

**SOUTH AFRICAN MARINE INSURANCE LAW:
THE CURRENT STATE OF OUR DRAFT
MARINE INSURANCE BILL AND THE EFFECT
OF ITS PROMULGATION ON THE SOUTH
AFRICAN MARINE INSURANCE INDUSTRY**

1 Introduction

In 1997 a draft proposal for a Marine Insurance Act was prepared as a new South African statute in response to a call for the development of marine insurance by legal practitioners, academics, various members of the Maritime Law Association and other members of various Marine Underwriting bodies (the draft bill was redrafted in 1997 by its main draftsman Adv Douglas Shaw QC). The draft legislation (the draft legislation for South African Marine Insurance website: <http://www.uctshiplaw.com>), tends to adopt the form and structure of the English Marine Insurance Act 1906 (6 Edw 7c 41), with minor differences. For instance, in keeping with the South African law on insurance (see *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419(A)), the draft Act excludes the English law concept “*uberrima fides*”, which has been rejected as an alien concept under South African insurance law. It is essential for legislature to review the status of the bill as marine insurance forms the oldest part of our well established maritime economy. Developments in marine insurance laws will enable South Africa to participate more meaningfully from a legislative point of view in the international arena.

The draft bill is a useful tool in determining the probable future direction of the developments in South African marine insurance, however, this draft legislation has not been promulgated. It is possible to underestimate the usefulness of such a code since ten years have passed since the bill’s last re-draft. It is proposed in this article that there is a need for codified South African Marine Insurance Law and that perhaps the legislature should reopen the debate on the bill and consider it in order to hasten the process of its promulgation. Further, if such a statute is developed it must be unique to South Africa in that it must reflect a balance between the modern Roman-Dutch law as applied by our courts in marine insurance matters while useful English law concepts are also reflected for the purposes of international uniformity. However, if capturing such a dichotomy in the draft bill proves to be against international marine insurance trends, perhaps the best way forward is to promulgate the existing draft Act as is. What must be achieved in the end is that South African Marine Insurance Law must lose its legal-research status of being the “Cinderella” (Maritime Law Lecture by Victor

Vaz of Eikos Risk Applications Services 2006) of all insurances and have positive laws that govern it specifically in the form of a South African Marine Insurance Act.

From an international perspective, it is evident that the well-developed marine insurance industry in England, for example, owes its existence to the English Marine Insurance Act 1906 (6 Edw 7 c 41). The principles contained in the English Marine Insurance Act have largely influenced other international jurisdictions such as Australia, Canada and America. Australia has codified its marine insurance in the form of the Marine Insurance Act 11 of 1909 (C2004C00549), an Act which is very similar in form to the English Act. Canada also has a more recent marine insurance code in the form of the Marine Insurance Act 1993 (C 22). The maritime nations with codified marine insurance have clear tenable principles of marine insurance which add value to their respective marine insurance industries. It is submitted, with respect, that South Africa should complete its journey towards creating a similar marine insurance code.

South Africa presently has a marine insurance system similar to that of the United States of America in that American marine insurance law is largely influenced by the English Marine Insurance Act 1906. However, this English influence is contained in American precedent only (<http://www.admiraltylawguide.com/insurance.html>; see, Healy and Sharpe *Cases and Materials on Admiralty* 3ed (1999) 802; and Buglass *Marine Insurance and General Average in the United States* 2ed (1981) 1). Although both countries are influenced by the English Marine Insurance Act of 1906, neither of them has a unique marine insurance code. On the other hand the United States does not compare to South Africa in terms of its vastly developed marine insurance practices; it is after all a first world country with leading maritime practices. In order for South Africa to be just as developed it should seek to develop its own marine insurance code as part of its endeavour to reach international uniformity in adopting proven marine insurance laws in an accessible form. The draft Act is a plausible step in that direction. However, it is concerning that nothing further has become of the draft Act. What has caused the draft Act's protagonists to lose wind in their sails in pursuing their efforts to create this statute? It is submitted that perhaps the problem lies in the fact that the South African marine insurance industry is comfortable in its current state.

In light of the above examination of the marine law statutory trends of leading maritime jurisdictions, it is proposed that South Africa should conform to a codified marine insurance system. This call requires a completion of what has already commenced, South Africa must respond by promulgating its own marine insurance code. This code will be influenced by English as well as South African law where necessary and practicable, thus achieving that desirable international uniformity and certainty in the application of marine insurance laws.

1 1 *The dynamics of marine insurance practices in South Africa*

According to Professor John Hare of the University of Cape Town, a leading writer with the most updated work on South African marine insurance, when contracting for a South African marine insurance policy a broker will approach a lead underwriter for a commitment to a certain portion of risk. At this stage it will be the broker who prepares the basic terms of the policy and presents them to the lead underwriter. The lead underwriter, relying on the strength of these terms, will indicate to the broker a commitment to an agreed portion of risk. The commitment forms the insurance contract between the assured (through the agency of his or her broker) and the insurer (Hare *Shipping Law & Admiralty Jurisdiction in South Africa* (1999) 667). A company such as Eikos Risk Applications is an example of brokers which have been necessitated by the marine insurance industry. The questions that arise in this structure show that firstly, there is no clarity as to the nature of such an agreement although Professor Hare submits that there is nothing preventing such an agreement from being a short-term policy in South African law. Further, Professor Hare raises a pertinent question when he asks the following question, "What therefore, in South African law, is the status of that policy? If an insurance contract is concluded by the broker with each subscribing insurer from the time of the latter's commitment, any policy subsequently issued would be evidence of pre-existing insurance contracts by which the full 100% of the risk is underwritten" (Hare 667).

Having considered the basic structure for the creation of a traditional South African marine insurance policy it is submitted that this structure requires some improvement in the form of a statutory regulation. While the model may at first glance seem simple, it is the questions of law relating to the nature of marine insurance that are expressly clarified. On the other hand, parties may prevent complicated legal questions by using very clear wording together with suspensive terms to prevent risk to underwriters where the risk has not been 100% covered (Hare 668). However, it is not sufficient for the industry to ignore the need for a marine insurance code by relying on industry practices that do not address some of the questions raised above. This point is further reiterated by Professor Hare who highlights the inadequacy of the current Short-Term Insurance Act 53 of 1998 in dealing with marine insurance matters by stating that the 1998 Act deals with the formalities and technicalities of insurance rather than the general principles of marine insurance (Hare 658). It is submitted that necessary to the dynamics of South African marine insurance practices is a marine insurance code to set out the principles of marine insurance.

2 **A lesson from history**

The history of South African marine insurance demonstrates a slow progression towards the creation of certainty and clarity regarding applicable principles. Sources of marine insurance in South Africa have always been

divided, thus aggravating the uncertainty. These divided sources of South African law on marine insurance included the now repealed Insurance Act 27 of 1943, which at least provided a useful definition of marine insurance business. (S 1(a)-(d) of the repealed Act, provided that "marine business" meant the business of insuring persons against loss or damage to any vessel, including barges or dredges; loss or damage to goods during their conveyance by land, air or water, whether inclusive or exclusive of loss of or damage to such goods while they are being stored, treated or handled in connection with such conveyance or intended conveyance; loss of freight for any such conveyance or any other loss in connection with any vessel or any such goods or freight, against which an insurance may be lawfully effected. This definition of marine insurance business is useful as a starting point toward the creation of a local marine insurance statute as it specifically defines and highlights all the attributes of marine insurance, which are unique to such business.) In the Cape Province and Orange Free State, English law applied, however, not in the form of the British Marine Insurance Act, 1906. In Natal and Transvaal, Roman-Dutch law was applicable, with English law being merely of persuasive authority. In addition to these sources the courts also had regard to South African judicial decisions and the writings of Roman-Dutch jurists (Hyman "Marine Insurance Claims Procedure" 1977 *South African Insurance Law Journal* (hereinafter "SAILJ") J1). Of course, this dichotomy is not unique to our legal system and we have a constitutional mandate to develop our common law where necessary.

In light of the sources listed above, developments in marine insurance law were somewhat thwarted. One of the main criticisms, for example, was that South African case law made no contribution to the development of marine insurance law (Hyman 1977 *SAILJ* J3). The situation of lack of development in South African marine insurance case law was not entirely hopeless, as the courts attempted to clarify applicable principles in cases such as *South African Railways and Harbours v WM Anderson & Co* (1917 CPD 121), where the courts deliberated on the aspects of abandonment, a principle unique to marine insurance and English law of marine insurance being applicable to the Dominion in such matters on that date in the Cape Province). This brief reflection on history teaches us that there was an urgent need for South African courts to settle the divisions and uncertainty in South African marine insurance law especially after the repeal of colonial laws applicable to South African marine insurance.

According to Dillon and Van Niekerk, the leading writers on South African marine insurance in the early eighties, South African marine insurance at that point had not received the attention it deserved considering that it is a complex field of law (Dillon and Van Niekerk *South African Maritime Law and Marine Insurance* (1983) 103). The contributions of these writers in the development of South African marine insurance included, *inter alia*, a thorough deliberation of the sources of marine insurance. They also made a call to develop South African marine insurance through legal history and comparative law (Dillon and Van Niekerk 105). Unfortunately, these writers also agreed that the principles of Roman-Dutch law in South Africa were

largely undetermined and uncertain, thus having little relevance to modern contracts (Dillon and Van Niekerk 109). It is submitted that our history has taught us that applying arcane principles of Roman-Dutch law has left our marine insurance in an underdeveloped state.

The underdeveloped state of South African marine insurance law was considered by the courts and heralded in the decision by the Appellate Division in *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* (*supra*). In this case the court deliberated on the history of marine insurance law developments. The court not only called for the application of Roman-Dutch law in South African marine insurance but it also mapped out the historical route leading to the adoption of Roman-Dutch law in South Africa (428 and 429). However, the court was also expedient in pointing out that the Roman-Dutch principles to be applied were those of modern law, which through necessary adaptation are able to meet the requirements of modern society (430A-C). It is this adapted modern law which to some extent is not entirely clear.

In the above case it was clarified that the law that is applicable to marine insurance law in South Africa is Roman-Dutch law; however, these principles are, arguably, not always capable of easy accessibility as they have been and continue to be developed over time. This was evident in the case of *Shooter t/a Shooter Fisheries v Incorporated General Insurance Ltd* (1984 4 SA 269 (D)). In an action for repudiation of a marine insurance policy for an insured vessel, the court, determined in terms of section 6(1)(b) of the Admiralty Jurisdiction Regulation Act 105 of 1983 that the law to be applied to the matter *in casu* was Roman-Dutch law. As part of his defence, the defendant attempted to invoke the principle of abandonment. The defendant argued that the plaintiff's claim should fail because the plaintiff failed to give a notice of abandonment to the defendant (which, it was argued on behalf of the defendant, was a condition precedent to a claim where the loss was a constructive total loss and not an actual total loss) (285A).

The court held that this defence was wrong on three grounds. Firstly, there was nothing in the policy about a requirement that a notice of abandonment had to be given. Secondly, a defendant who has outright repudiated a policy cannot go back and seek to uphold some aspect of that policy (287G). Thirdly, in terms of the Roman-Dutch law applicable to the Republic, there is no distinction between actual loss and constructive total loss (287G). Further, the court stated that the writings of three Roman-Dutch jurists, Van Der Linden, Van der Keessel and Grotius relied on by the defendant as authority for giving a notice of abandonment were based on ordinances from Middelburg, Amsterdam and Rotterdam respectively which do not necessarily form part of modern Roman-Dutch law. The court stated that to determine whether those ordinances can be said to be the modern Roman-Dutch law applicable in the Republic is a difficult inquiry (286B).

Friedman J, in his judgment explained that the notion of Roman-Dutch law, applicable in the Republic (modern Roman-Dutch law) in light of Roman common law, stemming from the Netherlands and Dutch statutory law,

derived from a number of learned treatises which had been written on the subject. However, not all the conclusions are harmonious. (286C. The judge in this case intimates that there are problems with regard to the clarity of what is truly meant by Roman-Dutch law applicable to the Republic. The conclusions on the Roman-Dutch treaties do not show the extent of their applicability to the modern context; therefore a marine insurance code with applicable principles of marine insurance must be created to do away with such debates.) In answering this question the court held that the statutory requirements of various provinces in the Netherlands or laws of purely local nature passed before or after 1652 do not form part of South African Roman-Dutch law. Therefore, the defendant could not claim that the plaintiff had to comply with a requirement of giving a notice of abandonment because it does not form part of Roman-Dutch law applicable to the Republic (286C). The opinion of the court was helpful to a certain extent; however, what constitutes inapplicable fiscal laws is still an uncertainty in Roman-Dutch law in the context of marine insurance.

Currently South Africa may look to the Short-Term Insurance Act 53 of 1998 for the creation of certainty since marine insurance is by its very nature one of short-term insurance (Gordon and Gertz *South African Law of Insurance* 3ed (1983) 365). However, this statute has its limitations as it does not deal with peculiar aspects of marine insurance law. It is submitted that the call to codify marine insurance specifically into a South African Act of its own will be a copious and necessary exercise in light of the hesitant statutory developments of the general law of insurance in South Africa. For example, unlike the draft Marine Insurance Act of South Africa, the Short-Term Insurance Act 53 of 1998 is only limited to the class of policy specifically defined as engineering, motor, transport, property and some health policies of insurance. Clearly more needs to be done for marine insurance laws in South Africa.

3 The need for codification

In terms of section 1(u) of the Admiralty Jurisdiction Regulation Act 105 of 1983, as amended, marine insurance or a marine insurance policy (this includes the protection and indemnity by any body of persons of its members in respect of maritime matters) is a maritime claim. This means that it is a matter, in regard to which the High Court may exercise its admiralty jurisdiction to hear and determine, thus creating a place for the growth and development of legal principles applicable to marine insurance and the developments in admiralty law in general. Without a specific statutory regulation, the law regarding this important maritime claim will not develop. Any lack of development in marine insurance laws is inconsistent with the international trade trends of the marine insurance industry in South Africa.

It is proposed that a harmonious codified system of marine insurance law which is unique to South Africa will create certainty in harmonizing Roman-Dutch and English laws to be applied. Parties to such policies will be able to invoke correct remedies and defences in case of disputes. Further, with a

new marine insurance statute South African case law will develop. The initiative shown by the drafters of the Draft Marine Insurance Act of South Africa is applauded but this effort should be re-visited and re-considered. Perhaps this will bring success to the adoption and application of the crucial new laws in marine insurance.

4 The Draft Marine Insurance Act

4.1 The structure of the draft Act

The Draft Marine Insurance Act is a clear statute with most of its structure having the form of the English Marine Insurance Act, 1906. While the 1906 Act begins with defining a marine insurance contract, the South African Draft Act begins with the application of the Act. It is clarified in the draft Act that it shall be applicable to any insurance with regard to an insurable adventure, any other insurance where the parties have by agreement made the draft Act applicable and shall be applicable where it is deemed by the parties by agreement that the draft Act shall apply, where the contract of insurance is incorporated in a form entitled "marine policy" or bearing a title suggesting that it is a contract effecting a marine insurance (s 1 Application of the Act). While the 1906 Act initially defines the marine insurance contract the draft Act indirectly defines a marine insurance contract through an elaborate definitions section 2 together with section 3. This is an important introductory step in the draft legislation that operates as a caveat to the marine insurance industry about the extent of the application of the draft Act.

The draft Act then proceeds to take on a form and wording that is almost verbatim to the English 1906 Act although it is clear that under the South African draft Act insurance is one of good faith and not the English concept of utmost good faith. It is arguable that the draft Act is nothing more than a formalistic adoption and application of English marine insurance law that bears no reflection on the modern Roman-Dutch law principles of marine insurance. It is submitted, however, on this point that it is irrelevant what the source of the general law is so long as that law creates certainty and clarity in marine insurance laws. As the draft Act stands at the moment, it has recorded 66 sections with the last heading dealing with general average loss. The 1906 Act also contains such a heading in its section 66. Since the form and structure of the English Act 1906 is used in the draft Act it should not be difficult to complete the drafting of the proposed South African Marine Insurance Act.

4.2 Some peculiar concepts of marine insurance addressed in the draft Act

One of the difficulties in the development of marine insurance laws in South Africa involves the lack of code that deals specifically with marine insurance principles. The draft Act solves this conundrum because it clearly defines

crucial peculiar concepts of marine insurance such as the meaning of the marine insurance contract, general average, insurable risk, *etcetera*. While considering a few of these concepts which will give certainty to the law on marine insurance it is essential to note that when disputes are considered in our courts, the rich sources of English precedent may be persuasively used to give more substantive value to South African marine insurance law. With these circumstances in mind, it is proposed that South Africa must move ahead to the completion of the draft Act. In the sub-paragraphs below this paper will consider sections dealing with Good Faith and Disclosure, Delay in Voyage and Notice of Abandonment as exemplary sections in the draft Act that will bring certainty into the marine insurance industry.

4 2 1 Good faith and disclosure

Sections 17, 18 and 19 of the draft Act deal with the marine insurance contract being one of good faith and stress the importance of disclosure by the assured and the agent effecting the insurance for the assured. These sections will obviously be interpreted in harmony with the law of general application. I believe that the use of the phrase "good faith" is a unique stance which South Africa has taken in marine insurance law to establish that good faith should not vary in degrees as applied by the English courts. (See, Hare *Closing Comments on Behalf of Common Lawyers* paper delivered at University of Antwerp, November 1999 <http://www.uctshiplaw.com/imic-sum.htm>.) Ultimately the usual tests for determining proper disclosure will revolve around the test for materiality of the circumstance which the assured is bound to communicate to the insurer.

4 2 2 Delay in voyage

One of the main considerations in marine insurance is the issue of the delay in the insured voyage. This is dealt with in section 48 of the draft Act. It is provided that, "in the case of a voyage contract, the adventure insured must be prosecuted throughout its course with reasonable despatch, and, if without lawful excuse it is not so prosecuted, the insurer is discharged from liability as from the time when the delay became unreasonable". This section clearly shows that an insurer under a marine insurance may escape liability for unreasonable delay. This is a vital statutory regulation for the marine insurance industry as well as the maritime industry in general. The objective test is used for determining reasonableness. Further, section 49 provides for excuses for deviation or delay as an exception to escaping liability under a marine insurance contract and these are important to note as they draw the line in determining the attachment of insurer's liability in such delays.

It is clearly stated in the various subsections that an assured is excused from delay or deviation in the following circumstances: where authorized by any special term in the contract; where caused by circumstances beyond the control of the master and his employer, where reasonably necessary in order to comply with an express or implied warranty, where reasonably necessary

for the safety of the craft or property insured, for the purpose of saving human life, or aiding a craft in distress, where human life may be in danger, where reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the craft, where caused by the barratrous conduct of the master or crew, if barratry be one of the risks insured against (s 49(1)(a)-(g) Draft Marine Insurance Act). However, it is provided that when the cause excusing the deviation or delay ceases to operate, the craft must resume her course, and prosecute her voyage, with reasonable dispatch (s 49(2)). These are some of the peculiarities of the marine environment and clearly the draft Act is a substantial source of substantive law relating to marine insurance and is most necessary.

4 2 3 Notice of abandonment

Since the giving of a notice of abandonment was rejected in *Shooter t/a Shooter Fisheries v Incorporated General Insurance Ltd (supra)*, it is essential to consider the position of the draft Act on this issue. In terms of section 62(1) of the draft Act an assured may elect to abandon the property insured to the insurer by giving notice of abandonment. If he fails to give such notice then the loss is only treated as a partial loss. Section 62(4) provides that where notice of abandonment is properly given, it will not prejudice the rights of the assured where the insurer refuses to accept the abandonment. Section 63 deals with the effect of the abandonment. In this case the insurer is entitled to the interest of the assured in whatever may remain of the insured property, together with proprietary rights incidental thereto. This means that in the case of an abandoned craft, the insurer is entitled to freight in the course of being earned (s 63(1)(a) and s 63(2)). Clearly the notice of abandonment is a tool created by English law to benefit the insurer in the situation where the assured wishes to abandon rights to the damaged property. In the marine insurance code it is clear what the circumstances are that give rise to such a notice. Therefore it forms clear substantive rules for South African law to avoid any confusion when making legal arguments as noted in the case above.

5 Conclusion

Marine insurance is an aspect of South African law which has not been considered to any great extent by the South African courts. Apart from general principles of insurance law, there are various peculiar aspects of marine insurance in which specific clarity and certainty is needed. It is submitted that the measures afforded by the draft Act are welcome as they fortify substantive law and remove the antiquated uncertainty of the sources of South African marine insurance law.

We have come a distance in marine insurance law to the extent that some concepts of marine insurance have become obsolete, for example, the concept of insurance on bottomry as determined in *Macke, Dunn & Co v S British Insurance Co (The "Paz" case)* (1885 3 SC 405). The time has come

for South African marine insurance law to create or update (should the draft legislation be retained) a statute that will reflect the relevant changes in law. This effort would be a significant contribution in South African marine insurance law.

It must be noted that there are various international initiatives to harmonize marine insurance laws. The draft Act is a correct response to these efforts in the South African context as it deals with the specialized marine insurance terms in a clear and accessible manner. In South Africa this specialized law and information must be expressed fully to a greater extent in the form of an appropriate South African Marine Insurance Act. This will serve as an educational and developmental tool in South African marine insurance law. It is therefore proposed that the draft bill must be revisited, considered and promulgated.

Portia Ndlovu
Attorney of the High Court
University of KwaZulu-Natal, Durban