confirmed that, for accidents at sea, the burden was on the underwriter to establish inherent vice as the proximate cause, which involves consideration of whether there was some other external fortuitous event which caused the loss. The Judge was not satisfied to 'simply say' that the event was caused by perils of the sea, believing that 'if it is the action of the sea which caused the loss, there has to be something beyond the "ordinary" and the question is by what is the ordinary to be judged.' [59] The Judge further noted that the aforementioned question may be affected by consideration of exactly what the insurance covered. This approach is considered as correct.

Further review of authorities, in particular *The Miss Jay Jay* [1985] 1 Lloyd's Rep 264, led Waller LJ to conclude that 'if cargo was damaged by the motion of the vessel in "favourable weather" or "perfect weather" the obvious inference in most cases would be that any damage was caused by inherent vice or the nature of the cargo'. [61] This statement is less strict than that in *Mayban*, although extremely comparable. If cargo is damaged in such weather and no other cause is found, is it correct to assume inherent vice? Surely, an established cause that can be classed as inherent vice is preferable, even if the result is less advantageous to cargo owners than ship owners; ships being of

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a different species to goods. Also, it may be argued that this statement conflicts with para [59] (above).

Waller LJ thus continued 'in considering whether damage to cargo has been caused by inherent ... the answer cannot be found by reference to what might be reasonably foreseeable as the ordinary incidents of that voyage, but by reference to wind or wave which, it would be the common understanding, would be bound to occur as the ordinary incidents on any normal voyage of the kind being undertaken.' The Judge did stress that 'this is not equating inherent vice with certainty but it is recognising that an insurer would not cover damage to cargo flowing from the motion of a vessel in such seas, even if it was not certain to occur." Waller LJ has thus included a test for peril of the seas within the test for inherent vice, where both are argued to be causative. Accordingly, the following is suggested (with hesitation, as it is frustratingly unclear) as the applicable test for inherent vice:

a) was the cause (of damage) an inability to withstand the ordinary incidents of the voyage? And,
b) were the incidents, ie wind or wave, on common understanding, bound to occur as the ordinary incidents on any normal voyage of the kind being undertaken?

If the above interpretation is correct, then Waller LJ has qualified the test in Mayban, by providing a secondary requirement to prove that 1) the incident was ordinary; 2) the voyage was normal; and 3) both parties knew that the incident was bound to occur, (or perhaps, this is an objective test of common understanding?) The first two points highlighted here are easy to prove factually: weather experts, forecasts, trade experts etc., and they may even be merged together. It is the third point that causes some difficulty, as it is not easy to prove subjective knowledge. Also, if the burden initially lies with the insurer to prove inherent will the insured have the opportunity of rebutting his evidence? The original dilemma, whether damage was caused by a peril of the sea *instead* of inherent vice, has now changed substantially. To prove inherent vice in such a case, it is now necessary to show that damage was caused by an ordinary incident of the voyage undertaken (which may still be a peril of the sea), however, it was bound to happen and both parties were aware of that fact, thus the inability of the cargo to withstand such ordinary incident renders the proximate cause of the loss as inherent vice. The test has consequently gone from one extreme to the other.

Application of the 'narrower' test to the instant case

Given the finding by Blair J that the accident was not a certainty, it was deemed that he must have concluded that a 'leg breaking wave' was not bound to occur on the voyage.

As a consequence, it was the Judge's conclusion that 'Metal fatigue was not the sole cause of the loss of the legs. A leg breaking wave, not bound to occur in the way it did on any normal voyage round the Cape of Good Hope, caused the starboard leg to break off. That led to the others being at greater risk and then breaking off. It was not certain that that would happen and although with the benefit of hindsight we know that it was highly probable, that high probability was unknown to the insured and that was a risk against which the appellants insured.' Accordingly, the appeal was allowed.

Further comment

Even though an unsatisfactory judgment, the practical consequences of the decision will be welcomed by insureds, as the exclusion of inherent vice in all risks insurance has been severely narrowed. If it is right that inherent vice can only stand alone as a proximate cause, subject to contrary proof that the proximate cause was a peril insured against, the courts will be required to examine all causative factors and to reach a definitive judgment in that regard. Finally, like the judgment, Waller LJ's test for inherent vice is overly complex. The burden of proof is much more difficult to discharge, and although the Judge stated that he did not equate inherent vice with certainty, it certainly seems that he did.

A longer version of this article is available on *www.i-law.com*.

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