

**MIABC EDUCATION SEMINAR  
MAY 4, 2010**

**RECENT DECISION ON INHERENT VICE**

***Global Process Systems Inc. & Anr v. Syarikat Takaful Malaysia  
Berhad, [2009] E.W.C.A. Civ. 1398***

**Douglas G. Schmitt  
Alexander Holburn Beaudin & Lang LLP  
Barristers & Solicitors  
#2700 – 700 West Georgia Street  
Vancouver, BC V7Y 1B8  
Telephone: (604) 484-1700  
Facsimile: (604) 484-9700  
Email: dschmitt@ahbl.ca**

**I. Introduction**

The English Court of Appeal recently (December 17, 2009) handed down a decision which sheds new light on the difficult and changing meaning of the “inherent vice” exclusion in marine insurance policies.

Inherent vice is a common exclusion, by statute and by time honoured wording. As the legal definition changes, so change the claims that underwriters must pay. Much money hangs in the balance, in this case tipping the scale against underwriters.

In *Global Process* the Court of Appeal considers inherent vice in a cargo policy. The case is now the starting point for any discussion of the issue.

The case involved a large oil drilling rig which was carried as cargo on a barge from Texas to Malaysia via the Cape of Good Hope. The sea conditions were foreseeable, with 4 metre waves. Fatigue cracking caused by repeated bending of the legs from the motion of the barge as it was towed caused one leg, then others, to break and be lost. Some degree of such fatigue cracking was inevitable. This huge claim raised the issue of whether underwriters can deny based on inherent vice of the cargo, when the waves were no greater than reasonably expected.

The trial judge held that there was no coverage because if the weather was foreseeable then the loss was not due to perils of the sea, and therefore must have been caused by an inherent vice in the cargo. The Court of Appeal

reversed that decision and found that there was coverage because the cause of the loss was a fortuity.

## **II. Policy Wording**

The policy was a common all risks form, Institute Cargo Clauses (A), excluding among other things inherent vice:

### RISKS COVERED

1. This insurance covers all risks of loss of or damage to the subject-matter insured except as provided ... below. ...

### EXCLUSIONS

4. In no case shall this insurance cover: ...

4.4 loss damage or expense caused by inherent vice or nature of the subject matter covered.

The UK *Marine Insurance Act*, 1906, like the Canadian Federal *Marine Insurance Act* (s.53(2)(b)) provides that inherent vice is excluded in every policy, unless the policy says otherwise.

## **III. Some Relevant Legal Principles**

A. Underwriters insure against risks which might happen, but not against events which must happen.

B. Another principle needed to understand the *Global Process* decision is that if there are two proximate causes of the loss, one of which is covered by the policy and the other not excluded, then the policy must pay. However, if there are two proximate causes, one of which is covered and one of which is expressly excluded, the policy does not pay.

C. The classic definition of inherent vice by Lord Diplock in *Soya v. White*, [1983] 1 Lloyd's Rep. 122, as a peril proximately causing a loss, is:

“... It means the risk of deterioration of the goods shipped as a result of their natural behaviour in the ordinary course of the contemplated voyage without the intervention of any fortuitous external accident or casualty.”

The difficulty in the *Global Process* case was that the waves experienced were entirely foreseeable, but they were not inevitable; the dispute was about whether such conditions were “fortuitous” under the above definition.

D. Inherent vice may not be a proximate cause if there is a fortuity or accident from without that causes the loss. Only if a peril insured against is not a proximate cause can inherent vice be the sole and proximate cause of the loss.

E. Inherent vice can be a cause of loss even though some outside agency such as the motion of the waves has contributed causally to the loss.

F. "Perils of the seas" refers to only fortuitous accidents and casualties of the seas. It does not include the ordinary actions of the wind and waves.

#### **IV. Reasoning of the Court of Appeal in *Global Process***

The burden is on underwriters to prove an exclusion to coverage. The underwriter must therefore show that the proximate cause is inherent vice and that there was no other external and unexpected event which caused the loss. The Court of Appeal reformulated the test for what underwriters must prove in order to establish that the seas were so calm the cause of loss was probably inherent vice: the waves must be small enough that the parties understood that such waves would be bound to occur on any normal voyage of the kind being undertaken.

The heart of the *Global Process* decision is:

62. ... in considering whether damage to cargo has been caused by inherent vice, even if the question to be considered is – Was the cause an inability to withstand the ordinary incidents of the voyage? – 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. 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. ... [emphasis added]

Applying the facts to the drilling rig, the Court of Appeal found that the metal fatigue in the legs – which was the inherent defect – was not the sole cause of the loss. The fatigue slowly weakened the legs. Then, a "final straw" wave, which was foreseeable but not bound to occur on any normal voyage around the Cape of Good Hope, caused the leg to break, which then led the other legs to be at greater risk and break. That "final straw" wave was from a fortuitous external cause and not "inherent vice".

One way to understand the reasoning in *Global Process* is that underwriters do not insure certainties, which are losses caused by things which were bound to occur. However, underwriters do insure the risk of things that are not bound to happen but might happen, which is a commercial risk for which businesses buy insurance; and includes losses like that in *Global Process* which, in hindsight, are probable but not inevitable. Businesses would not buy insurance only against unforeseeable (i.e. extremely rare) events; if underwriters could exclude claims for “inherent vice” unless there was an extremely rare event, then underwriters could avoid most claims involving non-extreme weather.

#### **V. Implications of *Global Process***

Applying the decision to a BC local voyage – say, across Georgia Strait – to rely on inherent vice, underwriters will need a weather expert to prove what waves actually caused the damage, and that those waves were “bound” to occur on that voyage at that time. If conditions were worse than inevitable waves, then there is a fortuity, and no inherent vice defence. This may be difficult to prove. It will be interesting to see where courts draw the line on the probability. What if the conditions happen 99% of the time? 95%?

May 4, 2010

---

**Doug Schmitt**