Inherent vice as all-risk exclusion and its clarification from common law point of view

Hoda Asgarian *

Abstract: There is an assumption among shippers that as soon as their cargo is insured, their insurance policy would cover any loss caused under any occasion, while there are certain occasions in which insurance policy will not provide coverage. Inherent vice is an important instance in which the shipper's claim over the cargo is not eligible. This notion is varied from the perils of the sea. It simply refers to any damage caused to the cargo due to the inherent nature of the goods as opposed to any damages inflicted on the goods by the carrier. In other words, the damage is inflicted by internal causes rather than external ones. Some examples of the aforementioned term can be deterioration due to product instability, rust forming due to metal materials/moisture, and combustion (batteries or other substances). The main reason that makes it impossible to be claimed is that it is most clearly outlined in the contract terms or there is no causation found (no exterior causation). This paper will elaborate on the extended meaning of the inherent vice which is not favored by marine insurance with the help of case law.

Keywords: Inherent vice; perils of the sea; fortuitous; insurance; all risks; proximate cause.

1. *Introduction*

Over a long period of time, insurance was chiefly a side activity to trading, envisaged by merchants to share among themselves the risks of maritime trade. When profit-seeking replaced protection-seeking in the insurance business in the seventeenth century, the role of insurance became more prominent[1]. The extent of marine insurance coverage is portrayed either expressly in the policy itself or implied by virtue of the Marine Insurance Act 1906[2]. Besides, the insured may expand the coverage of insurance by paying an additional premium, unless otherwise stated, if the policy includes the Inchmaree clause, as the clause is known as an additional perils clause[3].

In case of damage to cargo or a vessel, the relationship between the right of the insured to recover for the insured risk on one hand, and

* Hoda Asgarian is a lawyer and general counsel at the AVA Digital Banking company. She has worked at Unilever as a legal consultant and has legal experience over a decade. She holds LL.M of Maritime Law from Lund University-Sweden. She has recently published an article; The Doctrine of Deviation, Its Historical and Legal Roots; Baku State University Law Review, Vol.7, 2021. She is interested in both academic and experimental side of law.

1. See *Book Review: Marine Insurance: Origins and Institutions, 1300–1850*, 28 International Journal of Maritime History 813 (2016).

2. See Howard Bennett, *Reading Marine Insurance Contracts: determining the scope of cover*, 27 Asia Pacific Law Review 239 (2019).

3. See Babazadeh Araz Farhad Oghlu, *Inchmaree clause as an additional perils clause in marine insurance law*, available at https://www.researchgate.net/publication/326697716_Inchmaree_Clause_as_an_Additional_Perils_Clause_in_Marine_Insurance_Law (last visited April 3, 2022).

the right of the insurer to rely upon the defense of inherent vice, on the other hand, is an important issue which needs to be analyzed.

In insurance contracts, commercial common sense has restricted the scope of cover by accepting the risk of losses which is intervened by "external accidental factors"[4]. Regarding this, section 55 (2) (c) of the Marine Insurance Act of 1906 is relevant. It is a UK Act of Parliament that governs not merely English Law but also dominates marine insurance worldwide through its wholesale adoption by other jurisdictions. Section 55 (2) (c) stipulates, *inter alia*, that: "Unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject-matter"[5]. In other words, one can say these losses are natural incidents of carriage of goods by sea[6].

Moreover, the act of case law which has ruled out the term "risks" shows a logical commercial assumption keeping natural losses out. Besides, section 55(2) (c), by considering the bargain situation between the insurer and insured, sheds light on the fact that the assumed exclusion of natural losses from cover does not depend on the express wording in the policy[7].

As Lord Summer mentioned in *Gaunt*[8]*,* inherent vice, following section 55 (2) (c), has been excluded from the "all-risks" policy. An "all-risk" policy covers all risks of physical loss or damage to a vessel from an exterior cause unless otherwise excluded. Inherent vice, or wear and tear or nature of the subject matter, is among one of the common exclusions[9]. This is because insurance covers "a casualty that happens

4. Howard Bennett, *Fortuity in the Law of Marine Insurance,* 3 Lloyd'S Maritime & Commercial Law Quarterly 315, 327 (2007).

5. David M. Sassoon, *Damage Resulting from Natural Decay Under Insurance, Carriage and Sale of Goods Contracts*, 28 The Modern Law Review 180, 181 (1965).

6. See Bennett, *Fortuity in the Law of Marine Insurance* at 327 (cited in note 4).

7. See *id.*

8. *British & Foreign Marine Insurance Co Ltd v. Gaunt*, 6 Ll.L.Rep. 188 (House of Lords 1921).

9. See Marilyn Raia, *Marine-Insurance-101* (Bullivant Houser, May 11, 2010), available at https://www.bullivant.com/Marine-Insurance-101/#:~:text=An%20%E2%80%9Callrisk%E2%80%9D%20policy%20covers%20all%20risks%20of%20physical,only%20from%20the%20perils%20named%20in%20the%20policy (last visited April 3, 2022).

to the subject matter which is not from the natural behavior of that subject matter in the circumstances under which it is carried".

Respectively, inherent vice differentiates between damage caused by any external occurrence and damage arising exclusively from the nature of the good itself. Damage from inherent vice can be as unexpected as damage caused by perils of the sea[10].

Arnold shows a tendency toward the limited concept of inherent vice, by stating that "the underwriter is not liable for the losses arising solely from a source of decay or corruption inherent in the subject insured, or as the phrase is, from its proper vice as when food becomes rotten, or flour heats or wine turns sour, not from external damage, but entirely from internal decomposition"[11].

Knowing the specific scope of inherent vice can be challenging. Generally, marine policy regulations are in favor of the insurer regarding the unknown unfitness of cargo in a specific voyage. This article explores the extended meaning of inherent vice in the carriage by sea which is not completely accepted by marine insurance. To achieve this goal, case law will be considered, as it has contributed to defining the actual standing point of inherent vice.

The article is structured as follows: first, the concept of inherent vice will be examined in paragraph two, then paragraph three will analyze inherent vice and inevitable losses, in this paragraph the natural behavior of the subject matter will be discussed as well. Furthermore, the concept of "perils of the sea" will be discussed comprehensively in paragraph four. The article will end with a conclusion regarding the examinations carried on throughout the whole paper.

2. *Concept of inherent vice*

The term inherent vice or nature of the subject matter insured, which is embedded in subsection 55 (2) (c) of the Marine Insurance Act, is aimed chiefly at the sort of "vice proper" described in *Blower v.*

10. See *T.M. Noten B.V. v. Harding*, 2 Lloyd's Rep. 283 (Court of Appeal 1990).

11. Jonathan Gilman, et alt., *Arnold's Law of Marine Insurance and Average* at para. 782 (Sweet & Maxwell, 17th ed. 2008).

Great Western[12]. It states: "that sort of vice which by its internal development tends to the destruction or the injury of the animal, or a thing to be carried, and which is likely to lead to such a result".

In *Soya v White*[13], the absence of a definition for inherent vice resulted in the prominent explanation by Lord Diplock stating "the risk of deterioration of goods shipped as the result of their natural behavior in the ordinary course of the contemplated voyage without the intervention of any fortuitous external accident or casualty"[14]. This notion addresses deficiencies in the subject matter, as well as broadens the notion of the natural function of the subject matter unless an unplanned external incident happens[15].

A better definition of inherent vice is given by Arnold as follows: "inherent vice means that the insurer is not liable for the loss or deterioration which arises solely from a principal of decay or corruption in the subject insured [...] not from external damage, but entirely from internal decomposition." It means "inability of cargo to withstand the ordinary incidents of the voyage" is not "always" because of inherent vice[16].

Inherent vice does not mean damage that must inevitably happen, instead, it regards the difference between damage caused by external incident and damage resulting exclusively from the nature of the cargo[17].

There is little difference in practice between the inherent vice and the nature of the subject matter insured, which sometimes makes it hard to use them interchangeably. The latter pictures the behavior of the subject matter being what it is in the usual and expected course of transit. The courts have considered the following as cases of inherent vice in cargo: fruit decomposing as a natural process; timber shipped green and wet which undertook damage because the quality

12. *Blower v. Great Western Railway Company,* 3 S.C.R. 159 (Supreme Court of Canada 1879).

13. *Soya GmbH Mainz Kommanditgesellschaft v. White*, 1 Lloyd's Rep 122 (House of Lords 1983).

14. See *id.* at 125.

15. See Bennett, *Fortuity in the Law of Marine Insurance* at 327 (cited in note 4).

16. *Global Process System Inc and Another v Syarikat Takaful Malaysia Berhad (The "Cendor Mopu")*, 2 Lloyd's Rep. 72 (Queen's Bench Division (Commercial Court) 2009).

17. See *T.M. Noten B.V.*, 2 Lloyd's Rep. 782 (cited in note 10).

and conditions prohibited its sound delivery; leather gloves in cartons sorted in containers and shipped during the monsoon season from Calcutta to Rotterdam damaged by moisture, originally from the gloves condensing on the inside of the top of the container and falling on the cargo therein[18].

2.1. *Concept of inherent vice: test*

Moore-Bick J[19] stated that if what the sea experienced is more severe than could be rationally expected, it is likely that the loss was caused by the perils of the sea. On the contrary, if it was no more than that, the real cause of the loss is the inherent incompetence of the goods to undergo the ordinary incidents of the voyage. Hence, if the cargo is not fit to endure a more severe event than normal ones, the loss must be due to the inability of the transformer to withstand the ordinary incident of that particular voyage[20]. Conversely, Ms. Blanchard – attorney for the Appellant in *N. E. Neter* – indicated that if the condition is not more severe than normal while a loss occurred, it is not necessarily a base to conclude that it is caused by inherent vice[21].

Arnold states that the inability to hold out the ordinary incidents of a voyage is evidently an appropriate test of inherent vice[22]. Mr. Justice Blair clarified the above-mentioned definition in the *Mayban* case, by adding the word 'inherent' before the phrase 'inability to hold out' and made it more sensible[23].

2.2. *Concept of inherent vice: fortuity*

In general terms, due to the nature of the goods being carried, the motion of waves could cause crackings in the cargo. Conversely, in

18. See Donald O'May, *O'May on Marine Insurance* at 197 (Sweet & Maxwell 1st ed. 1993).

19. See *Mayban General Insurance Bhd v Alstom Power Plans Ltd*, Lloyd's Rep IR 18 (Queen's Bench Division Commercial Court 2005).

20. See *id.*

21. See *N. E. Neter & Co., Ltd v Licenses & General Insurance Co., Ltd*, 77 LI L Rep 202 (King's Bench Division 1943).

22. See *T.M. Noten B.V.*, 2 Lloyd's Rep. 22-26 (cited in note 10).

23. See *Global Process System Inc and Another*, 2 Lloyd's Rep. (cited in note 16).

case the motion is adverse in a way it causes the breakage of the legs is called fortuity against the cargo insured[24].

According to section 55 (2) (c), "inherent vice will afford a defense if the sole cause of the loss is the internal decomposition or deterioration of the cargo insured unless the policy otherwise provides"[25]. Nevertheless, if the loss is the result of the inability of the cargo to withstand the ordinary incidents of the voyage and some fortuitous but not uncommon external occurrence, the inherent vice likely represents the overriding cause. Nonetheless, in many cases, the strength of both causes is roughly equal. Therefore, if the external cause is an insured peril and there is no exclusion of inherent vice, the insured is eligible to recover. Instead, if there is an exclusion of inherent vice, the claim will fail[26].

Therefore, in this regard when there is no exclusion and all-risk phrase is brought in insurance, it could be defined as a promise to pay upon the fortuitous and extraneous event of loss or damage to a particular thing or person from any cause whatsoever, except when occasioned by the intentional or fraudulent acts of the insured[27].

Thus, the term "all risks" does not contain inherent vice and ordinary deterioration. It covers a risk not a certainty. Not only is it not natural behavior of the subject matter, but also it is not a loss that was caused by an insured's act of exposing the cargo to get damaged. Akin to what was stated above, Viscount finally affirmed that "there must be something like an accident that brings the policy into play"[28].

"The precise scope of all risks policy depends on the policy wording". When there is no differing target, four factors within the *Gaunt* case were applied for further guidance[29]. One of them is fortuity, meaning that the loss should not be caused by the assured's voluntary

24. See *id.* at 252.

25. *Soya GmbH Mainz Kommanditgesellschaft*, 1 Lloyd's Rep (cited in note 13).

26. See *Global Process System Inc and Another* at 253 (cited in note 16).

27. Andrew C. Hecker, Jr. and M. Jane Goode, *Wear and Tear, Inherent Vice, Deterioration, Etc.: The Multi-Faceted All-Risk Exclusions*, 21 Tort & Insurance Law Journal 634 (1986).

28. *Global Process System Inc and Another* at 251-254 (cited in note 16).

29. Bennett also stated the scope of voluntary conduct which can be seen in the law of unseaworthiness. It is stated in Marine Insurance Act (MIA), c 41 UK (1906), sections 39-40, but in the cargo policy there is no warranty of seaworthiness and no analogous part in the Act about the cargo worthiness.

conduct, and the other is that the loss should not be a certainty. Besides, it should be regarded as external to the insured property.

Based on the above, it can be said that in *Gaunt*, the concept of inherent vice is discussed as the mere cause of the loss or damage without the intervention of any external events or the cause resulting from a specific peril[30]. Willful wrongdoing, whether it is on purpose or based on recklessness, will stop the claim. In this concept, if the insured knew the spectral calculation and still gave the rig to sail, it can be regarded as the reckless running of the risk[31].

Fortuity echoes two points. The first point being that "insurance policies are not designed to finance routine maintenance; some natural wear and tear to a vessel is a natural product of a vessel's normal existence. Perils of the sea do not include the silent, natural, gradual action of the elements upon the vessel, which is just another way of describing ordinary wear and tear"[32]. The second one is brought in the *Xantho*[33] case by Lord Herschel who famously defines "the purpose of the policy is to secure an indemnity against accidents which may happen, not against an event which must happen".

It is almost impossible to foresee the usual act of some elements during a specific voyage in any specific vessel. Though, insurers do not regard such loss as fortuitous[34].

3. *Scope of inherent vice*

One might limit inherent vice to loss or damage that occurred solely because of internal characteristics of the insured adventure. It can also be extended to a loss or damage as a result of many internal characteristics of the subject matter and risks of the insured voyage.

---

30. See Ayça Uçar, *Perils of the Seas and Inherent Vice in Marine Insurance Law* (Routledge 1st ed. 2020).

31. See *Global Process System Inc and Another* at 251-254 (cited in note 16).

32. *J. J. Lloyd Instruments Ltd. v. Northern Star Insurance Co. Ltd. (The "Miss Jay Jay"),* 1 Lloyd's Rep. 264, 271 (Queen's Bench Division 1985).

33. *Thomas Wilson, Sons & Co v Owners of the cargo per the Xantho (The "Xantho")*, 12 App. Cas. 503, 514 (House of Lords 1887).

34. *Global Process System Inc and Another* (cited in note 16).

In the former situation, the same rule is applied in cooperation with inherent vice and ordinary wear and tear. In other words, it could be said that it may not be defined that breakage or deterioration will occur in an ordinary course of transit, but the innate nature of an insured subject matter may usually cause a loss or damage which is unavoidable[35]. In the latter situation, inherent vice and inherent frailty must be regarded independently. For instance, if the voyage of a cargo of eggs takes longer than usual, many of them would be in danger of getting rotted, which is the exact meaning of inherent vice regarding the nature of the eggs. Many are also prone to get broken which is not regarded as an inherent vice, hence the loss in excess of ordinary breakage will be covered (contrary to one regarded as inherent vice) provided that operation of an insured peril can be proved[36].

3.1. *Scope of inherent vice: action of wind and waves*

In order to get covered by the marine insurance policy, the accident or casualties should be fortuitous. Perils of the sea are not regarded as ordinary incidents during the course of a journey and, hence, they are covered by the marine insurance policy. The action of wind and waves is not usually regarded as perils of the sea but in case they are stronger than normal, they render the insurance policy into full coverage of loss. This depends on various issues such as the weather, the course of the voyage, its type, and also the severity of the incident.

Based on section 55(1) of the 1906 Act: "*Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against*". It does not matter whether the current was to be expected since in the schedule to the 1906 Act the adjective "*ordinary*" qualifies "*action*" and not "*winds and waves*", the action of wind and waves can be a "peril of the seas" whether or not the conditions could rationally have been predicted and foreseen[37].

---

35. Bennett, *Fortuity in the Law of Marine Insurance* at 328 (cited in note 4).

36. See *T.M. Noten B.V.*, at para. 22-26 (cited in note 10).

37. See Toby Stephens and Alex Kem, *Marine Insurance Court Updates High Court, Court of Appeal and Supreme Court Cases July 2013 to March 2014 Update 4*, at 14, available at https://docplayer.

Regarding the type of voyage, Mustill J.[38] stated that the routine action of wind and waves are aimed to show that the type of voyage is important. As the case in point, the normal action of waves in the Mediterranean will be different from the normal action of waves around the Cape of Good Hope. Hence, the casualties done as a result of waves might be treated differently by the insurance policies. The topmost aim of the definition is to exclude the ordinary wear and tear that can be expected to happen as a result of that ordinary action[39]. In other words, distinguishing between the ones which may happen from those that must happen, where the latter is out of the scope of marine insurance.

For example, Tucker J. in *N E Neter*[40] identified that stowing in the rainy weather, which is something beyond the wear and tear of the voyage, was fortuitous.

3.2. *Scope of inherent vice: the burden of proof*

As a basic rule, when a vessel confronts an accident over the course of voyage, the burden of proof lies on the insurers to present inherent vice as the proximate cause.

In *Mayban*[41], regarding the burden of proof, Moore-Bick expressed that the loss should be recovered under the policy insured[42]. "The insured only needs to prove the loss but accident and not the exact nature of it"[43]. Lord Sterndale M.R.[44] declared "I think that where the evidence shows damage quite exceptional and such as has never in a long experience been known to arise under normal condition of such voyage, there is evidence of a casualty or something accidental, and of a danger or contingency which might or might not arise, although the particular nature of the casualty was not ascertained". For instance,

net/7741204-Marine-insurance-case-updates-high-court-court-of-appeal-and-supreme-court-cases-july-2013-to-march-2014-update-4-toby-stephens-and-alex-k-emp.html (last visited April 3, 2022).

38. See *J. J. Lloyd Instruments Ltd.* at 271 (cited in note 32).
39. See *id.*, at 262.
40. *N. E. Neter & Co., Ltd*, 77 LI L Rep (cited in note 21).
41. *Mayban General Insurance Bhd*, Lloyd's Rep IR 18 (cited in note 19).
42. *British & Foreign Marine Insurance Co Ltd*, 6 Ll.L.Rep. (cited in note 8).
43. See *id.*
44. See *id.*

when the same cigarettes have been shipped in a similar type of packing to the same destination at the same time of the year in which there was no harm occurred, it would be ample evidence to show that when the cargo was damaged during the transit, with the aforementioned condition, there must have been a casualty or something accidental[45]. Regardless of this, there must be evidence that establishes the comparability of the different shipments relied on.

In order to better clarify the burden of proof, it is worth mentioning what Lord Sumner elaborated in the *Gaunt* case to note how the 'quasi-universality' of the description affects the onus of proof in one way: "The claimant insured against and averring a loss by fire must prove loss by fire, which involves proving that it is not by something else. When he averses loss by some risk coming within 'all-risks', as used in this policy, he only needs to provide evidence reasonably showing that the loss was due to a casualty, not to certainty or to inherent vice or wear and tear. That is easily done. I do not think he has to go further and pick out one of the multitude of risks covered, to show exactly how his loss was caused. If he did so, he would not bring it anymore within the policy"[46].

There is another point of view offered by the Supreme Court held in *Volcafe Ltd v Compania Sud Americana de Vapores SA ("CSAV")*[47] which is different from the above with different reasoning and base for the judgment. In the High Court, the judge argued the case based on the doctrine of *res ipsa loquitur* (i.e., "the thing speaks for itself"). Under this doctrine, negligence is presumed if the actor had exclusive control of what caused the injury, even in the absence of evidence of the actor's negligence and held that the shipowner should disprove its negligence. The Court of Appeal set aside the decision declaring that as the shipowner claims for inherent vice the burden of proof shifts to

45. See *E.D. Sassoon & Co. Ltd. v Yorkshire Insurance Co.*, 14 LIL Rep. 129, 167 (King's Bench Division 1923).

46. *Thirty Years of Inherent Vice-From Soya v White to the Cendor MOPU and beyond* (Law Explorer, October 5, 2015), available at https://lawexplores.com/thirty-years-of-inherent-vice-from-soya-v-white-to-the-cendor-mopu-and-beyond/ (last visited April 3, 2022).

47. EWCA Civ 1103 (2016). See also Theodora Nikaki, *Carriage of Goods, Inherent Vice: Who proves what and how*? (International Maritime and Commercial Law, November 23, 2016), available at https://iistl.blog/2016/11/23/inherent-vice-who-proves-what-and-how/ (last visited April 3, 2022).

the cargo owner and who owns the assets must prove under Article IV Rule 2(m) and 2(q) of the Hague Rules. The Hague Rules of 1924 (formally the "International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, and Protocol of Signature") is an international convention to impose minimum standards upon commercial carriers of goods by sea. It represented the first attempt by the international community to find a workable and uniform way to address the problem of ship owners regularly excluding themselves from all liability for loss or damage to cargo. The objective of the Hague Rules was to establish a minimum mandatory liability for carriers.

This was overturned by the Supreme Court referring to the principles of bailment at common law which in its opinion "since the Hague Rules did not deal with the mode of proving a breach and questions of evidence, these will be governed under the law of evidence and the rules of procedure in the appropriate forum", which is the English Court in this case. Hence, the Supreme Court clarified the vague question of the burden of proof and held that the carrier shall bear the legal burden to disprove that the loss or damage sustained was caused by its breach of Article III Rule 2 of the Hague Rules or to prove that the defense under Article IV Rule 2 of the Hague Rules applies[48].

4. *Inherent vice and inevitable loss. The effect of moisture*

In the case *Noten v Harding*[49] which supports *Arnold's* constricted view of inherent vice, gloves were wrapped in Kraft paper and placed in doubly walled corrugated cardboard cartons each containing 120 pairs of gloves. The cartons were wrapped up with tape and secured by plastic bands. At the dockside, they were placed into 20 ft. closed-top box containers. In the policy, the cargo was insured under "all risks" ICC (A) which excluded the loss caused by inherent vice or nature of the subject matter insured. After the voyage, the gloves were found to be wet, stained, moldy, and discolored. It was common ground that

48. *Who shall bear the burden of proof in cargo damage claims?* (ONC Lawyers, January 31, 2019), available at https://www.onc.hk/en_US/publication/who-shall-bear-the-burden-of-proof-in-cargo-damage-claims, (last visited April 3 2022).

49. *T.M. Noten B.V.* (cited in note 10).

the damage was the result of moisture condensing in the inside of the top of the container and falling on the gloves packed inside the container[50]. This echoes the importance of load management being an extensive subject and first and foremost involving the interface between the ship and the port, meaning that if one fails to fulfill its requirements the other is affected too[51]. Hence besides the advantages that the carriage of goods in sealed containers has, there are some drawbacks such as specific environmental conditions that can arise inside such a container[52].

Justice Philips of the English Queen's Bench Division expressed that the insurers are liable under the warehouse-to-warehouse clause[53] for the container which formed part of that transit. A warehouse-to-warehouse clause is a provision in an insurance policy that provides for coverage of cargo in transit from one warehouse to another. It usually covers cargo from the moment it leaves the origin warehouse until the moment it arrives at the destination warehouse. Separate coverage is necessary to ensure goods before and after the transit process.

In this case, the damage occurred as the result of the water from an external source onto those goods. However, the quality of the goods contributed to the loss as well because they had absorbed moisture before it was positioned in the container. Justice Philips disagreed that the natural behavior of the goods was the cause and regarded this case as the one "where the proximate cause of the damage to the goods has been external to the goods, even if a characteristic of the goods has helped to create that external cause"[54].

---

50. See *id.* at 290.

51. See Alan E. Branch, *Elements of Port Operation and Management* at 56 (Chapman and Hall, 2nd ed. 1986).

52. See *The Loss of Goods Due to Inherent Vice - T.M. Noten B.V. v. Harding* (i-law.com, 1991), available at https://www.i-law.com/ilaw/doc/view.htm?id=367522 (last visited April 6, 2022).

53. See Daniel Liberto, *Warehouse-to-Warehouse Clause 2021* (Investopedia, July 08, 2021), available at https://www.investopedia.com/terms/w/warehouse-to-warehouse-clause.asp (last visited April 5, 2022).

54. J. Kenrick Sproule, *Inherent Vice in Marine Insurance Law: The Case Of the "Bengal Enterprise" T.M. Noten B.V. V. Paul Charles Harding* (FAGUY & CO.), available at https://sflawblog12.wordpress.com/2012/01/01/inherent-vice-in-marine-insurance-law-the-case-of-the-bengal-enterprise-t-m-noten-b-v-v-paul-charles-harding/ (last visited April 4, 2022).

The Court of Appeal stated that "the goods deteriorated as a result of their own natural behavior in the ordinary course of the contemplated voyage, without the intervention of any fortuitous external accident or casualty. The damage was caused because the goods were shipped wet"[55]. It means that the excessive moisture which emanated from the gloves while getting shipped under an expected and typical condition of the voyage is the real and leading cause of the loss. Although the insured has the right to claim that the damage to the goods was caused by a combination of other elements, there was no evidence before the court to establish the conditions in which they were shipped. Therefore, damage might be the result of inherent vice without being unavoidable and "there was nothing in the facts to suggest any untoward event or an unusual event of any kind"[56].

4.1. *Inherent vice and inevitable loss. The effect of moisture: the natural behavior of subject matter*

Relating to this issue, no evidence could be found regarding the issue that the moisture came from the air inside the container rather than the gloves when they were stuffed. One part of Lord Bingham's argument was based on the opinion of an expert in moisture migration within a cargo. As the temperature of airdrops, it becomes less able to contain moisture which causes dew point. The greater the moisture contents of the air, the higher the dew point. The expert explained with his technical knowledge that leather is hydroscopic[57], and in the humid atmosphere of Calcutta, absorbed moisture as the cardboard did. Gloves kept absorbing water until an equilibrium state occurred between the gloves and the atmosphere. Once they had been stuffed in the container, they rapidly equilibrated with the atmosphere within the container, where it absorbed or disclosed a little moisture. It is noteworthy that in that case it was accepted on behalf of the insured that if the damage claimed had been targeted by excessive moisture in

55. See *Id.*

56. *Who shall bear the burden of proof in cargo damage claims?,* ONC Lawyers, 2019 (cited in note 48).

57. See *Id.*

the gloves, but without the intervening process of condensation on the roof of the containers, the position would have been different[58].

4.2. *Inherent vice and inevitable loss. The effect of moisture: discussion*

The insured claimed that the investigation which was made was not trustworthy because there had been numerous shipments of gloves before, during which no such loss occurred. There were some elements that made the condition and had to be compared, and which would normally affect the result, such as the process under which they were manufactured in Calcutta, the situation in Calcutta, and also the course of transit where it was involved. It was held by the court of appeal "that the loss was fortuitous in the sense of not factually inevitable was no answer to an inherent vice defense. The fortuity required to rebut such a defense related to the events of the transit"[59].

As Bingham LJ said, the gloves were damaged because they were shipped wet, regardless of the fact that the moisture penetrated around the container before doing the damage that was complained of[60].

Another similar case in this regard is *C.T. Bowring v. Amsterdam London Insurance* in which a cargo of ground nuts imported from China to Rotterdam and Hamburg was damaged by heating and "sweat" from the ship's holds. Such cargo is regarded as hydroscopic[61]. The judge declared that: "it is impossible to trace the source where the moisture comes from in order to trace the origin of the water which came to the goods. It may be from the moisture in the air within the container or through the ventilator. Then, the water comes from the universe to the goods ignoring the source"[62]. It is inferred that the judge presumed that as long as the goods themselves contain ample

58. See *Global Process Systems Inc. and another v. Syarikat Takaful Malaysia Berhad*, 1 UKSC 5, 7 (The Supreme Court 2011).

59. Bennett, *Fortuity in the Law of Marine Insurance* at 344 (cited in note 4).

60. See *Who shall bear the burden of proof in cargo damage claims?,* ONC Lawyers, 2019 (cited in note 48).

61. See Rajiv Ranjan, *My Attempt to Understand Condensation Losses under Marine Policies* (LinkedIn, November 14, 2019), available at https://www.linkedin.com/pulse/my-attempt-understand-condensation-losses-under-marine-rajiv-ranjan/ (last visited April 5, 2022).

62. 36 LI.L. Rep. 309 (King's Bench Division 1930).

moisture, the damage shall be attributed to its inherent vice instead of the external elements which cannot be measured or calculated[63]. On the contrary, in *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* (henceforth referred to as the *Layland shipping)*[64,] it was declared that "a broad common sense commercial view should be taken as to the real or dominant cause of the damage"[65]. In his explanation, the term 'proximate cause' should be construed to mean 'predominant' or 'efficient cause'[66]. In *Noten v Harding*, the gloves were damaged because of their natural behavior in emanating moisture. Hence, there was no fortuity, chance, or casualty because the process of convection, condensation, and wetting was a natural and ordinary chain of events, each of which followed naturally and independently from the other. As *Bowring's* case had different clauses and different facts, the view given by the judge, in this case, is not acceptable in Bingham's opinion because he stated that even if the moisture came from the damaged cargo, it was fortuitous whether it fell on the insured cargo or other cargo[67].

Accordingly, on one hand, there is no common sense in the business if we do not know the process in which the water comes from the external origin. On the other hand, the common sense of business says that the gloves were the only and the most tangible source of the water[68].

Although the concept of inherent vice indicates some defect in the subject matter insured, the gloves were not defective in any ordinary sense, the s 55 (2) (c) must be read as the whole phrase "inherent vice or nature of the subject matter insured".

---

63. See Meixian Song, *Rules of Causation under Marine Insurance Law from the Perspective of Marine Risks and Losses* at 119 (University of Southampton, thesis for the degree of Doctor of Philosophy, 2012).

64. A.C. 350, 363-369 (King's Bench Division 1918).

65. Who shall bear the burden of proof in cargo damage claims?, ONC Lawyers, 2019 (cited in note 48).

66. *The cause of loss* (Law Explorer, October 16, 2015), available at https://lawexplores.com/the-cause-of-loss//, (Last visited April 5, 2022).

67. Unreported judgment.

68. *Who shall bear the burden of proof in cargo damage claims?,* ONC Lawyers, 2019 (cited in note 48).

5. *Perils of the sea*

Perils of the sea are often called out as extraordinary forces of nature faced by maritime ventures on the course of the journey. An expanded explanation would be that peril of the sea covers damages to shipments during the voyage by the Acts of God. It covers those accidents or casualties which do not happen due to the free will of a human being[69]. There are different perils of the sea such as stranding, sinking, collision, heavy wave action, and high winds[70]. The three important and principal perils are, collision, stranding, and foundering. These are results, not causes; accidents, not forces[71]. In this sense, one cannot regard the ordinary act of waves and wind as perils of the sea, but it should be a fortuitous accident or casualties of the seas[72].

Regarding the burden of proof, it is not sufficient for the insurer to prove that the weather conditions encountered by the vessel were reasonably predictable, but he must prove that those conditions were bound to occur as the ordinary incidents of any normal voyage of the kind being undertaken[73] and perils of the sea are not confined to cases of exceptional weather or weather that was unforeseen.

The notion of insured perils meaning the ones which are insured under an insurance policy is very crucial as the insurer will indemnify the insured against certain loss or damage falling under the scope of the perils of the sea and not among the exclusions namely inherent vice[74].

---

69. See *What Are the Perils of the Sea in Marine Insurance?* (Secure Now, August 12, 2021), available at https://securenow.in/insuropedia/perils-sea-marine-insurance/ (last visited April 5, 2022).

70. See *Perils of the sea* (Assignment Point), available at https://www.assignmentpoint.com/business/finance/perils-of-the-sea.html (last visited April 5, 2022).

71. See Everett V. Abbot, *Perils of the Seas: a study in marine Insurance*, Vol. 7, No. 4 Harvard Law Review 221, 227 (1893).

72. See *What are the Perils of the sea in the Marine Insurance?* (Secure Now, August 12, 2021) available at https://securenow.in/insuropedia/perils-sea-marine-insurance/ (last visited April 5, 2022).

73. See William Melbourne, *The Court of Appeal restricts the scope of the defense of "inherent vice" in marine cargo insurance* (CLYDE & Co, January 2010), available at https://www.clydeco.com/clyde/media/fileslibrary/Publications/2010/Marine%20Insurance%20Update_January%202010.pdf (last visited April 05, 2022).

74. See Wan Izatul Asma Wan Talaat, *Perils of the Sea: A Conclusive Definition?* XXXII No 1 INSAF: Malaysian Bar Journal 55 (INSAF, 2003).

Relating the above, *Cendor Mopu* has an important position in the history of the inherent vice as it not only clarifies that inherent vice exception is solely where the loss emits from the internal characteristics of the goods, but also made it clear that there cannot be two causes for damage and if there is a peril of the sea then there is no room for inherent vice, and both cannot be applied[75]. In the decision made on 1st Feb 2011 the Supreme Court held that in order to defend successfully under inherent vice, the intrinsic nature of the subject matter insured must be the mere cause of the loss. There must be no intervention by any external source[76].

Following the history of failure of the leg during the transit, which was caused by the level of stress, the surveyors suggested that in order to clarify the case, the leg which might not have efficient fatigue fails to tolerate the full tow must be investigated again.

Because of the increasing degree of cracking around the pinholes in Cape Town, the repairs were done. After less than one week, one of the legs got lost at the sea. The next day, the other two legs fell off in quick succession[77].

The insured had appointed exports to manage the transit, hence any arrangements had to face the confirmation of a marine surveyor for the purpose of insurance. In this case, they asked the surveyor to calculate the integrity of the legs for the two purposes of transportation as well as for its use at the location. This way of transportation had the eminent danger of imposing stresses on the legs which were evaluated carefully. Nevertheless, there was a substitute choice that was safer, but it was too costly, and the court agreed upon the issue that the unwillingness of the insured to crop was reasonable. The rig was confirmed and got ready for the voyage with regard to the sea

75. See Ayça Uçar, *The meaning of the perils of the seas and the definition of Inherent Vice in the Supreme Court decision "the Global Process System Inc and Another v Siyarikat Takaful Malaysia Berhad (The Cendor MOPU)"* (University of Exeter, September 22, 2017), available at https://ore.exeter.ac.uk/repository/handle/10871/32455?-show=full (last visited April 5, 2022).

76. See Rupert Banks, *Legal Update: 'Cendor Mopu'-Inherent vice and perils of the sea* (Standard Club, March 1, 2011), available at https://www.standard-club.com/knowledge-news/legal-update-cendor-mopu-inherent-vice-and-perils-of-the-sea-2547/ (last visited April 5, 2022).

77. See *Berghoff Trading LDT and others v. Swinbrook Developments LDT and others*, 2 Lloyd's Rep 233, 244-245 (Court of Appeal 2009).

motion analysis and weather data for the proposed route by the first consultant.

On the one hand, this is fair to emphasize the fact that the insured and the insurers relied upon the surveyors and consultants on counting the ability of the legs to endure the voyage around the Cape. The act of the insured in placing the rig on a barge with the knowledge that the leg was not proper for that voyage or being reckless about the fitness of the rig is not acceptable. On the other hand, surveyors relied on the simplistic analysis and acknowledged the legs for the last part of the voyage. This made the fact obvious that the surveyors did not know about the spectral analysis[78]. Once again both insurers and insureds trusted the surveyors' assessments which had no suggestion on deficiency in the ability of the legs to bear the last part of the journey.

Although the weather was normal, the leg was not just rolling from side to side or pitching forward and backward, the leg breaking waves means a mixture of these motions, which go around in big circles and different directions. Consequently, the stresses caused by that are compound[79].

5.1. *Perils of the sea: fortuity*

Fortuity is related to incidents that might happen, not that must happen and it has to be an accident not a normal course of events[80].

Events that must happen in the ordinary course of navigation were excluded by the word accidental in the present case. The word accidental refers to fortuity, in the absence of which there is no recoverable loss. However, if an event that might happen does not happen, it is still regarded as accidental because it is not guaranteed to occur.

There is no doubt that the accident in *Cendor Mopu* was inevitable. Hence the court must hold that a leg-breaking wind was not certain to occur on the voyage because the cargo was properly stowed and was in good condition. In order to clarify the facts, surveyors had been consulted on the issue of how the rig should be carried. "They certified

78. See *id.* at 247.

79. See *id.* at 248.

80. See Richard Lord QC, *Approximate Causes and Perils of Perils of the Seas*, available at https://bila.org.uk/wp-content/uploads/2019/04/Issue-126-Lord.pdf (last visited April 05, 2022).

that it was fit for the voyage". The Court of Appeal correctly declared that a "leg-breaking wave" had felled the first leg, resulting in more prominent stress on the other two legs, which ultimately also broke off[81]. Then it was not ordinary wear and tear in which the legs would simply suffer numerous metal cracking. It means "a leg-breaking was not bound to occur" in any ordinary voyage round the Cape which results in the breaking of the first leg. Even if it was highly probable, the probability was unknown to the insured and was a risk that was insured under this policy[82]. In addition, climatic conditions were deeply hostile as to cause the legs to break was the very risk against which the respondents had insured[83].

In *T M Noten,* the court declared that on the basis of spectral figures, if a surveyor knew them, the rig would not be permitted to start the voyage. This is because it would increase the chance of failing the leg in which it happened, however, the judge found that "the failure of the legs as this rig was towed round the Cape was very probable, but it was not inevitable"[84]. Moreover, the possibility of the presence of two causes "perils of the sea" and "inherent vice" which leads the claim to be failed, was rejected on the ground that "this is not a realistic possibility"[85].

The specialists recognized that the reason for the loss was repeated bending of the legs under the pressure of the barge at the sea. The weather was within the range that could practically have been experienced[86].

---

81. See Borden Ladner Gervais, *Inherent vice vs. peril of the seas* (Lexology, July 25, 2021), available at https://www.lexology.com/library/detail.aspx?g=-97d58a02-0d36-490c-83fc-3bee0f723d6f (last visited April 05, 2022).

82. See Rupert Banks, *Legal Update: 'Cendor Mopu'-Inherent vice and perils of the sea* (Standard Club, March 1, 2011), (last visited April 5, 2022) (cited in note 76).

83. See *Inherent Vice & Perils of the Seas* (Steamship Mutual, February 2010), avaiable at https://www.steamshipmutual.com/publications/Articles/ViceandPeril0210.html (last visited April 06, 2022).

84. *Durham Tees Valley Airport LTD v. Bmibaby LTD and another*, 2 Lloyd's Rep 246, 249 (High Court (Chancery Division) 2009).

85. See *id.* at 261.

86. See *id.*

5.2. *Perils of the sea: a new perspective*

In *Mopu* defending under inherent vice was restricted dramatically, which led to commensurately increasing the utility of cargo insurance for cargo owners, and also supporting the cargo insurance market[87]. As the court of appeal mentions, insurers have a defense only where the inherent vice is the proximate cause of the loss. Although it is not necessary for inherent vice to be the only cause of the loss, it will only provide a defense when there is no other external cause that results in an insured peril. This idea was not accepted under the grounds that in case there is a specific and foreseeable loss it is caught by the exception of inherent vice. Hence, the insurance coverage would be limited to loss which is wholly the result of unusual perils or unusual examples of known perils. It can be said in other words that, in a situation where the loss is caused by the mixture of inherent vice and sea conditions, the ordinary rule states that "a loss approximately caused by one insured and one expected peril" is not covered but displaced. Hence the insured is able to get recovered unless the sea conditions were ordinary and did not amount to a proximate cause of loss. It was later held in this case that a leg-breaking wave was not bound to occur, even though it was highly probable, and the insurance was against that probability.

Besides, the judgment in *Global Process* narrows the test for inherent vice and broadens the variety of events that may be regarded as fortuitous external accidents. It is now evident that inherent vice will not be deemed the sole proximate cause of a loss simply because the other external events experienced were "reasonably to be expected". This may make it easier for an insured to defend from an insurer's claim that cover is excluded from an "all-risks" policy because the loss was due to inherent vice[88].

---

87. See *Restricting the defense of inherent vice* (University of Nottingham Commercial Law Centre), available at https://www.nottingham.ac.uk/research/groups/commercial-law-centre/research/restricting-the-defence-of-inherent-vice.aspx (last visited April 5, 2022).

88. See Sam Tacei and Ajita Shaha, *Wave goodbye to inherent vice exclusions*? (Edwards Angell Palmer & Dodge LLP, March 2010, available at https://www.lexology.com/library/detail.aspx?g=cf8d2039-3424-4e00-b5f4-666f11c7ab08 (last visited April 5, 2022).

5.3. *Perils of the sea: discussion*

On the one hand, based on *Cendor Mopu* case, the burden of proof in an inherent vice is with the insurers, and it is not enough only to prove that the condition of the sea was no more than ordinary, because insurers have the protection of the law of non-disclosure and misrepresentation whether to accept the risk. Besides, they also benefit from the contractual freedom to restrict their liability by reference to the possibility of loss occurring[89].

On the other hand, the decision which was held in *Mayban*[90] confined the scope of cover far beyond any logically assumed exclusion of ordinary losses and designated a total division between the hull and cargo insurance that does not seem to respond to commercial common sense[91]. If numerous spells of bad weather conditions at different levels of the carriage could be regarded as normal and natural incidents which continuing the voyage without facing them might be considered unusual, then the decision to continue the voyage could be regarded as rational[92]. The approach would be that if an insured peril is not a proximate cause, the inherent vice can be the sole and proximate cause[93].

6. *Conclusion*

Insofar as the inherent vice is concerned, section 55(2) (c) is used as an explanation of the scope of cover and not as an implied contractual exclusion. Meanwhile, the key aim of the definition is to exclude the ordinary wear and tear that would be expected as a result of that ordinary action[94].

89. See Bennett, *Fortuity in the Law of Marine Insurance*, at 348 (cited in note 4).
90. *Mayban General Insurance Bhd*, Lloyd's Rep IR 18 (cited in note 19).
91. Sam Tacei and Ajita Shaha, *Wave goodbye to inherent vice exclusions*? (Edwards Angell Palmer & Dodge LLP).
92. See *id.*
93. See *Durham Tees Valley Airport LTD*, 2, Lloyd's Rep (cited in note 84).
94. See *British & Foreign Marine Insurance Co Ltd v. Gaunt* (cited in note 8).

Even though the concept of inherent vice shows some deficiencies in the insured subject matter, Section 55 (2) (c) must be read as the whole phrase "inherent vice or nature of the subject matter insured".

By looking at the different definitions given on inherent vice, in my opinion, the best goes with *Arnold's*[95] definition "in the subject insured, [...] not from external damage, but entirely from internal decomposition". It means that the "inability of cargo to withstand the ordinary incidents of the voyage" is not "always" because of inherent vice[96].

The commercial experience shows a definite range of possibilities of a certain type of loss that the rational person considers insurance a wise and prudent investment. Besides if cargo is not able to bear the foreseeable perils, it cannot be called a "risk" within the meaning of the "all risks" insuring clause, because in this case the main object of the insurance which is a possibility, will disappear[97].

Regarding the issue of burden of proof as mentioned before, *Cendor Mopu* endorsed the idea that the burden is with the insurers. It can be said that the main difficulty which has been encountered in the context of "all risks" policies on cargo has been the issue of determining the burden of proof. This could vary case by case and based on the proximate cause of the voyage.

Eventually, although inherent vice needs to be discussed separately on the particular aspects of every case, from my point of view, the commercial common aspect of the marine sector needs a wider insurance cover. It seems that the best way is to consider the concept of law in practice and adapt to the necessities of the modern market which brings new methodologies to meet new necessities.

95. *T.M. Noten B.V. v. Harding* (cited in note 10).
96. See Gilman, *Arnold's Law of Marine Insurance and Average* (cited in note 11).
97. See note 29.