
AVERAGIUM

Newsletter of Harvey Ashby Limited
Average Adjusters & Claims Consultants

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Welcome to AVERAGIUM

To all our clients and friends we wish you a Happy Christmas and a prosperous New Year.

We trust that you will find the Newsletter informative and would welcome any comments or contributions. The Newsletter is for the general interest of our clients and friends



OUR NEWS

AMD reins pass on...

Michael Harvey completed his two year term as President of AMD (the international body of the Average Adjusting profession previously known as AIDE) in September 2015. At the General Assembly held in Bath, UK, Michael hosted a successful conference and passed the Presidency on to Jonathan Spencer of the USA.

During his term, Michael established AMD with Affiliate status with IUMI. He also participated in the CMI International Working Group that contributed towards the production of the York-Antwerp Rules 2016.

YAR 2016 means revising the book ...

Following the agreement at the annual Conference of the CMI in New York in May this year of a new set of York Antwerp Rules, Michael is now busy revising Hudson & Harvey on The York Antwerp Rules to publish the 4th edition of this valuable reference book early next year. Time to get your orders in ...

He who holds the purse strings ...

Tristan Miller became Treasurer of the Association of Average Adjusters (AAA) in May 2015 and re-elected in May 2016 and sits on the AAA Committee of Management.

Spreading the Word ...

Both Michael and Tristan have been called upon to speak at various events including:

- Michael was a keynote speaker on the YAR 2016 at an Informa conference on General Average
- Tristan spoke at an AAA seminar on Ballast General Average's for vessels under time charter
- Tristan presented a paper on Loss of Hire to the International Marine Claims Conference in Dublin.

For any specific advice or adjusting services our contact details are as follows:

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Substituted Expenses and Consequential Losses.

General Average

Under the York Antwerp Rules there is provision for Substituted Expenses in Rule F and classifies any additional expense incurred in place of an expense which would have been allowed in general average as a general average expense but limited to the amount of the general average expense avoided.

This rule was put under the spotlight in the 2014 case of the "Longchamp". In this case a vessel was taken by pirates in January 2009 who demanded a ransom of USD6M. After a 2 month period of negotiation the ransom was agreed at USD1.85M.

Normal practice of adjusters is to exclude wages & maintenance incurred until the vessel's release as they represent a cost of delay excluded under Rule C.

In this case the adjusters in question allowed wages in general average under Rule F because there was a saving in cost (i.e. the ransom) that would be allowed in general average under Rule A. This alternative approach was approved of by the Commercial Court in 2014.

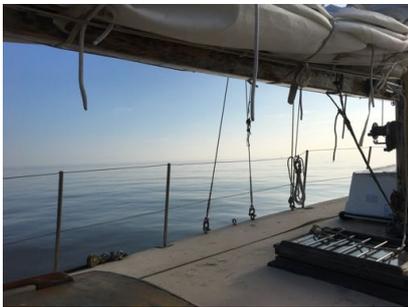


The Court of Appeal revisited this case in July this year. The judgement reinstated the original approach taken by the majority of adjusters to such costs by clarifying that for one expense to be a substitute for another there must be a true alternative course of action taken. A short negotiation which achieves the release of the vessel for a relatively higher ransom is actually the same course of action as a longer negotiation which achieves the release of the vessel for a lower ransom. Therefore wages & maintenance, fuel & stores and other costs of delay will continue to be excluded from general average during ransom negotiations.

We believe leave to appeal to the Supreme Court is being sought by the shipowner so this saga may not be over yet!

Particular Average

Under English Law, and in the absence of any contractual agreement to the contrary, the concept of substitute expenses is not recognised. Take the example of a vessel that suffers damage to her crane and instead of repairing the damage immediately she loads cargo using a shore crane and sails to a cheaper part of the world, discharges cargo using another shore crane and then effects repairs to her crane. The cost of the shore crane is a consequential loss due to the damaged nature of the vessel. It is not a substituted expense that can be claimed from underwriters in substitution for a lower overall cost of repair.



Taking consequential losses and Loss of Hire into account may well mean it is reasonable for the Shipowner to carry out a more expensive repair although the Shipowner may still have his reasons for deferring repairs. We would suggest that when Assured's consider whether to defer repairs for cost reasons but will incur substantial consequential expenses as a result they should talk to their underwriters at an early stage to agree what consequential expenses they would be prepared to cover, if any.

New Insurance Act 2015 and Class Maintained Warranties.

The Insurance Act 2015 came into force on 12th August this year and is the most significant reform of UK insurance law in over 100 years. The Act applies to all new insurance and reinsurance policies that are entered into (including renewals) and to any variations agreed to existing policies (unless agreed otherwise by the parties) from 12th August 2016.

The main areas that the new act changes are:

- disclosure and misrepresentation in business and other non-consumer insurance contracts;
- insurance warranties; and
- insurers' remedies for fraudulent acts.

If we just look at warranties, under the 1906 Act, a breach of warranty discharged the insurer's liability under the contract in its entirety, even if the breach was trivial or unrelated to the circumstances of the loss. Such treatment is now considered to be too draconian and so the new Act has amended the categorisation of warranties and the penalties for breaching them.



The main change is that warranties are now suspensive conditions and so the Assured has the opportunity to rectify any breach of warranty that may occur and reinstate his cover.

However, if a loss occurs when the Assured is in breach of any warranty that is designed to reduce the risk of loss:

1. of a particular kind,
2. at a particular location,
3. at a particular time,

an insurer may not rely on the insured's breach of a term to avoid paying his claim if the breach would not have increased the risk of the loss.

An interesting scenario may occur with the typical warranty that a vessel is classed and existing class maintained throughout the period of insurance. Whether a vessel is classed or not is simple to interpret under the new Act such that if a vessel loses its class, insurance cover will be suspended until the vessel regains its class. However the position for the traditional "existing class maintained" section of the warranty is less clear. It is not possible to remedy this part of the warranty which goes against the whole intention of the new Act. We would suggest that existing wordings such as "existing class maintained" would be interpreted as no more than a simple warranty that the vessel is classed at the time of the casualty. For Insurers to maintain the original intention of the "existing class maintained" warranty we suggest wordings are reviewed to make it clear that this is a condition precedent to liability.



"It is not the strongest of the species that survives, nor the most intelligent that survives. It is the one that is most adaptable to change." attrib. Charles Darwin

A bit about our home ...

We have been in our comfortable modern office in Langham, about 4 miles north of Colchester, for 3 years now. The two storey converted barn in which we sit was originally built in 1864. This barn was initially a grain store of a crescent shape with two traditional large doors, where the horse and cart would arrive at the back door, unload their grain or hay into the barn and move out of the front door. At a later date, the doors were removed and the barns were converted into horse stables facing the courtyard with a grain store to the front.



During World War I, single storey barns were built on to the two storey barn in order to stable more horses that were reared to be sent off to the war in France.

In 1937, the barns were converted for use as a farmyard for fruit packing and retained this use until 2008 when they were bought by the current owner who then completed their renovation to offices in 2011.

The offices sit next to Boxted airfield, a disused World War II airfield. The airfield was built in 1942 by the American airforce and was home to some of the most successful American squadrons to operate in the war. The groups stationed here were:

- 354th Fighter Group Ninth Air Force with P51b Mustangs
- 386 Bombardment Group flying Martin B-26 Marauders
- 56th Fighter Group flying the P-47 "Thunderbolt" fighter
- 5th Emergency Rescue Squadron.

The 354th had the top number of air victories, 701, of any American Fighter Group in the European Theatre of Operations as well as the only Medal of Honour recipient, Col James Howard whilst the 56th Fighter Group had Colonel Francis "Gabby" Gabreski - the top scoring American "Ace" in the European Theatre.

The airfield was abandoned after the war and much of the concrete was used in the construction of the nearby A12 road although parts of the runways still remain.

A memorial (see picture to the right) to those pilots who died sits on the site where the old runway crosses Park Lane a few hundred yards from our office.



Harvey Ashby Limited: Experienced in handling Hull & Machinery claims,
General Average Statements, Loss of hire claims, Builders' Risks, Cargo claims,
Claims on Mobile Drilling Units, FPSOs or Offshore Production Facilities,
Control of Well, Redrilling & Seepage and Pollution claims,
Business Interruption and Loss of Production Income claims.