

## All risks insurance

**In *Global Process Systems Inc &#38; Anr v Syarikat Takaful Malaysia Berhad* [2009] EWHC 637 (Comm), the Court of Appeal has dealt a blow to insurers by narrowing the scope of the ‘inherent vice exclusion’ and in so doing cast doubt on the decision in *Mayban General Insurance v Alstom Power Plants* <xref id="LLR:2004020609">[2004] 2 Lloyd’s Rep 609</xref>. The Court of Appeal, reversing the first instance decision of Blair J, discussed in the August 2009 issue of *Insurance Law Monthly*, has found that the crucial question is not what might be reasonably foreseeable as the ordinary incidents of a sea voyage but what would be bound to occur in the course of a voyage of the type being undertaken at the time that the loss eventuates. The case is discussed by David Turner QC and Clare Dixon of 4 New Square.**

### Global Process Systems: the Facts

Cendor MOPU was an offshore oil rig. It consisted of a working platform which could be raised and lowered on the rig’s three legs according to the depth of the sea in which the rig was positioned. The legs each weighed about 404 tons and were about 300 ft in length.

In July 2005 the rig began a journey from Texas to Malaysia. A few days after the rig departed from a stop in South Africa one of the legs broke off. The following day, the other two legs broke off.

The technical explanation for the failures was common ground: fatigue cracking propagated to a critical point, so that when a ‘final straw’ event occurred (when roll angle, direction of motion and the location of the crack all converged) the leg gave way. It was also common ground that the weather and sea conditions encountered during the tow were within parameters which were reasonably foreseeable.

### The policy and the dispute

The claimants obtained all risks insurance to cover the rig from the commencement of loading operations in Texas to the completion of discharge in Malaysia. The policy incorporated ICC(A) terms and, therefore, included an exclusion which stated: ‘In no case shall this insurance cover ... loss, damage or expense caused by inherent vice or nature of the subject matter covered’.

### The first instance decision

The trial judge, Blair J, considered two issues: (i) fortuit; and (ii) inherent vice and proximate cause.

On the basis of expert evidence it was found that each leg was subject to a 99.6% risk of failure in the course of the voyage. Notwithstanding this, the judge found that risk of one or more of the legs breaking was a fortuity and not an inevitability. This was because, whilst it was highly probable that the legs would break in the course of the voyage, it was not inevitable and the legs would not have failed without the intervention of a ‘final straw event’.

On the second issue the judge found against the insured. He said: ‘I felt that the defendant’s expert Mr Colman came closest to expressing the view of a “business or seafaring man” (Noten BV v Harding, ..., per Bingham LJ). As he put it— “I don’t think that these legs were ever going to make it round the Cape”. That in my opinion is the reality of this case’. He therefore concluded that the legs failed because they were not capable of withstanding the ordinary incidents of the voyage and, as such, there was never any real chance that the legs would survive the voyage. Therefore, the proximate cause of the loss was the inherent vice of the legs themselves.

### The arguments on appeal

There was no appeal from the decision on fortuity and so the appeal focused entirely upon whether the proximate cause of the loss was an inherent vice in the legs themselves such that the loss was excluded from cover.

The insured argued that if the sea was in any way a cause of the loss then the proximate cause of the loss was the perils of the sea and not inherent vice in the legs. In making this submission the insured relied upon the decision in *JJ Lloyd Instruments Ltd v Northern Star Insurance Co Ltd* (The Miss Jay Jay) [1985] 1 Lloyd’s Rep 264. Miss Jay Jay was a vessel which was found to be unseaworthy by reason of latent defects in its design. Despite this, Mustill J (as he then was) found that an exclusion in the policy relating to latent defects in design or construction did not apply because the immediate cause of the loss was the bad (but not exceptional) weather conditions. His decision was upheld on appeal ([1987] 1 Lloyd’s Rep 32) although on slightly different grounds: the Court of Appeal considered that both the vessel’s lack of seaworthiness and the adverse sea conditions were proximate causes of the loss (rather than just the latter); since the adverse sea conditions were an insured peril, and lack of seaworthiness was not excluded, the policy responded to the loss.

In the present case, insurers’ argument was summarised by Waller LJ as follows: ‘if the actions of the sea are no more than would reasonably have been contemplated on that particular voyage, then the cause of the loss must be inherent vice or the nature of the subject matter’. In making this submission insurers found support in the decision of Moore-Bick J (as he then was) in *Mayban* that: ‘If the conditions encountered by the vessel were more severe than could reasonably have been expected, it is likely that the loss will have been caused by the perils of the sea ... If, however, the 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’. The decision in *Mayban* had been the subject of trenchant criticism by academic

commentators: Professor Bennett suggested, in the 2nd edition of his book *The Law of Marine Insurance* that the effect of the decision was that 'that cover under the Institute Cargo Clauses (A), the most generous standard cargo cover, is confined in respect of bad weather damage to wholly exceptional adverse conditions'.

## The decision on appeal

In finding for the insured, Waller LJ (who gave the leading judgment) made three central findings.

First, that inherent vice can be a proximate cause even though there is another factor which contributes to the loss. He cited an example given by Byles J in *Koebel v Saunders* (1864) CBNS (NC) of calves which are unfit to bear the agitation of the sea: if the calves die or are injured at sea then there are two causes of that loss: the constitution of the calves themselves (inherent vice) and the agitation of the sea. In such circumstances the proximate (but not the sole) cause of the loss would be the constitution of the calves and the policy would not respond.

Second, inherent vice may not be a proximate cause if there is an eventuality or accident from without that causes the loss. Thus, in the current case, the insurance contemplated that the condition of the legs was such as they would suffer from fatigue. That was always likely to be a cause if the legs snapped but the fact that it was a cause could not have been understood by the parties to exclude cover altogether.

Finally, the correct question to ask was: 'Was the cause an inability to withstand the ordinary incidents of the voyage?' Waller LJ considered that the answer was not to 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. Waller LJ said that this was not to equate inherent vice with certainty, but recognised 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. (If the reader of this article is confused by the preceding two sentences, such confusion is understandable: our analysis is that Waller LJ was drawing a distinction between what ordinary seafaring people would expect to be bound to occur on the one hand; and what was scientifically or empirically certain on the other). Waller LJ thus considered the test applied by Moore-Bick J in *Mayban* to be too wide in scope. In the present case, he considered that the 'final straw' event (or the 'leg breaking wave') was not bound to occur in the way that it did on any normal voyage of the type being undertaken by the rig. As a result it was a risk against which the rig owners had insured.

## End note

The Court of Appeal expressed some uncertainty as to whether there was sufficient evidence for them to resolve the appeal, applying the correct test. Ultimately they decided that there was no need for the case to be remitted and that they could conclude that the inherent vice defence failed. Some may find it hard to understand how, even on the narrower test applied, insurers had not succeeded in the light of Blair J's acceptance of the expert's view that the legs were never going to make it round the Cape.

The Court of Appeal's decision will undoubtedly make it harder for insurers to rely upon an inherent vice exclusion. In the context of marine insurance, evidence will be required to establish that the sea state at the time of the loss did not merely fall within the scope of what was reasonably foreseeable but was such as would be considered relatively benign on the voyage being undertaken. The threshold set is therefore high, but not insuperable.