AVERAGIUM

Newsletter of Harvey Ashby Limited
Average Adjusters & Claims Consultants

Issue Number 12 - June 2018

Welcome to AVERAGIUM

Our Newsletters are for the general interest of our clients and friends. We trust that you will find this issue of informative and would welcome any comments or contributions.

OUR NEWS

The York Antwerp Rules by Hudson & Harvey

The fourth edition of this reference book was published in September 2017 by *informa law from Routledge* under the auspices of the CMI. The update was necessary following the adoption of the York-Antwerp Rules 2016 and includes a commentary on each of the rules highlighting the changes. The book also deals with practical issues such as general average and salvage security, general average absorption clauses and the insurance of average disbursements and includes a useful comparison with previous rules.

The Journal of International Maritime Law

Since our last issue, Michael Harvey has been invited to contribute two articles to this publication. In the November-December 2016 edition he addressed The York-Antwerp Rules 2016 from the perspective of the average adjuster and in the March-April 2018 edition The Supreme Court decision in The Longchamp and its potential impact on general average (see précis below). Copies of both of these articles can be downloaded from our website.

Autonomous Vessels

The 2017 General Assembly of AMD (Association Mondiale de Dispacheurs – the international association of average adjusters) established a working group to consider the possible impact of autonomous shipping on insurance claims and general average. Michael Harvey was appointed the convenor of the working group whose interim report will be presented to the 2018 General Assembly to be held in Cyprus in September.

IUMI

AMD is an Affiliated Member to IUMI. At AMD's General Assembly, Michael Harvey was reconfirmed as their IUMI liaison officer. Michael will attend the forthcoming IUMI Conference in Cape Town also in September.

AMD is currently assisting IUMI with its education programme.

Spreading the Word ...

- In July 2017 Michael presented two webinars for IUMI on the practical aspects of general average.
- In April 2018 Michael presented a 1 day seminar on insurance principles and the energy Welcar wording for a client in the Arabian Gulf. In fact, the seminar was presented twice due to the numbers wishing to attend.

Rule F of the York-Antwerp Rules and The LONGCHAMP

This case was mentioned in our last Newsletter since when the Supreme Court of England and Wales has settled the matter.

The case concerned the vessel LONGCHAMP which whilst performing a loaded voyage was boarded by pirates off Somalia. A ransom of USD6m was demanded initially but was settled through negotiation by a payment of USD1.85m some 51 days later. The contract of carriage provided for general average to be settled in accordance with the York-Antwerp Rules 1974.

A general average statement was prepared in London within which certain running expenses of the vessel incurred during the period of ransom negotiation (30 January/22 March – 51 days) were allowed in general average; these expenses amounted to USD160,000. The adjuster's justification for this allowance was that these expenses were incurred in order to reduce, by negotiation, the amount of the ransom from USD6m to USD1.85m. He argued that had the first ransom demand been met, the amount of USD6m would have been allowed in general average under Rule A and that by undertaking the negotiation of the ransom there had been a very significant saving to the parties to the general average. The adjuster reasoned that such expenses were allowable in general average in accordance with the terms of Rule F of the York-Antwerp Rules 1974.

Rule F provides as follows:

> *"Any extra expense incurred in place of another expense which would have been allowable as general average shall be deemed to be general average and so allowed without regard to the saving, if any, to other interests, but only up to the amount of the general average expense avoided."*

The cargo interests disputed the allowance made under Rule F and they were supported in this by a report issued by the Advisory Committee of the Association of Average Adjusters who concluded, *inter alia,* that the payment of the initial ransom demand would not have been reasonable and therefore would not be allowable in general average under Rule A which requires expenditure to be reasonably incurred.

The Commercial Court found in favour of the adjuster's position but this was overturned by the Court of Appeal. The Supreme Court handed down its' judgment on 25 October 2017 supporting the decision of the Commercial Court and the allowance made by the adjuster.

The principle issue before the Court was whether or not the daily operating expenses of the vessel incurred by the shipowners whilst they were negotiating the payment of a ransom with the pirates should be allowed in general average under Rule F. The arguments before the Court primarily turned on whether or not the payment of the initial ransom demand of USD6m would have been reasonable. If it would not have been reasonable to have made such a payment, the running expenses allowed by the adjuster could not be justified as being in substitution of it.

The Supreme Court is of the opinion, by a majority, that it was not necessary to resolve the issue of whether or not the payment of the initial ransom demand would have been reasonable because it was not critical to an allowance under Rule F. Lord Neuberger said that the assumption that it was necessary to determine whether the payment of the initial demand would have been reasonable would lead to very odd results: *"It would mean that if a ship-owner incurs an expense to avoid paying a reasonable sum, he can in principle recover under Rule F, whereas if he incurs expense to avoid paying an unreasonable sum (i.e. a larger sum), he cannot recover."* This is known as the "Hudson conundrum", named after Geoffrey Hudson who first described it.

In the opinion of the Court the reference in Rule F to "*expense which would have been allowable"* is reference to an expense of a nature which would have been allowable rather than its' quantum. Thus the Court found that as the ransom was an allowable expense in principle, the expenses amounting to USD160,000 fell within Rule F, this being subject only to it being demonstrated that the payment of a ransom of approximately USD2.4m (the ransom paid plus USD160,000 plus the costs of negotiation) would have been reasonable.

This judgment will have a number of consequences.

Having established the principle that vessel operating expenses incurred while a ransom is being negotiated are recoverable under Rule F, the breadth of such expenses may be considered. The claim in this instance was limited to crew wages and maintenance and fuel costs. However, might other operating expenses such as insurance premiums and, maintenance costs, management costs and, possibly, the interest components of loans also be included? It would appear that such expenses may be included provided that they are incurred on a periodic basis; clearly capital costs or depreciation could not be included.

It is difficult to see why the principle established in this case might not be applied in cases other than those involving piracy and ransoms. For example, during delays on the voyage whilst salvage rewards or even repair contracts or charges in respect of general average repairs are being negotiated.

There would seem little doubt that it was never intended that Rule F should be applied in the way that it has been by the adjuster and endorsed by The Supreme Court. It would therefore seem quite likely that the shareholders in general average the shipowners and the cargo interests, and their respective insurers, may seek to revert to the practice which was generally accepted. This might be achieved by market practice, express language in the contract of carriage or the amendment of the Rules.

Having just been through a quite comprehensive revision of the Rules in 2016, it is doubted whether there will be sufficient enthusiasm to seek an amendment to Rule F in the foreseeable future. Any remedy may therefore seem to be limited to either a market agreement or an amendment to the contract of carriage.

Neither of these avenues would seem to be attractive particularly at a time when the numbers of Somali-style seizures by pirates, where the ship, cargo and crew are held hostage, have reduced to a trickle. Recent piracy events appear to have been directed to the taking of some of the crew as hostages or the theft of the cargo, events which do not have the necessary ingredient for any ransom to constitute general average; the necessity of common peril.

A more comprehensive review of this case can be found in Michael Harvey's article published in The Journal of International Law available from the News page of our website.

What is and what is not 'all risks' cover

The cover afforded by the Nordic Plan in respect of Hull Insurance is often referred to as 'all risks' cover, a reference that can cause confusion in other markets.

The main rule concerning liability of the insurer is set out in Chapter 12-1 of the Nordic Plan:

> *If the ship has been damaged without the rules relating to total loss being applicable, the insurer is liable for the costs of repairing the damage in such a manner that the ship is restored to the condition it was prior to the occurrence of the damage.*

Exceptions to this are contained in Chapters 12-3 (the costs of repairing or replacing parts which are defective as a result of wear and tear, corrosion, rot, inadequate maintenance and the like) and 12-4 (the costs of parts defective due to error in design or faulty material, unless those parts have been approved by the classification society). Thus where the ship is damaged, the cost of repairs will be recoverable unless any of the exceptions apply.

The Scandinavian Market generally describes this as 'all risks' cover. However, when viewed through the eyes of English law this is something of a misnomer.

Although English hull insurance is almost exclusively placed on a named perils basis (the policy only covers those losses proximately caused by one or other of those named perils), the concept of 'all risks' cover is well understood under English law. In England the leading case on 'all risks' cover is British and Foreign Marine Insurance Co. v Gaunt [1921] which involved exceptional

damage by water to a cargo of wool. It was held that the words 'all risks' did not cover all damage however caused and, in particular, damage caused by ordinary wear and tear and inevitable depreciation were not covered. 'All risks' cover under English law covers only damages and losses that are accidental or fortuitous.

There is thus a significant difference between the cover afforded by the Nordic Plan and English policies. For example, under the Nordic Plan in the event of damage caused by wear and tear it is only the cost of repairing or replacing the part which is defective due to wear and tear that is excluded, accordingly any consequential damage to other parts will be covered. But under an English policy damage proximately caused by ordinary wear and tear is excluded, and this applies to both the worn and torn part and any resultant damage.

This is because English marine insurance polices are subject to the Marine Insurance Act [1906] Section 55 which provides:

> ***55 Included and excluded losses.***
>
> *(1) Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.*
>
> *(2) In particular —*
>
> *… … …*
>
> *(c) Unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject-matter insured, or for any loss proximately caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils.*

It is clear that both the damage to the worn and torn part and any resultant damage will have been proximately caused by ordinary wear and tear and thus excluded.

In view of the fundamental difference between the cover under the Nordic Plan and English policies it is clearly incorrect and misleading to refer to them both as 'all risk' polices, we prefer that the Nordic Plan cover be described as 'all damage with exclusions' cover.

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