AVERAGIUM

Newsletter of Harvey Ashby Limited, Average Adjusters & Claims Consultants
Winter 2000

London Market Claims Procedures - A Setback for Revisionists?

In 1997 the London Marine Insurance Market established a set of claims handling guidelines, commonly known as the Hull Claims Protocol, with the objective of giving Underwriters more involvement in the claims process and speeding up the settlement of claims. Unfortunately, the Protocol was issued after little consultation with Shipowners who regarded the document as heavy handed and overly legalistic. For these reasons its implementation was resisted and it has been rarely used.

Earlier this year, the Joint Marine Claims Committee instigated an initiative to revisit the Protocol. A working party was established, which included representatives of the broking and shipowning fraternities as well as the Association of Average Adjusters; one of whose representatives was Michael Harvey.

The working party readily agreed that the primary objective of any guidelines should be to make the claims handling process more efficient and thereby expedite the settlement of claims.

The key issues for Underwriters are: (a) influence, if not

"IGLOO MOON" STS, November 1996 (NOAA)

control, over the appointment of the average adjuster, (b) regular reporting by the adjuster so that claims issues can be dealt with prior to any adjustment being finalised. Underwriters wish to monitor the claims process so that they are made aware of issues as they are identified and have some input into resolving them. Thereby avoiding delay in agreeing and settling claims once the adjustment has been issued and finally, (c) monitoring of the cost of adjustment.

It is clear that Underwriters feel that they do not have enough contact with shipowners and adjusters and are thus not 'fully involved' in the claims process.

The meetings of the working party included discussion of all aspects of the claims process, from the radical, such as the possibility of the adjuster appointing the claims surveyor, to those which may be regarded as mere housekeeping.

Following the meetings a revised set of Guidelines was drafted and developed. The principal provisions of the latest draft of these Guidelines are as follows: -

1. Notification and Instruction - This provision requires the assured to advise the broker of any incident likely to result in a claim as soon as possible. For the broker to instruct The Salvage Association or other agreed surveyors on behalf of underwriters and, once it has been determined that the services of an average adjuster are required, for the assured to notify one of the adjusters named in the 'Slip Endorsement'. The 'Slip Endorsement' being the mechanism by which the Guidelines would be adopted in relation to a specific insurance. The provision, as drafted, also gives the assured the right to appoint an adjuster not named in the 'Slip Endorsement', subject to underwriters approval.
2. Reporting - This section establishes a regime of reporting, by both surveyors and the adjuster, within set time-frames. The following are the principal elements:(a) The surveyors reports to be issued simultaneously to underwriters, adjuster

Welcome to the fourth edition of AVERAGIUM, Harvey Ashby Limited's Newsletter which we endeavour to publish twice each year. 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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London Market Claims Procedures - A Setback for Revisionists? (continued)

and the assured (via the broker). (b) The adjuster to issue a preliminary report within 30 days of appointment, simultaneously to the assured, underwriters and brokers. Such report to include a brief description of the circumstances of the incident and any other information relevant to causation or quantum. (c) The adjuster would be required to issue a more comprehensive report within the next 60 days and to report further at six monthly intervals thereafter. (d) The adjuster will issue a short-form adjustment where appropriate.

3. Fees - Under this head, underwriters agree to accept the adjuster's reasonable fees relating to the reporting process. And in relation to the adjuster's charges overall, would require a detailed narrative describing the work performed together with a breakdown of the fee to show the hours worked and hourly rate for each grade of person involved. Underwriters agree to pay interim accounts when appropriate.
4. Payments on Account - This section essentially represents a statement of the existing practice with regard to payments on account; i.e. underwriters will consider any reasonable request for a payment on account of major items of expenditure without prejudice to underwriters ultimate liability and that any payments in relation to unpaid items will be distributed to creditors via an intermediary (usually The Salvage Association).

"MEGA BORG" - June 1990 (NOAA)

5. Settlement of Claim - This provision embodies some important concessions by underwriters aimed at speeding up the claims settlement process: (a) Small claims for repaired damage may, with the agreement of underwriters and the assured, be completed on the basis of agreed estimates. (b) Invoices not exceeding US$7,500, which would normally require the approval of the underwriters surveyor, may be approved by the adjuster provided that the total of invoices so approved does not exceed US$50,000. The surveyors undertake to respond to the adjuster's queries within 10 working days. (c) Underwriters undertake to respond to any claim within 10 days of receipt of the adjustment.
6. Mediation Clause -In the event of a dispute that cannot be settled amicably, the assured would be entitled to refer the dispute to mediation in accordance with the CEDR (Centre for Dispute Resolution) model mediation procedure. This provision only applies where there is no mediation clause in the policy.

In addition, appendices included a proposed Slip Endorsement and the proposed format for average adjuster's reports.

Regrettably, the revised Guidelines have not found favour with the shipowning community. It is understood that they see no justifiable need for what they view as a set of rigid rules to apply to the processing of adjustments. They are also concerned regarding the erosion of their fundamental right to appoint the adjuster of their choosing. They are, however, not adverse to a more open flow of information to facilitate the speeding up of the claims process, provided that openness exists on both sides.

There can be little doubt that there would be considerable benefit to the claims process by underwriters being kept 'in the loop'. We also believe that regular reporting alone would help to remove some of the scepticism that underwriters show with regard to the role of adjusters.

There is absolutely no doubt in our minds that the skills of the average adjuster are of tremendous benefit to the shipping and insurance communities. However, there are two important considerations. Firstly, that the environment in which adjusters operate should have efficient and logical procedures which benefit all parties involved and, secondly, that the adjuster should have the full confidence of all sectors of the market.

Regular reporting and the inclusion of underwriters in the claims loop should provide a more open framework in which claims can be settled amicably and expeditiously We need to develop a system which is not adversarial, where the skills of the adjuster can be properly applied for the benefit and understanding of all concerned – this is the true role of the average adjuster.

In our niew, the Guidelines should not be cast aside, but those elements which streamline the claims process should be taken and used as the foundation upon which to build an efficient claims handling regime acceptable to all involved.

Irrespective of whether or not we can agree a set of Guidelines, we believe that there is, nevertheless, much that can be done to streamline the claims handling process in the market. It is clearly beneficial to keep underwriters in the loop and for the underwriter to have a dialogue with the adjuster whenever either party considers that such a dialogue would be beneficial to expedite the ultimate settlement of the claim. Such a system, in our experience, works well in other markets.

However, underwriters should appreciate that an open channel of communication brings with it some responsibility. When they are brought into the loop, say during the immediate aftermath of a casualty, when the shipowner is struggling with several alternative courses of action and seeks underwriters approval of, or comment on, his chosen course, it would be totally inappropriate to receive the current standard response of "seen" or "noted w.p.".

Changes to the operating parameters of underwriters surveyors would also be beneficial in terms of expediting the settlement and reducing the cost of claims.

An example. It is our understanding that surveyors are required not to comment on the cause of any damage unless the shipowner's representative has made a formal allegation. We have recently sought the advices of a consulting engineer on the

cause of an engine damage, based on his advice we wrote to the Underwriters Surveyors putting forward the consultant's view that the cause was a latent defect in part A. The response clearly indicated that the cause of the damage had already been considered and was a latent defect in part B. All this exchange has done is to delay and enhance the cost of the adjusting process. If the surveyor has a clear view as to the cause of a loss, it is clearly in the interests of all concerned that he is allowed to say so in his report.

Even if it is not possible to agree a set of written guidelines at the moment, we hope that all those involved will accept that there is much that can and should be done to improve the claims handling procedures in the London Market.

[The above article is based on a presentation given by Michael Harvey at a Seminar organised by the Association of Average Adjusters at the Little Ship Club in London on 27th November 2000.]

"BAHIA PARAISO" - Antarctica, January 1989 (NOAA)

Arcane Matter Sees Light of Day

When misadventure strikes a loaded vessel, necessitating resort to a port of refuge and her repair before the voyage can be continued, concern on the part of the ship-owner regarding how much the delay will affect the net cost of completing the voyage, may be matched by similar concern felt by the cargo-owner as to the affect that the delay may have on delivery of his goods. A Non-Separation Agreement (NSA) – somewhat bizarrely named as it comes into use only when a ship and her cargo become (voluntarily) separated at a port of refuge – is invariably entered into by the ship-owner and the cargo-owner in circumstances where mitigating action is taken to avoid the affect on the goods that protracted delay might otherwise cause awaiting repair of the original vessel.

The essence of the bargain entered into by the cargo-owner and the ship-owner is that in exchange for the latter arranging earlier delivery of the goods in another bottom, the cargo-owner agrees to treat the general average as continuing, notwithstanding the termination of the community of interest. As a consequence, the ship-owner can claim also in general average for his post-separation running expenses at the port of refuge.

The standard form of NSA in use in recent years has come to include what is known as the Bigham Clause. A clause that gives the cargo-owner the benefit of hindsight, in that it states it is understood that the amount payable by the cargo-owner under the NSA shall not exceed what it would have cost him if he had opted to take delivery of his goods at the port of refuge and forwarded them at his own expense to destination.

In a recent English law case, the "Abt Rasha", the potential consequence of the cargo-owner invoking the Bigham Clause came into sharp focus when the difference between the rateable contribution due from cargo, based upon it's delivered value at destination and the assessed cost to the cargo-owner of forwarding his goods to destination at his own expense, was calculated at over US$ 787,000. The facts concerned the transhipment and forwarding undertaken of a crude oil cargo to destination by the ship-owner from his ULCC, which had suffered damage to it's steering gear on the voyage, rather than wait 4 months before the ULCC could continue to destination after repairs had been effected.

Not unnaturally, the cargo-owner invoked the Bigham Clause cap, leaving the ship-owner with a shortfall in the recovery of his port of refuge detention expenditure that had been allowed in general average in accordance with the York-Antwerp Rules 1974. The ship-owner claimed from his hull insurers the balance of the cargo contribution not recoverable by reason of the Bigham Clause. The claim was heard by the Commercial Court. The Court considered the relevant provisions of the vessel's hull cover, including, Clauses 11.1 and 11.2 of the ITC, Hulls, 1.10.83., which read (in part):-

11.1 This insurance covers the Vessel's proportion of salvage, salvage charges and/or general average….
11.2 Adjustment to be according to the law and practice obtaining at the place where the adventure ends, as if the contract of affreightment contained no special terms upon the subject; but where the contract so provides the adjustment shall be according to the York-Antwerp Rules….

also Section 66 (3) and (4) of the Marine Insurance Act, 1906, which read (in part):-
(3) Where there is a general average loss, the party on whom it falls is entitled, …. to a rateable contribution from the other parties interested….
(4) Subject to any express provision in the policy where the assured has incurred a general average expenditure, he may recover from the insurer in respect of the proportion of the loss which falls upon him….

In the Commercial Court it was held that Section 66 provided that entitlement to a rateable contribution was subject to the conditions imposed by maritime law; furthermore, that the hull insurers were not responsible for the Bigham excess. The ship-owner appealed. The Court of Appeal reversed the decision of the lower court.

The Appeal Court concluded that:

i)The hull insurers were correct to concede that ship's proportion of general average within the meaning of Clause 11.1 includes the expenses admissible in general average only by reason of the NSA and notwithstanding that, unlike the 1994 York-Antwerp Rules, the 1974 Rules do not include any reference to any NSA or indeed one incorporating a Bigham Clause. To suggest otherwise would be to maintain that insurers' liability should be assessed without reference to any agreements not recognised by the York-Antwerp Rules.

ii)The NSA, of which the Bigham Clause was an integral and indivisible part, was reasonably entered into. Since the Bigham Clause clearly is part of the NSA, the respective proportions of the general average due from ship and cargo must be calculated by reference thereto. Thus when applicable on the facts, cargo's proportion is limited to the amount of the Bigham cap and ship's proportion is the balance.

iii)The Court rejected the hull insurers' view that the expression in

Arcane Matter Sees Light of Day (continued)

Section 66(4), "*…he may recover from the insurer in respect of the proportion of the loss which falls upon him…*"can only mean rateable value. The Court decided that there is no reason to hold that the reference to proportion in 66(4) should be limited to rateable proportion when the sub-section does not expressly do so.

The Court noted that there is no particular authority to support construction of the word "*proportion*" in 66(4) as meaning only rateable proportion. An earlier law case was cited as supporting the 'wider' interpretation; in that case the general average expenditure incurred by the ship-owner exceeded the combined salved values of ship and cargo. Contribution was collected from cargo in full up to its value. It was held that what was recoverable from the hull insurers was the balance in excess of cargo's rateable proportion, in the sense that it was the proportion of the loss that fell upon the assured, as contemplated by Section 66(4).

What are the ramifications of this apparent 'wider' interpretation of the potential liability of hull insurers under Section 66(4) of the Marine Insurance Act, if any ? The leading judgement suggested the approach taken by the Court would not, "*open the floodgates to all manner of agreements between ship-owners and cargo-owners.*"

Nevertheless, the leading judgement included two interesting observations by way of postscript. Firstly, the fact that similar, if not identical provisions to the standard form of NSA, incorporating the Bigham Clause are included in the 1994 York-Antwerp Rules, leading to the conclusion that this form of NSA is accepted as reasonable in the market. Secondly, the Judge said that he would have expected expenses of the kind incurred in this case to be recoverable from hull insurers and not left to be met by the ship-owners. He added that it seemed to him that it would be an odd result if the effect of cargo invoking the Bigham cap would be to make a proportion of general average expenditure not fully recoverable from cargo or hull insurers.

In addition, the second judgement given, concluded that the NSA was a reasonable one in the circumstances of this case. The Judge noted that it had the effect, by admitting in general average substantial towing charges from the port of refuge to the port of repair, of reducing hull insurers' liability. Whereas absent the NSA, these charges would have been part of the particular average claim on ship and which would have increased hull insurers' liability. This judgement stated also that a ship-owner and a cargo-owner are not excluded from making an agreement that has the effect of defining the extent of hull insurers' liability under Section 66(4). He suggested that insurers' protection is in the right to challenge the reasonableness of the agreement made by their assured and which assessment of reasonableness must have regard to their statutory obligation under under 66(4). With the proviso that the corollary of the obligation is that it does not permit the assured to enter into a NSA that increases insurers' liability to the benefit of another.

The latter observations endorse the practice that we advocated in our previous Newsletter, viz., that prudent practice includes obtaining the agreement of hull insurers before entering in to a NSA with cargo. Furthermore, the fact that similar provisions to the standard NSA appear in the 1994 York-Antwerp Rules, does not entitle the ship-owner to disregard his insurers' interests. They may challenge the reasonableness of their assured arranging separate forwarding of cargo, as the "Abt Rasha" decision clearly shows.

[*Harvey Ashby Limited provided uncontroversial expert evidence to the Commercial Court]*

Comings & Goings

During the last six months we have visited Australia, Singapore, Abu Dhabi, Dubai, Greece, Norway, Denmark and Indonesia.

Colchester Oysters

Oysters have been grown around Colchester since the Romans settled here in 50AD and are cultivated and harvested by fishermen whose families have worked the oyster beds for generations.

Colchester Oysters are available from September and April and are world famous for their quality and flavour. To mark the opening of the season, the mayor of Colchester presides over the Colchester Oyster Feast in the Town Hall.

Oysters are generally sold live, afficionados prefer to shuck (open the shell of) the oyster and immediately consume the oyster raw. However, there is a difference of opinion as to whether the oyster should be swallowed whole or chewed before swallowing! Oysters are also served smoked or cooked.

Pearls are formed in oysters by the accumulation of the material lining the shell around a piece of foreign matter over a period of years, however, pearls formed in edible oysters are of no value.

Finally a poem -

Oysters by Jonathan Swift

Charming oysters I cry:
My masters, come buy,
So plump and so fresh,
So sweet is their flesh,
No Colchester oyster
Is sweeter and moister:
Your stomach they settle,
And rouse up your mettle:
They'll make you a dad
Of a lass or a lad;
And madam your wife
They'll please to the life;
Be she barren, be she old,
Be she slut, or be she scold,
Eat my oysters, and lie near her,
She'll be fruitful, never fear her.

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