AVERAGIUM

Newsletter of Harvey Ashby Limited, Average Adjusters & Claims Consultants
WINTER 1999

The First Year

The end of August saw the completion of our first year of operations. It was a very successful year, exceeding our expectations in every way.

The move away from the City after almost 30 years has proved to be a good decision. Our quality of life has improved and yet being away from the City has not been detrimental to the business. Perhaps this is not surprising given modern communications and the fact that the majority of our clients are overseas.

Our portfolio of clients continues to grow. This is important as the frequency of claims continues to diminish, principally due to a greater emphasis on safety.

There were two particular trends during the year. Firstly, we received many more instructions as general average adjusters than in recent years. Secondly, we were instructed in respect of several cargo losses which appear to involve fraud on the part of the shipowners or charterers.

Our continuing objective is to provide high calibre services which are valued by our clients. We look forward to our continuing relationship with all our clients and contacts.

Hull or Machinery?

A hull policy requirement to apply an additional deductible in the event of a claim for machinery damage can lead to much scratching of his head by an adjuster while he ponders whether all parts lost or damaged by an insured peril should be regarded as machinery in the context of a deductible wording.

Take for example, the Institute Additional Machinery Damage Deductible Clause, 1.11.95., which reads, in part, as follows:"Notwithstanding any provision to the contrary in this insurance a claim for loss of or damage to any machinery, shaft, electrical equipment or wiring, boiler, condenser, heating coil or associated pipework arising from any of the perils enumerated in clause 6.2.1 to 6.2.4 inclusive of the Institute Time Clauses,Hulls (1995), or from fire or explosion when either has originated in a machinery space shall be subject to a deductible of…"

As the perils named in clauses 6.2.1 to 6.2.4 refer, mainly, either to loss or damage caused by a latent defect or by an act of negligence, you may think it quite straightforward that the 'intention' of underwriters is to penalise those owners who employ contractors or crew who do not maintain the appropriate standards when carrying out their services / duties in relation to a ship's machinery. But intention can never be the final arbiter in determining whether particular circumstances are within or without a particular wording.

For example, what if the jib of a deck crane is damaged and is required to be replaced as a consequence of an act of negligence by the crew. Would it be correct to apply the machinery damage additional deductible in this case?

Although the reference to fire or explosion in the Clause necessitates that either of these operative perils must originate in a machinery space, no such location limitation applies to loss of or damage to "machinery", as the Clause refers specifically to "any machinery". Thus if an electrically operated windlass was damaged by a peril named in one of Clauses 6.2.1 to 6.2.4, we would apply an additional machinery damage deductible, because we regard a windlass as "machinery", notwithstanding that it is deck machinery.

However, the fact that a part (of a ship) is connected to machinery is not the criterion for determining whether or not

(continued overleaf)

WELCOME

Welcome to the second edition of AVERAGIUM, Harvey Ashby Limited's Newsletter which we had hoped to publish several times during 1999. However, pressure of work has prevented this. Nevertheless we trust that you will find the Newsletter informative and would welcome any comments or contributions.

Those of more mature years may recall that AVERAGIUM was the telegraphic address of Bennett & Co, the average adjusting firm with which Messrs Harvey and Ashby started their average adjusting careers in 1969.

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Overheads

The allowance of operators or contractors overheads in oil & gas claims is frequently an area of dispute between the assured and the adjuster or insurer. This is particularly the case where the assured claims a significant percentage of the claim and argues that this is what the last adjuster allowed!

There can be no doubt that in the event of an insured loss the assured is entitled to be indemnified in respect of the reasonable cost of the remedial measures required to restore his property to its pre-accident condition. The operative word is "indemnify", to pay what it has cost; ideally, no more and no less.

The extent to which overheads can be claimed depends to a large extent upon what costs have otherwise been claimed and, for this reason, the allowance of overheads is generally best left to the discretion of the adjuster. For example, if labour costs have been claimed on the basis of basic wage cost only (i.e. what the workman is paid), it is clearly reasonable to uplift this cost to reflect other financial outlays incurred as a result of employment. However, if the labour rates have been established including employers' burdens, it may not be appropriate to include a further overhead. Another factor with respect to labour costs, is the extent to which supervision has been claimed separately.

In view of the above variables, it would seem difficult to establish a set percentage uplift for overheads on labour costs to be applied in all cases. However, if only basic wage costs are claimed, an uplift of 10/15% may not be unreasonable, although this would be subject to local variable factors.

Notwithstanding the above, where labour is provided by a third party we find it difficult to see how an allowance of overheads can be justified, other than in relation to the cost of supervision. It is clear that the use of third party labour does not attract the same cost burden as using your own labour force.

We accept that where an assured procures materials, equipment or spare parts used in relation to a repair, an overhead

cost is incurred in relation to the selection, procurement and receiving of the goods as well as the accounting activities involved, irrespective of whether the supply is obtained locally or from overseas. It may be argued that, unless the assured has had to take on extra personnel, these activities do not actually involve any extra cost, nevertheless, it is the practice to accept the reasonable cost of these activities as part of an energy insurance claim. Therefore, the only issue is what is reasonable.

It is clearly not reasonable to apply a significant set percentage in all cases. For example, there will be very little, if any, additional cost in purchasing six drilling bits rather than one. Why should the allowance for overheads be six times higher?

In our experience percentage allowances, where agreed as appropriate, vary from 2% to 15%, the latter generally being acceptable only in relation to relatively small claims where a lesser percentage will not cover the costs likely to have been incurred. However, we consider that it is preferable to treat each case on its merits and to agree a reasonable monetary allowance to reflect the likely extent of overhead costs incurred in each particular instance.

Hull or Machinery? (continued)

the additional deductible is to be applied. In fact this became clear when application of the Clause was reviewed recently by the Commercial Court in The "Lydia Flag"(1998).

The Vessel lost its rudder approximately 8 months after a dry-docking. It was accepted by the litigants that the loss was caused by an act of negligence of some kind on the part of the repairers who had dismantled and then re-assembled the rudder in the dry-dock.

The Court thought it relevant to note the context in which the word "machinery" appears in the Clause, viz., in references to shafts, electrical equipment and wiring, boilers, condensers, heating coils and associated pipework.

The Court acknowledged also that the word "machinery" is apt to refer to motors of various kinds, including those that operate the Vessel's steering gear. However the Judge concluded that the rudder was a moveable part of the hull rather than machinery and that therefore the Institute Machinery Damage Additional Deductible did not apply in this case.

With due deference to the learned Judge, our (Oxford) dictionary defines a machine as 'an apparatus for applying mechanical power having several parts each with a definite function'. It seems to us that a steering gear is a machine which comprises of several parts, one of which is the rudder. However, we are aware of a long standing practice (malpractice?) in the London market of regarding a vessel's rudder as part of her hull.

The Judgement and practice are consistent with certain Institute clauses that pre-dated the introduction of deductibles as standard in all hull clauses – (we realise it is hard to believe that we were around in those times, but we started as boy adjusters in short trousers!) – wherein the rudder was specifically excepted from steering gear, as a part of the hull of a ship.

Which brings us back to the question posed earlier – is the jib of a deck crane, "machinery", for the purpose of interpreting the Institute Machinery Damage Additional Deductible Clause?

Interestingly, the old F.P.A. Absolutely Hull Clauses, which identified parts of a ship which were not deemed part of the hull, referred specifically to, winches, cranes and windlasses, separately from machinery. However, our dictionary defines a crane as a machine for moving heavy weights and we incline to the view that as the jib of a crane is integral to its function, it is a fundamental part of this deck machinery and as such, would be subject to application of the Additional Deductible.

A Little Local History

The Trinovantes, sometimes Trinobantes, were tribe of ancient Britain who lived in what is now Essex. Very little is known of them. They joined with Julius Caesar, who invaded Britain in 54 BC, against their rival tribes but were themselves conquered by the Romans in 43 AD. In 60 AD they joined an alliance with Boudicca (Boadicea) against the Romans.

Boudicca was Queen of the Iceni, an East Anglian tribe who the Romans allowed a certain degree of autonomy. The tribe had profited greatly from trade across the English Channel and had even issued their own coinage.

When Boudicca's husband, Prasutagus, died without a male heir, he left his wealth to his two daughters and the Roman Emperor Nero, in the belief that this would placate the Romans and secure his Kingdom. However, this was not to be. The Romans annexed his Kingdom, plundered the tribe's property and made slaves of the family of the dead King. This resulted in Boudicca raising a rebellion against the Romans in association with other East Anglian tribes.

The rebels burned Colchester, St. Albans and London, killing many thousands of Romans and pro-Roman Britons. The revolt was finally suppressed as a result of a battle in 61 AD in which some 80,000 Britons are said to have perished. It is also said that Boudicca either took poison or died of shock!

Westwood Park

Cargo Claims – Mitigation not Delay

A cargo of fuel oil was insured subject to the Institute Cargo Clauses (A) extended to cover "contamination however arising". Upon arrival at destination the cargo was found to be contaminated. However, it was established that by careful blending during discharge the contamination could be eradicated and the cargo accepted as sound. This blending was carried out but delayed the discharge operation to the extent that demurrage became payable to the Shipowners. The cargo owners present a claim to their insurers in respect of the costs incurred in blending the cargo together with the amount of the demurrage paid to the shipowner.

It is quite clear that there is a prima facie claim under the policy arising from the contamination of the cargo. The Duty of Assured (Minimising Losses) clause of the Institute Cargo Clauses impose an obligation of the assured to take such measures as may be reasonable for the purpose of averting or minimising a loss recoverable under the policy and further provides that the underwriters will, "in addition to any loss recoverable hereunder", reimburse the assured for any charges reasonable and properly made in complying with this duty.

The cost of blending the contaminated cargo was clearly incurred in order to prevent the loss or diminution in value of the affected fuel oil. On the face of it the demurrage payable to the shipowner was incurred on this account also, however, the insuring clauses contain the following exclusion: "In no case shall this insurance cover … expense proximately caused by delay, even though the delay be caused by a risk insured against."

Demurrage is the amount designated in the charterparty to be paid by the charterer to the shipowner as liquidated damages for the delay of the vessel beyond the number of days (lay days) provided for in the charterparty for the loading and discharge of the vessel. Thus, on the face of it, demurrage is an expense caused by delay and thus excluded from coverage. However, in this case such a position would overlook that it was the cargo owner's objective of minimising the ultimate loss under the policy which led to the expense being incurred.

However, there is a substantial argument that the undertaking to pay the cost of mitigation "in addition" to the loss otherwise recoverable, takes the cost of mitigation outside of the main policy coverage only to which do the exclusions apply. In other words, the delay exclusion only applies to the issue of whether or not the contamination itself is recoverable and not to the recoverability of the cost of mitigating a covered loss.

Thus, in this case, the cargo owner might have discharged the cargo immediately upon arrival at destination and in doing so would have rendered the cargo considerably less valuable. The point of the Duty of Assured clause is not only to require the assured to mitigate any loss but to provide him with an incentive to do so. If some varieties of mitigation costs are excluded this would act as a disincentive to mitigate.

We would be pleased to provide copies of the following documents upon request:

- Our Brochure
- The York-Antwerp Rules 1995
- General Average security forms

Misunderstanding the need to complete an Average Bond

Our involvement with our Associates, Berridge & Co. of Cardiff, in one of the major container ship casualties of the last 12 months, involving a fire in cargo, drew our attention to a practice, that may lead to a shortfall in adequate general average security.

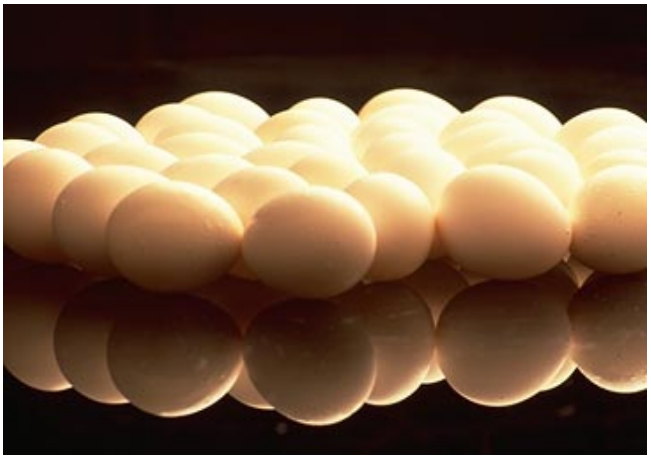
Ordinarily the documents to be completed by the concerned in property at risk in an accident where general average is declared by the vessel's master and which requirements are recognised world-wide, are:-

i) the completion of a Lloyd's Average Bond by the cargo receiver, together with,

ii) provision of an unqualified and unlimited Average Guarantee by acceptable insurers, in lieu of a cash deposit.

An insurer of containers proposed to delete from their guarantee each container for which the shipowner had also obtained the signature to an average bond by the container owner/ lessor.

The position taken by the container insurer misunderstood the need for the completion of an average bond, which document creates the contractual relationship that may not otherwise exist in the contract of affreightment. Furthermore, in certain jurisdictions, an average guarantee is not legally enforceable in the absence of an average bond completed by the receiver. Thus in the event of litigation, and because the court in which claim for general average contribution is heard may be determined by the jurisdiction where liability for the accident giving rise to the general average act is tested and not where the insurer is resident, it remains necessary to collect both i) and ii) above.



The Association of Average Adjusters

We are proud to be able to call ourselves Members of this Association having demonstrated our expertise to the satisfaction of the Examining Committee some years ago. However, from now on we must call ourselves Fellows; this title having been adopted at the Annual Meeting in May 1999 as the official designation of those who have qualified for membership by examination.

When we qualified it is fair to say that the Association was emerging from a period when it was regarded as something of a 'closed shop' in that one was invited to sit for the examinations. We are pleased to be able to say that this is very much not the position now. The Association is making a determined effort to attract new Fellows and to this end has changed its examination procedure to a fairer modular system which, it is hoped, will appeal to claims practitioners in the market as well as those who practice the art of average adjusting.

Further information about the examinations and the Association generally are available from Ms. Dawn Sole at the Association's office at 200 Aldersgate Street, London EC1A 4JJ (Tel: 020 7956 0099 Fax: 020 7956 0161).

Comings & Goings

During the last year we have received vsitors at Westwood Park from Los Angeles, Singapore and Sydney. We have visited Denmark, Norway, Sweden, Abu Dhabi, Bahrain, Aberdeen and Indonesia.

In March 1999 Brian Ashby addressed a seminar organised by the Department of the Environment.

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