AVERAGIUM

Newsletter of Harvey Ashby Limited, Average Adjusters & Claims Consultants
Winter 2003/4

A Christmas tale of our times

"Here's to you, Merry Christmas, everybody's having fun!" Kevin grimaced as he drifted with his fellow homebound commuters towards Liverpool Street Station, past a shop seemingly intent on repelling potential customers, as it bombarded their senses with the annual repetitive sound of Slade. Working life was anything but fun at the moment thought Kevin, as he moved on quickly to avoid the rasping voice of Noddy Holder becoming irritatingly lodged in his memory. What was on his mind was the Syndicate's involvement in a series of expensive casualties over the year, culminating in the recent container ship collision in the Channel, for which they were the leader. And to cap it all, they also had a line on a large consignment of containerised French perfumery that had been lost or washed overboard with all the other containers.

From the manner in which his Underwriter had ranted and raved that morning, you would have thought that I was personally responsible, sighed Kevin. Don't shoot the messenger, or to be precise, the Box's claims man, thought Kevin as he recalled the meetings earlier that day. First reports of the casualty indicated that our vessel was at fault for the collision with the passenger ship, probably increasing our loss way beyond the likely CTL of the container ship, Kevin reflected. He recalled the advices from solicitors and surveyors that made uncomfortable reading. The evidence was that senior duty officers on the container ship appeared to have been pre-occupied, trying to sort out a computer virus that had interfered with them receiving Owners' urgent routeing instructions, leaving an inexperienced junior officer in charge on the bridge, with disastrous consequences. Whilst there were reports of containers being washed ashore all along the Cornish coast.

Kevin tried to banish thoughts of work from his mind at the sight of the welcoming lights of his house, following his walk from the local railway station. At least his wife and teenage son Damian should cheer him up. Kevin dreamed that Damian would fulfil the potential he had shown when younger at rugby and blossom into another Jonny Wilkinson, but of late, he seemed more interested in his computer or watching the Simpsons. As the warm air of the house greeted him, he could hear the voice of Homer coming from the tv in the lounge. "Hi Damian, did you play rugby today ?" "Da-ad, we don't play every day you know." "Work at it Damian, look where's its got Jonny Wilkinson, he's now with Hackett." "Er ?" "You know the up-market gents' outfitters, a sponsorship contract to supplement his rugby income." "Yes, well I'm sort of busy with projects at the moment and besides, I'm only in the School third team! "

Later that evening, Tracy looked across at her husband asleep on the sofa with his mouth open, lips vibrating gently with his rhythmic snoring. He looks tired she thought, the Christmas break would do him good. Tracy had bought some of the expensive perfume that Kevin liked her to wear and which was being sold at an unbelievably cheap price at a market stall in the town. "Specially h-imported by my Cornish cousin for you Darling !" The stall-holder had joked when she bought it. That would take his mind off work, thought Tracy.

As they went to bed, Kevin noticed the light coming from under the door in his son's room. "Don't be long in going to bed Damian." "Just working on a project Dad", he replied. You've got to admire the long hours he puts in on these school projects, thought Kevin, no doubt it will bring its reward.

Damian smiled to himself as he worked on his next project. What an inspiration his Dad was! Unwittingly suggesting a name for his next computer virus – a sponsored message from Jonny Wilkinson! How could both admiring women and men fail to be tempted to open an e-mail from the man of the moment? It would be even more successful than the last.Nice one Dad, you're responsible for this one!

We wish you all a very ... **Happy Christmas**

International Hull Clauses - One Year On

On 5th November, the Joint Hull Committee launched revised International Hull Clauses (1/11/03) only a year after the original clauses had been announced. This was no surprise since at the original launch the JHC had made it clear that a revision would be forthcoming. However, this announcement was, perhaps, a double edged sword. It was pleasing to see the JHC encouraging the consultative process to continue but it also meant that brokers and shipowners were not persuaded to use 'temporary' clauses and would wait for the 'bugs' to be removed. Hence, the IHC were hardly used.

The JHC established a technical working group to review the comments made and to propose changes. Michael Harvey was invited into this group as a representative average adjuster.

The group reviewed a log of comments on the clauses from the time that they had originally been released, this included views expressed in articles and at seminars, and it had also sought the opinions of the same representative bodies that assisted with the preparation of the original clauses.

(continued overleaf)

Welcome to the eighth edition of AVERAGIUM, Harvey Ashby Limited's Newsletter which we endeavour to publish twice each year.; although this is the only edition published in 2003. It has been another busy 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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International Hull Clauses - One Year On (continued)

Changes were made to the Clauses in pursuit of three principal objectives. Firstly to clarify that which was not as clear as it might have been, secondly, to make the clauses more palatable to Shipowners and, thirdly, to continue the modernisation of the cover.

The first category of change included amendments to the Perils Clause and, in particular to sub-clauses 2.2.1 and 2.2.2. The IHC (1/11/02) covered loss or damage caused by any latent defect in the vessel's machinery or hull, but only to the extent that the cost of repairing that damage exceeded the costs that would have been incurred to correct the latent defect. After the clauses had been launched it quickly became apparent that the wording used was not a model of clarity and was capable of several interpretations. The wording has therefore been amended to make it clear that the insurance covers loss or damage caused by any latent defect in the machinery or hull but does not cover the cost of correcting the latent defect. A new sub-clause provides that where there is a claim for loss or damage caused by a latent defect, the insurance will also cover one half of the costs common to the correction of the latent defect and to the repair of the loss or damage.

The specific reference to common costs was necessary, not only on account of a lack of clarity in the original wording, but also due to a variance in practice amongst average adjusters in London. Until the Court of Appeal decision in the "NUKILA" [1997], it was almost universally accepted that the coverage of loss or damage caused by any latent defect under the Institute Time Clauses, permitted the assured to recover the cost of repairing consequential damage but not the cost of repairing or replacing the defective part itself. Whilst it was common aground between adjusters that the cost of repairing or renewing the defective part was excluded, the treatment of common costs, e.g. the opening up of machinery, varied. There were those, including ourselves, who excluded half of any common costs but there were others who merely excluded the cost of the replacement part itself. Clearly it is necessary to have consistency in the treatment of claims and the changes to the Perils Clause (Clause 2) achieve this.

Notwithstanding the clear words used, it has already been suggested that common costs might only be those of opening and closing machinery and not those such as superintendence, towage and docking. In our view such a differentiation is untenable. Common costs are common costs and include the cost of all activities required to rectify both the latent defect and the consequential loss or damage.

The JHC Working Group took the opportunity to clarify the cover in relation loss or damage caused by bursting of boilers and breaking of shafts by similarly expressly only covering one half of costs common to the repair of consequential damage and the repair of the boiler which bursts or the shaft which breaks.

Representations made by Shipowner organisations clearly indicated areas of concern to them and gave rise to the second category of revisions.

The Duties of Assured Clause of the original version of the IHC (Clause 48.3) imposed a duty on the assured, as a condition precedent to Underwriters' liability, not to knowingly or recklessly mislead or attempt to mislead Underwriters or to conceal any circumstance material to the proper consideration of a claim "whether legal proceedings be commenced or not". The quoted words were incorporated as a result of the decision in the "STAR SEA" [2001] where it was held that the duty of good faith under the Marine Insurance Act, 1906 (Section 17) was superseded by Court Rules once litigation had begun.

Those representing the Shipowners felt that the clause could be used to compel an assured to disclose matters which were subject to legal privilege and that it was wholly inappropriate to attempt to overrule the "STAR SEA" decision. The response to the Shipowners' concerns has been to amend the Clause (now 45.3) by replacing the above quoted words by "prior to the commencement of legal proceedings" and to add a further sub-clause (45.4) making it clear that under Clause 45.3 the assured is not required to disclose any document or matter which is the subject of legal advice or privilege.

The Notice of Claims Clause was another concern to Shipowners. In its original form this clause required notice to be given to the Leading Underwriter within 180 days of when the Assured, Owners or Managers became aware of an accident or occurrence which might result in a claim. It was recognised that this provision might be impracticable as it might be difficult in practice to determine whether or not an occurrence is likely to give rise to a claim under the policy. The wording of what is now Clause 43 has therefore been amended to require notice to be given within 180 days of the Assured etc. becoming aware of loss, damage, expense or liability which may result in a claim.

There was some disquiet that the JHC had not adopted the BIMCO General Average Absorption Clause in the first version of the IHC. As a result the decision to reject this clause was revaluated.

There were four features of the BIMCO clause which gave rise to concern to Underwriters. Firstly, coverage of standing charges could be invoked even where there was no general average or perhaps when there was no accident to the vessel at all. Secondly, standing charges were not defined, Thirdly, the clause imposed a minimum sub-limit of US$150,000 and, finally, no deductible applied to claims under the clause.

These issues were dealt with by amending the clause to specifically provide that it is only applicable in the event of an accident or occurrence giving rise to a general average act, by incorporating a definition of standing charges and by deleting the minimum sub-limit provision. The JHC accepted that the cover should be free from the application of a deductible.

The final category of revision concerns the further modernisation of the cover. There will no longer be any reduction in claims for general average contribution, salvage or sue and labour charges to reflect any under-insurance of the vessel. The Bottom Treatment Clause no longer excludes the cost of supplying and applying anti-fouling coatings to new or disturbed steelwork.

In addition there have been significant revisions to the Navigation Limits (Clauses 32 & 33) and the exclusions applicable to war, strikes, malicious acts, radioactive contamination and chem./bio, have been tidied up.

It would appear that there is a confidence in the revised clauses which the original version did not enjoy. In fact, various Shipowner and Insurance Broker groups have already indicated that they will support the revised clauses.

A full copy of the International Hull Clauses (1/11/03) and The Joint Hull Committee's summary of changes from the Institute Time Clauses (01/10/83) are available for downloading from our website. We are aware that the LMBC will be circulating a comparison of the IHC with other hull forms in the near future. We will ensure that this is available on our website as soon as it is available.

A covered bridge in Vermont

York-Antwerp Rules 2004?

In the Summer of 2000, in the fifth edition of AVERAGIUM, we wondered whether or not the York-Antwerp Rules would be amended at the CMI (Comité Maritime International) Conference in Singapore in February 2001. In the event they were not, however, as the next CMI Conference approaches (Vancouver, June 2004) it looks quite possible that there will be some amendment this time.

As reported in 2000, there has been an ongoing debate regarding the limitation of general average, if not its abolition. Revisionists argue that general average has developed too far from its original concept of common safety to one which recognises common benefit and thereby, it is suggested, compensates Shipowners for costs which are essentially losses caused by delay or increased costs of performing the contracted voyage. The revisionists, prompted primarily by cargo insurers, also express general concern at the cost of general average including adjusters' charges.

Although no action was taken in Singapore to revise the YAR, in response to this ongoing debate, the CMI established a Working Group on General Average. This Working Group was asked to consider the principle issues raised in a report prepared by the International Union of Marine Insurers (IUMI) who are in the forefront of the call for reform. Following a number of meetings and some consultation, the Working Group issued a Report in March 2003. This Report was accepted by the CMI who, in June of this year, appointed an International Sub-Committee to formally consider the work of the Working Party and to make recommendations to the Vancouver Conference.

The International Sub-Committee invited submissions from interested parties and considered the responses at a recent (November) meeting in London. The Sub-Committee is currently preparing its final report which will be published in the New Year in preparation for the Vancouver Conference where its proposals will be debated and voted upon.

We understand that the following changes are under consideration: -

- Common Benefit – The YAR 1994 permit the allowance of detention expenses where a vessel is detained effecting repairs necessary for the safe prosecution of the voyage. Such charges include port charges, wages and maintenance of the vessel's crew and fuel and stores consumed by the vessel. It would seem likely that proposals to exclude crew costs and/or fuel costs will be debated.

- Temporary Repairs – The cost of temporary repairs at a port of refuge may be allowable in general average where they result in a saving in expense to the general average; i.e. reduced detention expenses. It is suggested that the financial benefit, if any, to the shipowner by reason of the deferment of permanent repairs to, say, a cheaper port, should be deducted from the cost of temporary repairs allowed in general average.

- Salvage – It has been suggested that salvage should be excluded from general average on the basis that each party incurs its own liability for salvage and that it is becoming commonplace for the owners of individual salved property to come to a settlement with the Salvors independent of the other parties. Against that, in some countries, notably the Netherlands, the shipowner is liable for the payment of salvage in full in the first instance and therefore incurs salvage on behalf of all parties to the adventure.

- Time Bar – It has been suggested that the YAR should incorporate a proscription period. The general view seems to be that since such a provision may be invalid under some laws it is preferable to leave matters as they are.

- Interest – The parties that have funded general average expenditure or have suffered a general average sacrifice are entitled to interest at a rate if 7% per annum under the 1994 Rules. It has been suggested that the rate should be variable, perhaps set by the CMI each year.

- Commission – An allowance of 2% is made to those who have funded general average expenditure. It is suggested that this allowance is unnecessary especially since interest is payable.

We must now await the Vancouver Conference.

Colchester Reef Light Revisited

The third edition of AVERAGIUM included an article about Colchester Reef Light. This was a lighthouse which had originally stood on Lake Champlain, between Vermont and New York State in the U.S.A. but which now stands in the grounds of the Shelburne Museum near Burlington, Vermont. MDH and his wife toured Vermont in October and visited the Museum.

The Museum was founded in 1947 by Electra Havemeyer Webb who had a lifetime fascination of everyday objects and was a passionate collector. The Museum was established to exhibit her collections and includes buildings from all over New England.

Covered Bridges are a unique and reasonably common feature of the Vermont countryside. Electra Webb purchased such a bridge for her collection and arranged for it to be moved to the Museum. So that the bridge had something to traverse, a large pond was built and filled with water. The bridge, in component form, duly arrived and workers were engaged to erect it across the pond. One of these workers, not knowing who she was, was heard to say to Electra Webb: "The only thing that I know about the woman who owns this place is that she is not too smart. It would be much cheaper to fill this pond in rather than build a bridge across it"!

MDH stands by the light!

Valuation agreed or not, that is the Question

When is a 'value to be insured' not the insured value? No, this is not a seasonal riddle from a Christmas cracker. But it is useful to remind ourselves of the problems that can arise if, when insurance is taken out, the intention to state the value of the subject-matter insured is not specifically agreed and so stated in the policy.

The applicable principle of marine insurance law is set out in Section 27(2) of the Marine Insurance Act, 1906, which defines a valued policy thus, "a valued policy is a policy which specifies the agreed value of the subject matter insured." Furthermore, the current form of marine policy, the Mar 91 form, which came into general use with the revision of the policy form and Institute Clauses in the early 1980's, contains a schedule where the name of the assured, vessel and subject-matter are to be set out; the form also sets out a space for "agreed value (if any)" and, "amount insured hereunder." What could be simpler and clearer?

Presumably the Owners of the yacht "Solveig" did not expect any problems as to valuation when, in 1996, they completed a proposal form showing the value to be insured as £100,000. This proposal was accompanied by a valuation, required by Underwriters, from a Lloyd's approved surveyor who stated the yacht's value to be in the region of £100,000. The proposal was accepted by Underwriters and a policy was issued. The policy comprised a schedule/certificate with attached conditions including the Institute Yacht Clauses 1/11/85. After the insurance was renewed on the same terms in 1997, a fire broke out on board in 1998 and, despite the efforts of the crew, it took hold and the vessel sank. Claim was made by Owners in the amount of £100,000, on the basis that this was the agreed value of the vessel. Underwriters raised a number of defences to the claim and contended also that the claimants were not entitled to receive more in respect of the vessel's value than it's value at the time of the loss, which their expert evidence stated was in the region of £70,000.

In fact, in the schedule/certificate it provided that the Sum Insured was £100,000.00, no reference to an agreed value was mentioned. The claimants conceded that, ordinarily, the term 'sum insured', in the schedule would point to the policy being an unvalued policy. Nevertheless, they contended that reading the policy as a whole together with the proposal form, this was a valued policy. Owners pointed to the fact that the specific provisions in the policy dealing with unrepaired damage and ctl referred to the insured value. In particular, the definition of ctl referred to, "the sum appearing in the schedule hereto as the value of the insured property."

However, the main insuring clause in the policy expressed the agreement of Underwriters to indemnify, "up to the amounts and/or limits contained herein." It was concluded by the Court that as the words actually used in the schedule were, "sum insured", the reference in the ctl clause and elsewhere in the policy to an insured value was applicable only if there is an agreed value. If no value is specified as agreed, said the Court, the references in these clauses cannot assist. Furthermore, the request of Underwriters for a valuation was not regarded as decisive. Although the proposal form contained the words, 'value to be insured', this was not an indication that the value so stated would be agreed as the insured value by Underwriters.

The Court held that if the proposal form and all of the policy clauses were read together, it did not point to the intention of the parties that the sum stated in the schedule as the "sum insured" was the agreed value of the yacht. The words "sum insured" ordinarily mean that the sum is a ceiling on the recovery under an unvalued policy. It was said that nothing in the policy displaced the ordinary meaning of 'sum insured' and, therefore, the policy did not specify, in accordance with Section 27(2) of the Act, the agreed value of the yacht.

Humpty Dumpty sat on a wall.
Humpty Dumpty had a great fall.
All the king's horses
and all the king's men
Couldn't put Humpty together again!

Almost everyone must know this nursery rhyme. However, how many are aware of its link with Colchester?

During the English Civil War in the seventeenth century, Colchester was a Parliamentarian stronghold which was captured by the Royalists in the Summer of 1648. Part of the Royalist defences was a large canon mounted on a church tower. This canon was known as "Humpty Dumpty". The church tower was hit during an attack and the canon crashed to the ground.

The rhyme celebrates this event and the unsuccessful attempts by the Royalist cavalry (horses) and infantry (men) to mend the cannon.

Comings & Goings

During the last twelve months we have visited Singapore, Jakarta, Balikpapan, Dubai, Abu Dhabi, Copenhagen, Amsterdam and Aberdeen.

In December 2002, Michael Harvey presented a paper in Jakarta on The Development and Adjustment of General Average to the members of the Insurance Association of Indonesia.

Michael was invited to address a Seminar organised by the London Shipping Law Centre in 29th January 2003. The topic was the International Hull Clauses.

Michael was also invited to address the Insurance session of the Money and Ships section of the London International Maritime Convention which was held at ExCel in London in September. Michael considered the role of the Average Adjuster in the 21st Century.

Copies of Michael's presentations can be downloaded from our website.

The Association of Average Adjusters has held two of its successful lunchtime Seminars during 2003. In January the topic was the International Hull Clauses - the speakers included Peter McIntosh (Wellington), Tim Taylor (Hill Taylor Dickinson), Richard Cornah (AAA) and Michael Harvey. A Seminar in November consisted of two panel discussions. The first dealt with the revisions to the International Hull Clauses and the second the possible revision of the York-Antwerp Rules. Panellists discussing the revised clauses were Donald Chard (The Chamber of Shipping), Chris Zavos (Hill Taylor Dickinson), Keith Jones (AAA) and Michael Harvey. Those discussing the future of the York Antwerp Rules were Bent Nielsen (Kromann Reumert), Donald Chard and Tim Madge (AAA).

We are pleased to announce our association with Marine Claims Office of Asia and Marine Claims Office of Australia, Average Adjusters and Marine Claims Advisors, with offices in Singapore and Perth respectively. These companies have recently been established by Chris Kilbee, who is a Fellow of the Association of Average Adjusters. This affiliation will enable both companies to benefit from representation in each others home region. Full contact details are available on our website.

harvey ashby limited

Westwood Park. Little Horkesley, Colchester, Essex CO6 4BS, U.K.
Tel: (44) 01206 274081 - Fax: (44) 01206 274099 - email: hal@harvey-ashby.co.uk
website: www.harvey-ashby.co.uk

Michael Harvey
Home Tel: (44) 01440 788033 - Home Fax: (44) 01440 788034 - Mobile: 0780 1232937

Brian Ashby
Home Tel/Fax: (44) 01732 454297 - Mobile: 0780 1232916