AVERAGIUM

Newsletter of Harvey Ashby Limited, Average Adjusters & Claims Consultants
Winter 2004/5

A Chairman's View

In May I had the honour of being elected as the Chairman of the Association of Average Adjusters and one of my first duties was to write an introductory note to the Association's Annual Report which is sent to all categories of members and can be downloaded at: average-adjusters.com

In that note I mentioned that I first became aware of the profession of Average Adjusting in 1969 when I applied for, what was intended to be, a temporary position with Bennett & Co. At that time the profession flourished. There were forty-eight qualified Members who were held in high esteem by all areas of the market. The cupboards of average adjusters were full to overflowing with cases and if the average adjuster's word was not law, it seemed that challenges were few and far between. However, at that time the profession was something of an autocracy. Candidates were invited to sit for the examinations but only if a berth had been secured in a member firm; there was a certain air of arrogance about the profession.

Not surprisingly, all this has changed as the profession has sought to keep pace with changing attitudes and the requirements of the shipping and insurance communities. For example, the Association's examinations are now open to anyone and have been modernised into a modular system. Nevertheless, the skills of the average adjuster are under-utilised and some underwriters perceive a lack of objectivity on the part of some adjusters.

Over the past five years or so strenuous efforts have been made to raise the profile of the Association; for it to play, and to be seen to play, a fuller role in the market. This has included the promotion of the topical lunchtime seminars and advising market committees, such as that which created the International Hull Clauses. However, much remains to be done. The profession must challenge market perceptions concerning the objectivity of some within its midst and must ensure that the considerable expertise and experience of the average adjuster is fully utilised to the benefit of the claims process.

In September, I was invited to address the first International Marine Claims Conference which was held in Dublin. The theme of this most successful conference was "Communication is the Key" in the context of the claims process. Over 140 underwriters' claims adjusters, lawyers, surveyors and average adjusters attended and rarely have I experienced such a worthwhile event.

My presentation to the Conference included the following:

"I recognise that the Fellows of the Association, a relatively small band of highly skilled and qualified claims professionals, need to change and adapt to a changing world, to secure the future of the profession. Similarly the insurance market needs to adapt to make the best use of our experience and expertise. A failure on the part of the Association or the London insurance market to grasp the nettle and change attitudes and procedures to maintain and encourage expertise, might ultimately lead to the demise of the profession of average adjusting as a valuable resource available to the market.

"Without support from the market there is a real danger that the skills of average adjusters will be lost and with their passing an irreplaceable fund of knowledge will disappear.

"Both the Association and market leaders need to identify measures that should be taken to use the profession more efficiently and effectively and need to implement changes to ensure the continuance of the profession to their mutual advantage.

"Fellows of the Association recognise that the days of adjusters producing tomes closely resembling (in volume at least) the complete works of Shakespeare, within which claims are evaluated to the last penny, are over. The insurance market and its clients, the Shipping Industry, require a fast, efficient and, perhaps above all, cost effective service. This entails the proper consideration of claims with a measured application of pragmatism. It also involves trust.

"The Market needs to regain confidence in the skills and objectivity of the average adjuster which, to some extent, has been lacking in recent times. Adjusters need to realize that it is their expertise and objectivity which creates the niche for them in the insurance market, if one or other is lacking it will be almost impossible for them to play a full and meaningful role in the claims handling process."

I am pleased to report that the Association is currently involved in two important initiatives. Firstly, it has initiated a dialogue with representatives of London market claims committees to increase awareness and acceptance of the skills and objectivity of Fellows of the Association and to generally see what can be done to improve the claims process. And, secondly, the Association is supporting an initiative of the IUA (International Underwriting Association) to explore the possibility of establishing a means by which claims adjusters can achieve a form of qualification or accreditation to encourage the development of skills. In this respect it is possible that such qualification might be via affiliation with the Association using its examinations or a variety of them.

MDH

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it is essential to take proper professional advice on specific issues.

CTL - Contrasting Terms (not always) Level

The introduction of the International Hull Clauses (IHC) saw the percentage of the insured value required to prove that a vessel is a constructive total loss (ctl) as the result of the operation of an insured peril, made more generous to assureds compared with the previous cover available under the Institute Time Clauses 1.10.83. The Joint Hull Committee decided that the percentage required to prove a ctl should be reduced to 80% of the insured value, from the previous position whereby the assured had to prove that the costs of recovery and repair exceeded 100% of the insured value of the vessel's hull & machinery. If one were cynical, one might conclude that London, acknowledging the competition offered by the Norwegian Marine Insurance Plan (NMIP) 'package', is simply endeavouring to respond to that challenge.

However, the new ctl provision of the IHC 01.11.03 exposes subtleties of difference in cover that assureds and their brokers may wish to consider when evaluating competing insurance conditions on offer.

Since it is the London Market cover for a ctl that has been amended recently, some might suggest 'up-graded' from that available previously, let us consider first the cover offered under the NMIP of 1996, current version (2003).

Take the 'simple' example of a vessel whose hull & machinery is insured for US$5 million and which is also its market value when she suffers fire damage. Repair costs are estimated at in excess of US$4 million. Para.11-3 of the NMIP entitles the assured to claim a total loss indemnity for the 'condemnation' of the vessel if the costs of repairing the ship are at least 80% of either its insured value or its market value, whichever is the higher, at the time the request for condemnation is made. Assuming that in our example case the assured has effected also cover against excess liabilities and which are referred to in the NMIP as hull interest insurance up to the maximum permitted percentage (under para.14-4) of 25% of the hull insured value, the assured can recover US$6.25 million in total if underwriters accept that the vessel is correctly condemnable as a result of the fire casualty.

If the same vessel had been insured subject to the IHC 01.11.03, the test of repair costs amounting to 80% of the insured value equally would have satisfied the requirement for the fire damage claim to be treated as a ctl; subject to the assured giving underwriters notice of abandonment in accordance with section 62(1) of the Marine Insurance Act, 1906 (MIA). Thus the two sets of conditions would treat the example in the same way.

In contrast, the 'older' American Institute Hull Clauses, June 2, 1977 (AIHC), require that the cost of recovering and repairing the vessel shall exceed the "agreed value" (insured value). In this case, as the estimated repair costs are substantially less than the insured value of US$5 million, claim for a ctl under the AIHC cannot be made. The assured would be obliged, either to repair their vessel and claim the reasonable cost of repairs, less the policy deductible, as particular average or to seek to negotiate with his hull underwriters a claim for unrepaired damage, but only upon expiry of the policy and based upon the estimated depreciation in the market value of the vessel by reason of the average damage, with all the potential uncertainty as to the indemnity to be achieved that that course of action raises.

But change the facts. Let us imagine that our vessel is a laden tanker that has grounded heavily and remains fast. Extensive bottom damage is known to exist and a salvage operation is required to be performed before the vessel can be refloated and towed to a shipyard for repair. The estimated cost of the operation required to refloat the vessel is US$500,000 and the removal and repair costs are estimated at a further US$3.5 million. Although the vessel's hull is insured for US$5 million, a sudden upsurge in the price of oil since the inception of the policy has caused her market value to increase to US$5.5 million.

Under the IHC 01.11.03, governed by section 60(2)(ii) of the MIA, the costs that can be taken into account in determining whether the vessel is a ctl, in these circumstances, include the estimated cost of the grounding damage repairs plus the expense of "future salvage operations". Let us imagine also that the assured decides that he will give notice of abandonment of his interest in the vessel, to his hull & machinery underwriters, and claim a ctl without commencing the salvage operation. He can do this, as the combined total of the required salvage operation plus the estimated repair cost amount to US$4 million or 80% of the insured value of the vessel. Possibly his decision is assisted in the knowledge that, if his ctl claim is accepted and settled promptly, he will recover 100% of the insured value of US$5 million plus the additional 25% of this amount he was permitted to insure in respect of what is termed increased value cover under the Disbursements Warranty (Clause 24) of the IHC 01.11.03 and which is the equivalent of what the Norwegians call hull interest insurance. Thus the assured, potentially, stands to recover US$6.25 million.

Because the combined amounts of the estimated cost of repairs plus the estimated salvage operation total just US$4 million, a claim for a ctl would not succeed if the vessel had been insured subject to the AIHC. June 2, 1977 and for the same reason that would have defeated a claim made on these hull insurance conditions in our first example above.

The position under the NMIP, in the particular circumstances of our second example, is less advantageous than that under the IHC 01.11.03. In considering whether or not the conditions for condemnation of the vessel are met, as stated above, it is the higher of 80% of the vessel's insured value or market value against which the repair costs are measured; in this case, 80% of her market value (US$5.5 million) or US$4.4 million. As the repair costs of our second example are estimated at US$3.5 million, the assured is US$ 900,000 short of the figure required to meet the conditions for condemnation under para.11-3 of the NMIP. Under this same paragraph of the NMIP, it is stated that salvage awards shall not be taken into account in determining whether the conditions for compensation are met. However, the Commentary to the Plan then introduces a note of ambiguity by stating that even if the salvage award is not included in the condemnation formula, the insurer must in practice take it into consideration if the assured claims for a total loss (or 'condemnation', as the case may be) before the ship has been salvaged. Nevertheless, whether or not, underwriters would include the estimated cost of the salvage operation, from our example, in their condemnation figures, the reality is that the maximum sum would be US$4 million, which is still US$400,000 short of 80% of the vessel's market value.

Thus if our assured had insured his vessel subject to the NMIP conditions, he could not claim as for a ctl in the stated circumstances, as compared with the IHC 01.11.03.

Let us assume a third set of circumstances. Take the situation that our assured, with an eye on the evidence of a rising market for tankers, decides that he would be better off in the long-term by opting to refloat and repair the vessel, rather than abandon the vessel and claim a ctl, in so far as he could do so. However, let us assume also that the repairs to

CTL (continued)

the casualty damage eventually increase from the US$3.5 initially envisaged, to US$4.5 million because of unforeseen main engine alignment problems. The IHC 01.11.03, like their predecessor conditions, permit the assured to elect to repair a vessel damaged by an insured peril and claim up to 100% of the sum insured as particular average in accordance with section 69(1) of the MIA. Thus the assured could claim his salvage expenses (US$ 500,000) in general average, of which hull underwriters would contribute ship's proportion, plus the actual repair costs in full (US$4.5 million) as this combined total will not exceed the insured value of US$5 million. However, the claim in particular average (repair costs) would be subject to the policy deductible, but which would not have been applied (by reason of the IHC 01.11.03 conditions), if the assured had 'gone the ctl route'. The same result would be achieved, if the vessel had been salved and repaired, and the vessel had been insured subject to the AIHC. June 2, 1977.

However, the position under the NMIP is different in this situation. The final repair cost of US$4.5 million would have meant that the vessel was condemnable and in these circumstances para.12-9 has to be applied. Para.12-9 (and the referenced para.11.5) of the NMIP limits hull underwriters' liability for the cost of damage repairs to the insured value less the value of 'the wreck'. The logic behind the imposition of this limit appears to be to protect underwriters from an insistence by the assured to repair their vessel which, on figures at least, is only fit for condemnation. In the particular circumstances envisaged, it would appear, therefore, that underwriters liability would be limited to US$4 million, being the difference between the insured value of the vessel (US$5 million) and the value of the wreck deduced from the difference between its sound market value (US$5.5 million) and the cost of repairs (US$4.5 million). However, if practical to do so, it might be more correct to deduct the actual damaged value achievable at sale in order to determine the limit of liability.

HAL's Year

During the last twelve months we have visited Copenhagen, Jakarta, Balikpapan, Aberdeen, Abu Dhabi, Dubai, Sharjah, Oslo, Bergen, Krisiansand, Dublin and New York. We have welcomed visitors at Westwood Park from Perth (Australia), Los Angeles and Singapore.

On 26th February the Association of Average Adjusters held another of its successful lunchtime seminars. On this occasion the topic was "Major Casualties – the Modern Role of the Surveyor". Participants considered whether traditional responses to the conflicting demands between cargo and vessel interests after major casualties lead to unnecessary and expensive litigation.

On 6th/7th May BJA and MDH attended an Introduction to Mediation Seminar arranged by the then Chairman of the Association, David Taylor, in association with Gail Winwood of Taramis Human Resources and Peter Ashdown-Barr of InterMediation. The objective of the course was to give Fellows of the Association an insight into the mediation process and principles. Although the course was only an introduction and did not turn any of the participants into mediators overnight, it did provide them with a detailed look at the skills demanded of the best mediators and the opportunity to practice some of those skills. The potential role of the Adjuster as contract neutral was also reviewed. All attendees agreed that the Seminar was a useful and stimulating experience.

MDH participated in the working group of AIDE which prepared a paper to inform the debate regarding possible changes to the York Antwerp Rules leading up to the CMI Conference in Vancouver at which YAR 2004 were adopted.

As noted elsewhere, MDH addressed the inaugural International Marine Claims Conference in Dublin in September and a copy of his address can be downloaded at average-adjusters.com. It is anticipated that this conference will be held periodically.

In his role as Chairman of the Association of Average Adjusters, MDH attended the annual meetings and dinner of the Association of Average Adjusters of the United States which were held in New York.

We will shortly be implementing a complete revision of our website: harvey-ashby.co.uk

From the archives

This is the ninth edition of AVERAGIUM, Harvey Ashby Limited's Newsletter which we endeavour to publish twice each year; although this is the only edition published in 2004. It has been yet 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.

General Average Security - re-inventing the wheel

The latest version of the York-Antwerp Rules, the York-Antwerp Rules 2004, was agreed and recommended for incorporation into contracts of affreightment at the June Conference of the Comité Maritime International (CMI); the 'guardian' of general average. Although a radical reform of the York-Antwerp Rules had been proposed by the International Union of Maritime Insurers (IUMI), prior to the Vancouver Conference, when it came to the vote, there was found to be little overall support amongst the delegates, from over 40 countries, for the proposed restriction of general average to the 'common safety' concept, and away from the existing concept of (successful) completion of the maritime adventure.

Nevertheless, changes have been introduced in the York-Antwerp Rules 2004 that include some 'streamlining' of adjusting procedures to avoid what the delegates appear to have concluded were unnecessary practices. For example, salvage payments are not to be re-distributed in general average under the 2004 Rules, as is provided for under earlier versions of the Rules, and which the Vancouver Conference clearly regarded as an unnecessary additional expense.

We do not propose to review in detail the changes to the York-Antwerp Rules arising from the adoption of the 2004 Rules by the CMI in this article but, in this respect, refer you to a commentary on these new Rules that appears on the Association of Average Adjusters web-site: average-adjusters.com. We welcome initiatives that generally are intended to 'speed-up' the process of general average. Rather like the best referees in sport, average adjusters hope that their involvement in casualties will be accepted as necessary and that their presence will be viewed as assisting the participants to a successful outcome.

One of the necessary actions of the general average adjuster is the collection of general average security from potential contributing interests where there is prima-facie evidence that a general average act has been performed by one of the parties to the maritime adventure.

When the initial advice is sent to all the interests with cargo on board the vessel at the time of the general average act, seeking a positive response to the request for the completion of the usual forms of security by the individual receivers and the insurers of the cargo, we understand perfectly that many receivers will not know the difference between General Average and General de Gaulle! And why should they? Most commercial people manage to go about their business blissfully unaware of and indeed not needing to know - whither general average? Average adjusters will patiently explain the mystery of general average and why completing the standard security forms does not commit them or their insurers to any liability that is not legally due from them provided that the general average has been adjusted in accordance with the provisions stated in the contract of affreightment.

The standard form of general average security that the cargo receiver is required to complete and sign is the Lloyd's Average Bond which, together with a valuation form that is normally attached to it, forms what is referred to as the 'LAB 77' form. As the number suggests, it has been in use since 1977 and indeed, similar forms had been in existence for many decades before. It is a standard form, recognised and accepted world-wide. Similarly, the wording of the forms of average guarantee in use by Fellows of the Association of Average Adjusters, for completion by insurers of cargo, were agreed by the Institute of London Underwriters on behalf of the London cargo insurance market. And yet, increasingly it seems, cargo interests are turning to lawyers who recommend to their clients, for no obvious or justifiable reason, that words and phrases be changed or added to these standard forms.

For example, instead of accepting the standard introductory wording that reads, "*In consideration of the delivery to us or to our order...*", the lawyer may recommend that the wording be amended to refer to the actual intended port of delivery of the cargo, e.g., "*In consideration of the delivery in London to us or to our order…*" A small change, you may remark, in the circumstances. Yet our point is that this amendment, to a perfectly adequate standard form, is unnecessary and furthermore, will necessitate a new average bond if, between presenting the altered average bond and arrival at the intended destination (London), a further casualty occurs that entitles the shipowners to deliver the cargo at a port of refuge short of that destination or, indeed, where the destination changes for whatever reason.

A further example is the unnecessary practice of adding to the agreement in the Lloyd's Average Bond to be signed by the cargo receivers, the words, "*and legally due*" after "*payable*" and where the signatory of the bond agrees to pay "*….the proper proportion of any salvage and/or general average and/or special charges which may hereafter be ascertained to be due from the goods or the shippers or owners thereof under an adjustment prepared in accordance with the provisions of the contract of affreightment governing the carriage of the goods or, failing any such provision, in accordance with the law and practice of the place where the common maritime adventure ended and which is payable in respect of the goods by the shippers or owners thereof.*" (our emphasis). This additional wording, sometimes, is added similarly to the standard wording of the average guarantee, required to be signed by the insurers of the cargo.

In the English law case, the "Jute Express" (1991), Counsel for the cargo interests submitted that the words of the Lloyd's Average Bond meant that when the general average has been stated in accordance with the York-Antwerp Rules, it is not open to the cargo owners to set up actionable fault as an answer to a claim under the average bond. However, the learned Judge stated that, "*I do not see an ambiguity in the (Lloyd's) average bond. I have been left in no doubt that the words 'and which is payable' mean 'and which is legally due'. They preserve the right of the cargo owners to challenge the amount said to be due to the shipowners.*"

Action by cargo interests, that seeks to vary standard general average security wordings that initially were introduced because they had been agreed beforehand by the relevant governing bodies and subsequently have been confirmed in the courts, does not, at the very least, sit well with the efforts by average adjusters to collect security in the most efficient and economic manner. At worst, such action can, potentially, delay a ship and the delivery of her cargo whilst, possibly, also adding unnecessarily to the cost of the general average.

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