ASSOCIATION OF
Average Adjusters

150 YEARS OF MARINE CLAIMS PROFESSIONALISM

Loss-of-hire policies in focus – Association of Average Adjusters expert casts light on problem areas

London 4th April 2023: London marine insurance professionals must contend with a series of long-standing problem areas in claims for loss of charter hire, with market clauses stopping short of answers to some key points.

Rui Hao, an associate director of Richards Hogg Lindley, sought to offer clarity on what the clauses "do and do not say" when he addressed a market briefing in the City organised by the Association of Average Adjusters and the International Underwriting Association.

A loss of hire policy comes into play when a vessel has sustained damage covered under a hull and machinery policy. If the assured is deprived of income because of an insured event, insurers would cover an agreed amount per day for a certain number of days over the policy excess.

The following policy conditions are widely used to insure loss of hire: the Nordic Marine Insurance Plan, the American Loss of Charter Hire Form SP40B (known as the Lazard form) and the policy form from the English market and named after the late Mr AB Stewart, a Lloyd's marine underwriter at the time. The latest version of the English conditions is ABS Loss of Charter Hire Insurance (1/10/83), either including or excluding war.

Setting the context for his remarks, Mr Hao, who is a Fellow of the Association of Average Adjusters, explained that while this type of insurance is generically called loss of hire (implying it was for time-chartered vessels), a wide range of business was written on the basis that a vessel was operating for instance on the spot market or in liner trades among others. The cover was better described as "loss of earnings", he said.

Clause 1 of the ABS form provides that "if in consequence of" loss, damage or an occurrence covered under a chosen set of hull clauses, or breakdown of machinery that has not resulted from wear and tear or neglect by the assured, there is prima facie cover under a loss of hire policy.

Mr Hao reminded his audience, who comprised a substantial number of in-person and online attendees, that there must be a causal connection between loss of

earnings and the insured event. This excluded a vessel that would have been out of employment in the absence of the insured event; but when proving a loss, the assured was required to show only that there was a reasonable chance of obtaining a charter.

Before the 1992 case known as The Wondrous, the understanding about the ABS wording was that the trigger for a claim was the insured peril and not that damage was caused by an insured peril. In that case, the High Court rejected a claim for loss of hire on the grounds that a failure to comply with customs regulations led to the ship being detained and this was excluded by the Institute War clauses referred to in the loss of hire conditions. The Court of Appeal held that there must be a loss of or damage to the vessel covered by hull clauses and a repair period to trigger a claim for loss of hire.

However, the policy wording in The Wondrous was not the same as the wording of the ABS form, and a reference to “occurrence” in the ABS conditions after the words “loss, damage” envisaged the aftermath of an insured event that had not caused physical loss or damage to a vessel.

The Nordic Marine Insurance Plan extended cover for circumstances where there was no damage, i.e. a vessel being stranded without sustaining damage, prevented by obstruction other than ice from leaving a port or similar area, because of measures to salvage or remove damaged cargo, or because of an event allowed in general average.

A vessel may be off-hire for repairs after the expiry of a policy during which an accident occurred; if damage occurred under policy number one, and the vessel was put off-hire for repairs during policy two, the claim would be on policy one.

Difficulties might arise when dealing with progressive damage. If 30% of damage attaches to policy 1, and 70% to policy 2 when the vessel is off hire for repairs to the progressive damage, which policy should respond to the loss of hire claim? Assuming the loss of hire policies are back-to-back with hull and machinery policies, it is suggested that the percentages of propagation of damage are applied to net claims under the two policies, said Mr Hao.

He addressed circumstances where a vessel is ‘partly’ prevented from earning hire, the most common example being slow steaming. If a vessel sustains main-engine damage which reduces its speed, then charterers may debit owners with a proportion of the daily hire. Other examples are loss of use of a ship's cranes, reducing its discharging capacity, and loss of use of a damaged hatch or hold,

lowering cargo carrying capacity. Insurers have sometimes argued that claims are only payable when a vessel is completely off-hire, but it is now generally agreed that this would be inequitable and claims for slow steaming were being settled by insurers, said Mr Hao.

He admitted that in practice, the difficulty might be to prove that a vessel's slow steaming and reduction of hire was the direct consequence of a casualty. There are many other reasons for slow steaming, such as to conserve fuel, to avoid port congestion or to provide time for engineers to carry out maintenance. Adjusters would have to satisfy themselves that a loss of hire claim for slow steaming did result from insured perils or ship breakdown and not from extraneous causes.

Would there be a claim for time for repairs extended by events beyond the control of the assured? Mr Hao cited two legal cases: one concerning The London (1914) and the other the well-drilling vessel Toisa Pisces (2012). The reasonable conclusion from those cases was that under English law, claims for loss of time for repairs extended by events outside the assured's control were in principle payable, unless there were a new proximate cause.

Mr Hao turned to the question of what is known as "common time" which might involve operations such as removal to a repair port, tank cleaning, gas freeing and sea trials; or operations involving different classes of repairs carried out simultaneously. The ABS form was silent about that, but the American Lazard form included a simultaneous repairs clause, which provides for time common to different classes of repairs to be divided between insurers and assured.

He said that there were considerations as to whether to call only on the assured to share time which is common to damage repairs and owner's work necessary for seaworthiness, or to extend the principle of sharing common time along the lines indicated by the Association of Average Adjusters D5 rule of practice.

The London practice was that the principles under D5 are applied to common time and simultaneous repairs in loss of hire claims, that is, the assured is called on to share time when damage repairs are deferred until a routine repair period or are carried out concurrently with owner's work immediately necessary for seaworthiness of the vessel.

Mr Hao said that the Nordic Plan differs from English and American practice in that if repairs covered are carried out simultaneously with works not covered but are done to fulfil classification requirements, to enable the ship to meet technical and operational safety requirements, to perform its contractual obligations, or are related

to the reconstruction of the vessel, half of common time in excess of the deductible is to be apportioned equally between both classes of work.

Are additional expenses payable? Clause 12 of the ABS provisions says that insurers have a right to require the assured to incur any expense which would reduce insurers' liability provided such expenses are for insurers' account. Likewise, if the assured incurs additional expenses which would reduce the loss of hire claim, such expenses are in principle allowable to the extent of savings for insurers.

Clause 3 of the ABS form provides that where a recovery in respect of loss of earnings is obtained from third parties, such recovery shall be apportioned between the assured and the insurers as their respective interests may appear. Thus, if loss of hire insurers pay a claim following a collision, and a recovery is obtained from the opponent vessel for loss of hire while the vessel is off-hire for the repairs, the loss of hire insurers would be credited with daily hire recovered beyond the excess period.

But if crew wages are allowed during an extra period of detention at a port of refuge, allowable in general average, should loss of hire insurers be credited with crew wages on paying a claim? Shipowners argue that hire is not divisible into elements of running expenses, direct overheads and profit, although owners expect to pay wages and maintenance out of their hire earnings. Loss of hire insurers on the other hand contend that when owners placed the insurance, they were taking into account running expenses, direct overheads and profit.

As far as Mr Hao understood, the practice was to credit recoveries of wages and maintenance to loss of hire insurers if owners successfully recovered general average contributions. Bear in mind, he added, that credit is not given for wages and maintenance that is recoverable in general average but falling within the excess period.

What if a bonus payment were made to crew members engaged in repairs, and owners managed to recover that from hull insurers – should loss of hire insurers receive credit for the bonus recovered? On that point, Mr Hao noted that crew wages were paid in lieu of cost of repairs. If crew were not engaged in repairs, hull insurers would have had to pay higher costs to repairers and the crew could have been occupied in other tasks. Mr Hao submitted that where crew are engaged in damage repairs, and hull insurers pay crew costs in excess of ordinary crew wages, the extra crew costs should not be credited to loss of hire insurers.

Mr Hao is based in London for Richards Hogg Lindley, having previously worked in the firm's Liverpool, Hong Kong, and Shanghai offices.

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Burkhard Fischer, vice-chairman of the Association of Average Adjusters, chaired the meeting and thanked Mr Hao for bringing clarity to the issues. What was less clear, he said, was the future of the ABS conditions when many in the market preferred to use the Nordic Plan. The ABS clauses were common sense, but their silence on some matters might or might not be an advantage.

Notes to Editors

The Association of Average Adjusters promotes professional principles in the adjustment of marine claims, uniformity of adjusting practice, and the maintenance of high standards of professional conduct. Irrespective of the identity of the instructing party, the average adjuster is bound to act in an impartial and independent manner.

The Association plays an important part in London insurance market committees and has strong relationships with international associations and insurance markets.

Please see www.average-adjusters.com

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