AVERAGIUM

Newsletter of Harvey Ashby Limited, Average Adjusters & Claims Consultants
Summer 2001

Underwriters Jib at Crane Damage

A claim under a hull and machinery policy involved a ship's deck crane that had toppled over whilst being operated by stevedores during cargo discharge operations. The damage sustained to the crane in the act of toppling over was so extensive as to cause its condemnation.

The attending Underwriters' Surveyor reported that the cause of the collapse had been agreed with the Owners as attributable to corrosion in the pedestal support brackets. The claim was advanced by the Assured on the basis that, whilst they acknowledged that no claim within the policy conditions could be made for the corroded condition of the pedestal support brackets, they maintained that Underwriters were liable for the consequential damage sustained to other parts of the crane when it fell over.

Certificates were produced by the Assured in evidence of the examination and test of the crane by Class on the last occasion that it passed survey; the next Class survey was not due when the subject casualty occurred.

The hull and machinery insurance cover included the Institute Time Clauses, Hulls, 1/10/83, with the Institute Additional Perils Clauses, Hulls, 1/10/83, attached.

On the facts, the Assured pointed to the evidence that, unexpectedly as far as they were concerned, the crane had suffered serious damage when it toppled over whilst in operation. They maintained that, within the cover provided they were entitled to claim for the reasonable cost of replacing the crane, excluding the pedestal support brackets, under any one of the following heads of claim:-

Institute Time Clauses, Hulls, 1/10/83

6.2. This insurance covers loss of or damage to the subject-matter insured caused by

6.2.1. accidents in loading discharging or shifting cargo or fuel

6.2.2 ……any latent defect in the machinery or hull

provided such loss or damage has not resulted from want of due diligence by the Assured, Owners or Managers.

Institute Additional Perils Clauses, Hulls, 1/10/83

1. In consideration of an additional premium this insurance is extended to cover

1.2 loss of or damage to the Vessel caused by any accident or by negligence, incompetence or error of judgement of any person whatsoever

2. The cover provided in Clause 1 is subject to all other terms, conditions and exclusions contained in this insurance and subject to the proviso that the loss or damage has not resulted from want of due diligence by the Assured, Owners or Managers.

The first potential head of claim, "*accidents in loading discharging or shifting cargo or fuel*", requires the Assured to

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USA Connection

We are pleased to announce our association with Tomar Marine Partners Ltd., Average Adjusters and Claims Consultants based in New Jersey. Tomar is a new company formed by Marty Rahn and Tom DiStefano who are both members of the Association of Average Adjusters of the USA. Our association will enable us to provide adjusting services involving New York law and practice. See the 'Associates' page on our website for contact details.

MDH Elected!

At the annual meeting of Fellows of the Association of Average Adjusters on 9th May, Michael Harvey was elected Vice-Chairman of the Association.

Welcome to the fifth 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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Underwriters Jib at Crane Damage

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establish that an accident has occurred and caused loss or damage.

The only English law case quoted with regard to this wording is Stott (Baltic) Steamers Ltd. v. Marten [1914], which case it is suggested led to the expansion of cover within the Inchmaree Clause. A boiler being lowered into the hold of a ship by a crane, fell into the hold as a consequence of the crane's tackle breaking and which in turn caused damage to the hold. Although the damage sustained to the hold of the ship was held not to be within the term 'perils of the sea', it is considered that such damage would now be covered by the above-quoted addition (6.2.1.) to the Inchmaree Clause.

However, can the collapse of the subject Vessel's deck crane be regarded as an 'accident' within Clause 6.2.1? Certainly its failure occurred within the timeframe laid down for the next examination by Class, but was it an accident? The Underwriters' Surveyor's reported that the collapse was caused by the poor structural condition of the crane's foundation which was evidenced by serious corrosion in that it was heavily rusted. Unexpected wear is not the same as accidental wear. Even if it came as a surprise to the Assured, the fact that corrosion occurs as a result of the normal use of the Vessel is not in itself evidence of a fortuity; normal wear is not necessarily linear. Although exceptional wear entitles an assured to a rebuttable presumption of fortuity, it cannot overcome the statutory exception of ordinary wear and tear, inherent vice or nature of the subject-matter insured – Section 55 (2) (c) of the Marine Insurance Act, 1906 – if the factual evidence supports the conclusion that the exceptional wear is simply the inevitable consequence of the final stage of the unchecked progress of normal wear. This condition can hardly be termed as accidental.

The fact that the crane collapsed before the next Class survey was due is not evidence on its own that the wear leading to its failure was something other than ordinary wear and tear. Anymore than one could reasonably argue that the failure of a part in your motor car could not be the result of ordinary wear and tear simply because it had passed its annual statutory test 6 months earlier.

Moving on, can it be argued that the corroded condition of the pedestal support brackets was a 'latent defect' in terms of Clause 6.2.2? A latent defect has been judicially defined as a defect that could not be discovered on such an examination as a reasonably careful skilled man would make – Brown v. Nitrate Producers S.S. Co. [1937]. This is a factual question to be answered by technical people familiar with such equipment. However, the evidence in this case was that the corrosion was patent and was therefore discoverable.

In the circumstances considered so far, can the Assured succeed alternatively under the Institute Additional Perils Clauses, Hulls, 1/10/83?

Under Clause 1.2 the Assured are still required to demonstrate that an accident has occurred if they assert that the damage sustained when the crane toppled over was caused by an accident. Where the evidence points to the failure as merely the natural development of ordinary wear, without the intervention of any fortuity, a claim for the damage sustained to the crane will not succeed because its collapse was not an accident but the inevitable consequence of wear and tear.

Can the Assured argue alternatively that even if, with the benefit of hindsight, action should have been taken earlier to deal with the wear to the pedestal support brackets that was occurring, because this condition was not advised to the Owners or the Managers by the crew, there was no want of due diligence on their part and that furthermore, there was either negligence or an error of judgement on the part of the crew in failing to warn the Assured of the corroded condition of the pedestal support brackets before the crane collapsed?

It is considered that the proximate (dominant) cause of the collapse of the crane was the corroded condition of the pedestal support brackets, as opposed to any failure on the part of the crew to take preventative action; their failure was simply a negative factor in the chain of events. But such negligence did not cause the collapse of the crane and therefore cannot be considered as a proximate cause of the loss.

Bailees Insurance on Cargo Stored Ashore - a necessary general average expense?

A laden vessel deviates to a port of refuge as a consequence of accidental damage sustained during the voyage and the repairs necessary to enable her to continue the voyage to destination in safety, require the temporary storage of the cargo ashore.

The vessel's P&I liability insurers recommend to the owners that bailees' insurance be arranged on their behalf. Their reasoning is that the discharge of the cargo is, prima-facie, a deviation from the voyage that the owners have contracted to perform. They consider that an insurance against the owners' potential liability to the cargo interests and for loss or damage to the cargo, is a duty that the owners have, by law or by custom, as bailee of the cargo. The liability insurers suggest that additional cover be put in place to ensure that there is no gap in the owners' existing liability insurance arrangements that may not protect them in this situation.

Having declared general average as a result of the necessary deviation into the port of refuge, the owners may expect that the premium on the insurance, recommended by the liability insurers would be allowable in general average.

A number of points arise from the advice received by the owners.

Firstly, the question as to whether the deviation is justifiable in terms of the contract of affreightment. If the expenditure arising from the decisions to resort to the port of refuge and to off-load the cargo there and store it whilst repairs necessary to complete the voyage were effected, are properly admissible under the York-Antwerp Rules, Rules X and XI, we would regard this as prima-facie evidence that the deviation is justifiable. By arranging storage of the cargo at the port of refuge whilst arrangements are made to continue the voyage to destination, owners demonstrate that they are acting reasonably to properly keep and care for the cargo in their charge. There may be defences available to the cargo interests, under the contract of carriage, and arising from the reasons for the deviation of the vessel from her proper course, but such contractual defences will not affect the fundamental point that a deviation that satisfies the criterion for allowing a deviation in terms of Rules X and XI is almost certainly justifiable in terms of the contract of affreightment. Even in the event of a successful defence being raised by cargo, by pleading a breach of the contract of carriage by the owners, the usual terms of entry with a vessel's liability insurers will entitle the owners to recover cargo's proportion of the general average in such circumstances.

Next, the advice from the liability insurers indicates that the cover taken out on behalf of owners is solely an insurance against their potential liability to the cargo interests in the event of a breach of some duty, whether as a bailee or otherwise. The definition of general average in Rule A of the York-Antwerp Rules requires that the extraordinary sacrifice or expenditure, which is the subject of allowance, is made or incurred for the common safety of property involved in the maritime adventure. It cannot be argued with conviction that it is reasonable to allow in general average the cost of insuring the potential liability of one party to the common maritime adventure to another. A claim against the owners for negligence in the handling of cargo is a matter for owners' liability insurance cover, not general average.

As to insuring the cargo itself against loss or damage, whilst Rule X(c) admits the cost of this insurance, if reasonably incurred, it is considered that such insurance as envisaged by this Rule and if arranged, is more than likely to be a re-insurance of a risk already covered by standard cargo insurance conditions placed on the goods on board. The cargo interests had taken already the decision, when the voyage commenced, as to whether or not to insure their cargo against normal risks during a justifiable deviation. However, in circumstances where a vessel is carrying general cargo, involving many separate cargo interests, time may not permit owners to make enquiry of all the cargo interests as to whether or not they already have insurance in place that permits cover to remain in force during any variation of the adventure arising after the exercise of a liberty granted to owners under the contract of affreightment. In such instances, it would be prudent to arrange limited insurance for the storage risk, for the benefit of the general average interests.

But where one is concerned with a bulk cargo, involving a limited number of cargo interests, it is considered that storage insurance admissible in general average in accordance with Rule X(c), whilst the cargo is stored ashore or in lighters, is only necessary if required by the concerned in cargo. As it is arguably a reasonably simple matter to ascertain from the cargo interests whether or not they require the storage risk to be specifically insured.

www.harvey-ashby.co.uk

Earlier this year we totally revamped our website. Our intention is enable the site to be used as a resource as well as providing details of who we are and what we do.

To this end we have included a facility to download copies of useful reference documents and have provided links to other useful sites. The list of available documents and the links will be added to as and when appropriate.

The documents for downloading are presented in PDF format and require a programme called Acrobat Reader to view and print them. Almost all computers come with this programme already installed but where this is not the case it is available on the internet free of charge. A link to the website where it can be downloaded is included in our site.

The documents available for download now are: -

- The York-Antwerp Rules 1994.
- The Rules of Practice of the Association of Average Adjusters.
- Standard general average security documentation - Lloyd's Average Bond & a General Average Guarantee.

The links from our site provide useful information such as: -

- Marine Insurance Act [1906]
- The Norwegian Plan
- Lloyd's Open Form of Salvage Agreement
- World News & Weather
- UK Shipping Forecast
- Exchange rates - current and historic
- Bunker prices

In addition the site includes details of companies with which we are associated in Wales, USA, Canada, South Korea and Brazil.

JIT Delivery - out of the ordinary course of transit?

Just In Time (JIT) delivery is a practice operated world-wide in the automotive industry whereby vehicle components are made available at the assembly plant just before installation. For the obvious reasons of cost and the efficient streamlining of car production, the philosophy is that component parts should not be stored for long periods at or near the production line. The global practice of manufacturers is that just before their installation, parts are stored in a holding area for a short period prior to being delivered to the production line, i.e., JIT.

The logistical efficiency of JIT delivery is no doubt an essential part of the success of the likes of, Mr. Ford or Mr. Honda. But a potential claims' problem can arise between the component suppliers and their insurers if special regard is not given to the potential conflict between the proper interpretation of the Transit Clause in the standard cargo clauses and a trade practice such as JIT.

Take the example of car components that are exported under a DDP (Delivered Duty Paid) invoice. The transit is under the control of, and risk of the seller and yet if a JIT arrangement between the seller and the buyer applies, it is the latter who controls the ultimate time of delivery. What if, subsequent to the discharge of the car components overside from the overseas vessel at the final port of discharge and prior to delivery to the assembly plant, an unforeseen delay occurs on the production line which in turn delays the delivery of the components to the plant. Furthermore, during this delay a fire occurs at the holding warehouse, resulting in the destruction of the car components. Let us imagine that at the time of the fire the components had been retained for 45 days in the holding warehouse (50 days after discharge from the overseas vessel). The assured claims for the loss by fire asserting that whilst a longer than expected delay was experienced at the warehouse, the goods were simply in transit to their intended final destination and that furthermore, the 60 days limit (from discharge overside from the overseas vessel) had not expired.

Clause 8 (Transit Clause) of the Institute Cargo Clauses, 1/1/82, states that the insurance on goods terminates on the occurrence of one of three events, whichever shall first occur, viz.,

- on delivery to the final warehouse or place of storage at the destination named in the policy, or,
- on delivery to any other warehouse or place of storage, whether prior to or at the destination named, which the assured elects to use either for storage, other than in the ordinary course of transit, or for allocation or distribution, or,
- on the expiry of 60 days after completion of discharge at the final port of discharge.

The 60 days limit had not expired, but is it correct to conclude that the ordinary course of transit was continuing at the time of the fire, in the sense that the holding warehouse was simply an intermediate 'stepping stone' in the transit from sellers' premises to buyers' premises?

The fact is that the goods are shipped to the holding warehouse by the seller but it is the buyer who determines when they are to be forwarded on to the assembly plant. In that sense there is a strong argument that the components are being 'stockpiled' at

the holding warehouse before being allocated or distributed by the buyer for his immediate use and that therefore the ordinary course of transit, as contemplated by Clause 8, had already terminated when the fire occurred. But what if the fire had occurred only a matter of a few days after the arrival of the goods at the holding warehouse, would it not be correct to argue that such a delay was merely part of the ordinary course of transit under a JIT arrangement? Does the period of delay at the holding warehouse determine whether it is part of the ordinary course of transit or conversely a place of storage that is being voluntarily used for allocation or distribution?

The trade practice of JIT arrangements in industries such as motor manufacturing are well-known and in the absence of special terms being agreed at the time the insurance is placed, it is considered that regard should given as to the information that was disclosed when the bargain was struck. For example, was an indication given to insurers as to the period of time that it was expected that components would ordinarily be spent at the holding warehouse 'en route' to the assembly plant?

The reality is that policies of insurance are governed in their interpretation by insurance law and practice and not by trade practices such as JIT. The assured would be advised to obtain the express agreement of his insurers that cover remains in force at an intermediate place of storage, irrespective of the terms of the standard Transit Clause.

Comings & Goings

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

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