ASSOCIATION OF
Average Adjusters

Fishing – Shades of Grey

We now turn to the subject of my address today – "Fishing – Shades of Grey". In somewhat the same vein a Paul Rowlands' address to this Association entitled "Basic Instinct", for those of you who may be hoping for a recitation of some kinky goings on during the lonely nights on a longliner in the Southern Oceans involving nets and ropes, I am sorry to disappoint.

When my father gave his address to this Association in 1983 on his slightly controversial views on the future of Average Adjusting, the then secretary, Robert Clancey, commented that if he did not like or disagreed with what my father said, he would seek to contain any heresy by simply forgetting to ask the traditional question following the address as to whether the Chairman would allow his remarks being published.

I feel a similar level of concern. During my research for this address, I have become aware that not all of my fellow adjusters will necessarily agree with what I am about to say. I would love to believe that my elegant rhetoric and undeniable logic will win them over. We will see.

However, it is a worthy reminder that Average Adjusters are not infallible - either individually or collectively. As Richard Lowndes noted in the very first address given to the Association in 1873 with regard to the almost "oracle" status which Average Adjusters enjoyed in the early years of the profession:

"Emancipated from the necessity of giving reasons, they were tempted to emancipate themselves from the necessity of forming reasons."

Items were adjusted according to Custom and if challenged as to whether such a practice was legal Lowndes suggested that an adjuster would likely respond with:-

"But, my dear sir, the custom is the law; custom makes law…".

Even in Lowndes' day, however, that was no longer good enough and the explosion of marine insurance litigation in the late 19th century served to severely narrow the domain of custom (whether in the adjustment of claims or other fields).

We have seen, in the last year, another example where the majority of average adjusters' practice would have been to adjust certain General Average expenses under Rule F of the York-Antwerp Rules in a certain way whilst the Supreme Court, in the "Longchamp" decision, have said that we have had this wrong for some time. The fact that the major stakeholders in General Average (principally being the bodies representing the respective ship and cargo interests) did not deem it necessary to make changes to Rule F when they had the chance prior to the 2016 York / Antwerp Rules, only emphasises how naively sure the parties were of their ground.

Whilst one has to respect the law, one can only harbour a little concern when one hears (in relation to another recent case involving marine insurance) that the judge was influenced by the fact that one party neglected to provide a sensible defence to a minor point in that case (but one which may have a much wider application as a precedent in others) and the dubious quality of one of the expert witnesses.

Whilst all cases are decided on their particular facts and a decision may not have great importance to that particular litigation, the precedents which are set have to be observed elsewhere.

The majority of the development of marine insurance policy wordings and law as well as Rules such as the York / Antwerp, Hague / Visby or Rotterdam Rules are concern what may be termed as "proper shipping". This involves generally larger, commercial vessels undertaking a voyage from A to B with third party cargo or passengers on board.

If, after several hundred years, we are still making mistakes and struggling to understand the intricacies of maritime law for 'proper shipping', imagine the situation when one ventures off and starts to look at some of the darker backwaters of the marine insurance world where the light of legal precedent and consideration rarely, if ever, penetrate.

As many of you will be aware, I live and work principally in the Australian and New Zealand markets. Due to the way in which the shipping industry has developed over the last few

decades, Australia and New Zealand no longer enjoy substantial (or even insubstantial) blue water shipping fleets. The issues which many in this room come across involving large bulk carriers, tankers or container vessel or large, multi-bill of lading general averages are not something which we see often in the colonies.

New Zealand's fleet, for instance, is largely made up of tourist and fishing vessels.

It is the fishing vessels upon which I would like to concentrate today as they throw up a number of questions and adjusting issues which have a wider application to other areas of shipping. Trying to fit some of the Rules and policy wordings from "proper shipping" in to the fishing trade can be challenging and leave an average adjuster wondering whether some of the "the law" is really intended to produce the often bizarre outcomes which result.

We will look at a few issues specific to the current Institute Fishing Vessel Clauses such as the wages and maintenance clause and ask who are the crew? Fishing vessels undertake voyages from a port to nowhere in particular (certainly not another port or place in legal terms) and return to the port from whence they came. Many expensive offshore supply vessels have a similar voyage profile and this produces some interesting issues when one starts to consider general average.

When thinking about fishing vessels, they are a huge class of vessel ranging from the small, inshore fishing vessels with a crew of two or three, through to the substantial ocean going factory vessels with a ship's compliment of over 40 and values in excess of fifty million US dollars.

In 2015, the UN statistics indicate the world fishing fleet was around 4.5 million vessels. This compares currently to around 17,000 general cargo ships, 11,000 Bulk Carriers, 13,000 oil or chemical tankers and a little over 5,000 container vessels.

Before you all rush off to amend your current marketing plans based on this startling piece of information, I ought to perhaps clarify that of the 4.5 million fishing vessels, around 1.7 million are not powered and not much more than rowing boats and those over 100 gross tons only make up around 1% or 40,000 – about the same number as there are "proper" vessels. That said, fishing vessels are not an insignificant market segment.

The Institute Fishing Vessel Clauses, under which many commercial fishing vessels are insured, came into existence in 1987. They owe their parentage to a blend of the more

common Institute Time Clauses (Hulls) and the British Trawler All Risks Clauses which most fishing vessels (certainly in the UK) had traditionally used.

Whilst a large part of the clauses therefore have the same or very similar wording to the Institute Time Clauses (Hulls) there are a number of adaptations for the fishing industry. It is in many of these adaptations that some of the problems with the adjustment of claims are to be found. Some are straight forward such as the substitution of "catch" for "cargo" in various places. "Catch", as the name suggests, is the term used to describe the fish that have been caught and are on board the fishing vessel. Once caught, they essentially become cargo as they have a value to those interested in their successful delivery back to shore. One issue can arise with valuing catch especially on factory vessels. The "catch" will include whole fish which have just come aboard down to frozen, processed and packaged fish fillets and other products plus everything at every stage of production in between. Thus the total value of the catch at the time of a casualty out at sea may be significantly different to the value of the catch discharged at a port of refuge once it has all been processed. Just one of the issues which can play with the mind of an average adjuster when looking at fishing vessel claims.

One of the significant difference which the Fishing Vessel Clauses have to their more common commercial stable mates is their Clause 9 about wages and maintenance. This states:

The Underwriters to pay the cost of wages and maintenance of members of the crew necessarily retained whilst the Vessel is undergoing repairs for which the Underwriters are liable under this insurance.

This was one of the clauses imported from the old British Trawler All Risks Clauses and maintained as a concession to the fishing fleet.

The clause is very different from the Institute Time Clauses (Hulls) Clause 16 - Wages and Maintenance which essentially says that no claim can be made for wages and maintenance of the master, officers and crew (other than in General Average) except for during necessary removal passages for repairs and sea trials following casualty repairs. This reflects the position under English Law established in *Robertson v Ewer* in 1786 that the wages and maintenance were a consequential loss and "not part of the thing insured".

Clause 16 has often led to some heated discussions with shipowners when the crew undertake repairs which would otherwise have been undertaken by shore labour at a higher cost. Whilst special payments to the crew or specific overtime working on the repairs are generally accepted as exceptional payments for which insurers are liable, the issue is when the crew undertake more mundane repair work.

Writing in the Lloyd's List in 1986, the then Principal Adjuster of Hull Claims at Lloyd's, Mr. Len Watson suggested that he may look upon claims for crew wages in such cases with sympathy on a "without prejudice basis" if there was a clear saving to insurers. This would be on the basis of the cost being a quasi- substituted expense for the shore based labour which would otherwise do the work.

Quite apart from the difficulties modern insurers (certainly company insurers) have with making ex-gratia" or "without prejudice" payments in the current compliance orientated environment, I would suggest that some exceptional circumstances would be required to make an allowance in such cases. Where repairs can be done competently by the crew, the action of a prudent, uninsured shipowner would be to have the ship's deck staff or engineers undertake the repairs and it would not, therefore, be "reasonable" to have the work done more expensively by shore labour. As such the crew's wages should not be claimable as a substituted expense and should simply be excluded by Clause 16.

The rationale for the allowance of the crew's wages during repairs under the British Trawler clauses (and now the Institute Fishing Vessel Clauses) was to ensure that the fish boat owners could retain quality crew during necessary repairs to the vessel. Without the clause and given the generally precarious nature of the liquidity of such operations, it was likely that the unpaid crew would drift away and be taken on board by other vessels. Once the repairs were complete, the fish boat owner would be faced with trying to re-crew the vessel from whomever was left. Having a crew who were unfamiliar with the vessel would not be in his interests or necessarily those of the insurers. For this reason the expression *"necessarily retained"* in the clause has generally been given a very generous interpretation and potentially includes the whole crew as being "necessarily retained" for the on-going fishing operations of the vessel rather than limiting the allowance to those crew "necessarily retained" on the vessel during the course of the repairs to assist or facilitate those repairs.

Whilst the Fishing Vessel Clauses Wages and Maintenances clause is unusual in terms of the standard Institute Clauses, it is becoming increasingly common for vessels involved in the offshore industry to have a manuscript wages and maintenance clause which extends the standard Institute Time Clause covers with similar provisions. With the wages on some of these vessels approaching US$ 100,000 a week, you can easily see how the wages element can start to dominate a claim for a relatively inexpensive repair if the required parts are not immediately available.

I therefore consider that this is an area worthy of a closer review.

When looking to talk about the wages and maintenance of the crew, whether for fishing vessels or any other type of vessel, it is important to have some agreement as to what we mean by the terms:-

- Crew
- Wages, and
- Maintenance

So – who are the "crew"? Should we consider everyone who works on a vessel which we might call the ship's compliment or some smaller subset and if so who?

Much of maritime legislation does not use the term "crew" when referring to personnel aboard a vessel, preferring the term "seaman". I would suggest that the terms, in the context of this discussion, are synonymous.

This is where we start to enter the grey world of the fishing vessel claim.

Fishing vessels may have a compliment of only one or two or they may have a compliment of over 40 with many of those engaged exclusively on the processing of the fish caught rather than navigating the vessel or tending to the machinery.

In a similar way, cruise ships and ferries will have a marine team who navigate the vessel. They will also have engineers to run and maintain the engines and generators. They may have more engineers on board than is strictly necessary to run the propulsion and basic husbandry machinery given the additional equipment required by such a vessel to cater for their clientele. Equally, on cruise vessels, there will be large numbers of staff to entertain

the passengers or work in any onboard casino together with a veritable army of cleaners and cooks who may loosely be referred to as the "hotel" staff.

Research and seismic vessels may have a number of scientific staff on board in addition to the more traditional positions of Master, Chief Officer, Chief Engineer, Bosun etc.

Dive support vessels have divers etc.

The list can go on of the roles of people who work comprises or contributes to the principal purpose of the vessel but whose role is not one of those of a traditional seaman.

Where do we draw the line between who is "crew" and who is not – if indeed a line needs to be drawn at all?

In 1899 there was the case of *Anglo-Argentine Live Stock Produce Agency Ltd v Temperley Steam Shipping Co. Ltd*

The vessel was on a voyage from Argentina to Europe with cattle when she had to put in to Bahia as a General Average act. The question arose as to whether the cattlemen employed by the charterers were "crew". In delivering his judgement, Bingham J advised:

In my opinion they are not part of the crew at all; they are not under the command of the master; they are not in the service of the shipowners; they do not sign the ship's articles; nor are they in any way engaged in the navigation of the vessel."

It is not clear whether Bingham J was looking for all of the above tests to be passed to have considered the cattlemen as crew or just any one of them or, more likely, the cattlemen failed a more subjective "sniff test" of what constituted a crew member.

In 1971, this Association's Advisory Committee issued an opinion which defined the term "crew" as follows:-

The term "crew" comprises those members of the ship's compliment of sea-going rank engaged under articles and / or entered in the Master's portage bill or harbour wage account.

Let us start with the second part of the definition that the crew member must be "*engaged under articles and / or entered in the Master's portage bill or harbour wage account."* This requirement is increasingly antiquated for "proper shipping" let alone fishing vessels. Crew members are as likely to have a shore based and signed contract directly with the shipowner

as anything else. If the shipowner owns several ships – as in the offshore supply industry - they may be transferred between vessels very frequently and freely (even at sea) and the most that can be said for them was that they may have appeared on a crew list somewhere at some point in time. There is no doubt, however, that the Chief Engineer was the Chief Engineer and the First Officer, the First Officer as they were required to hold those tickets to satisfy safe manning requirements.

The types of engagement vary enormously from many paged employment contracts to contracts which identify the individual as an independent contractor down to a handshake with a guy, or girl, you met in the pub.

Whilst portage bills still exist, their use is far from universal in the modern world and we are left, I think, with the second half of the Advisory Committees' definition being a little beyond its sell-by date and failing Bingham J's "sniff test".

Turning now to the first part of the definition, frustratingly, the opinion does not provide any background to how this definition was arrived at or who might be considered to be of *"sea-going rank"*. By phrasing the definition as *"…. those members of the ship's compliment of sea-going rank…."*, it is clear, however, that the Committee saw the "crew", for the purposes of General Average and Clause 16 of the Institute Time Clauses, as a subset of the ship's compliment as, presumably, there were people on board who were not of "*sea-going rank*".

In the late 1800s, one of the very first Rules of Practice that this Association adopted sought to standardising General Average allowances under the York / Antwerp Rules for the maintenance of the officers and crew. Whilst the Rule has since been long been rescinded, the rule allowed for varied amounts per day for officers and crew as well as depending on whether they were engaged on passenger steamers, passenger sailing vessels or cargo vessels.

Officers were defined as: *"the Master, deck officers, engineers (in the case of a steam vessel) as well as the doctor and purser if carried"*.

Crew were simply defined as *"the remainder of the ship's company"*.

It would appear that the Association at that time held a more generous opinion as to whom should be included when considering allowances as they included the whole "ship's

company" which I would suggest is synonymous with the "ship's compliment" and not a subset of it.

In the case of *Thompson v H&W Nelson* in 1913, a Steward was determined to be a "seaman" in relation to the Merchant Shipping Act although whether that is sufficient to constitute a "sea-going rank" remains unclear to me.

The current Merchant Shipping Act defines a "seaman" as :

"every person (except master and pilots) employed or engaged in any capacity on board any ship."

Chapter 12-13 of the current Nordic Plan, which is used extensively by Scandinavian insurers and owners when insuring ships and is their equivalent of the Institute Clauses, provides for insurers to be liable for the cost of removing a vessel from one port to another in certain circumstances. The chapter provides for insurers to be liable for the wages and maintenance of the **"necessary"** crew as a part of the costs of removal.

The Commentary which accompanies the Plan and which helps to explain the coverage states:

The requirement that the crew must be necessary is new in relation to the 1964 Plan. In the consideration of this question, regard must be had to what is necessary with a view to the removal. The maritime crew will obviously be covered, but normally not hotel and shop staff on a passenger liner, or mobile repair teams who work temporarily on board. However, the provisions must be implemented with some caution: it is not the intention to force the assured to empty the ship of crew for shorter voyages.

The intent seems quite clear that the maritime crew are covered but not the hotel crew. However the statement that the allowance does not *"normally"* cover the hotel crew and the last sentence that "*the provisions must be implemented with some caution: it is not the intention to force the assured to empty the ship of crew for shorter voyages"* suggests that there may be some circumstances where the hotel crew would be paid for. I am assured, however, by our Scandinavian cousins that no such circumstances have ever been found or

are really envisaged and that their practice is to exclude the hotel staff on the basis that they are not "necessary" for any removal.

The inference would be, however, that without the word "necessary" being in the section, the insurers would be liable for the wages and maintenance of the full ship's compliment – including hotel staff.

So where does this leave us with the Institute Clauses and our fishing vessel with a large "factory crew" or a cruise vessel and her "hotel" staff given the Advisory Committee's statement that we should only consider personnel of "*sea-going rank*".

We have a confused field of possibilities of who the "crew" are:-

a. The Merchant Shipping Act says it is more or less everyone on the ship except the Master.

b. The Association's Advisory Committee say it is everyone engaged under articles and of "sea-going rank".

c. The Institute Time Clauses (Hulls) and the York / Antwerp Rules do not provide a definition of crew but make allowances for the Wages and Maintenance of the "Master, Officers and Crew" which suggests that the term "crew" is not intended to include the Master and officers.

d. The Fishing vessel clauses mention an allowance for the wages of the "crew" only. If the Institute Clauses have consistent definitions of words between the clauses, is this intended to exclude any allowances for wages of the Master and any officers?

In terms of who are the members of the crew, looking objectively, I think we have to look at the purpose of the vessel and personnel who are employed directly or indirectly by the insured to contribute to the commercial mission of the vessel. These, I would suggest, have to be considered a part of her "crew". The purpose of a fish factory vessel is to catch fish and turn that into a distributable packaged product. As such not only the navigation and engineering staff (who get the vessel to the right position) but also the deck hands who work the fishing machinery and the factory staff who process the catch are working towards the vessel's commercial purpose. In a similar way the hotel staff on a cruise vessel work

towards the commercial purpose of looking after, providing for and entertaining the paying guests.

I would stress the need for the crew to work directly or indirectly for the insured.

Where one has the owner of a cruise vessel which has a casino onboard and the owners simply rents out the space on the vessel to a third party operator who takes the profit from the venture, then the casino workers are no more crew that the cattlemen in the Anglo-Argentinian case. They are employees of the charterer and do not pass Bingham J's sniff test. By contrast, if the owner of the vessel merely outsources the operation of the casino to a professional third party but retains the profits from the casino and is directly interested in its operation, then I think the casino workers are a part of the crew in the same way as the situation were "proper ships" are manned by people provided by third party crewing agencies.

The past year has seen an explosion of interest in autonomous vessels. Hardly a week goes by without there being a talk, seminar or article about the impact that these vessels may have on shipping, maritime law and marine insurance.

One of the challenges which will have to be addressed is as to whether any of the shore based operatives are "crew". I do not have the answers to this, sadly, but I suspect that some work will need to be done to adapt the standard insurance clauses as, if one of the main attributes of crew is that they have to be on board the vessel, then the current named peril of "negligence of crew" will be severely curtailed.

As any average adjuster in the room will tell you, a significant number of machinery claims are covered as a result of this peril and it is naïve to assume that just because no-one sails with the vessel, that the engineers who undertake the maintenance on the engines will do any better of a job than their current seafaring cousins.

So when looking at wages, If insurers want to restrict allowances for "crew wages" to a smaller subset of individuals than the full ship's compliment, then I would suggest, as the Scandinavian's have tried to do with the Nordic Plan, that clearer and more specific wording would be required and would not be overly complex to draft. A few well-chosen and placed words would suffice.

Is there significance to the fact that the wages provisions in the Fishing Vessel clauses only refers to the wages of the **crew** and not the **Master, Officers and crew** as in the Institute Time Clauses (Hulls) and other Institute Clauses? I think the answer has to be generally "no" - more especially where the Master is a paid employee of the fishing company. Where the Master is the insured owner of the vessel, a more complex question may need to be addressed.

And so we turn to what wages are:

Here, at least, we have a number of more helpful definitions.

Rule XI (c)(i) of the latest York / Antwerp Rules provides that

"wages include all payments made to or for the benefit of the master, officers and crew, whether such payments be imposed by law upon the shipowners or be made under the terms of articles of employment."

More specifically, the Advisory Committee of this Association in their 1971 report concluded that:-

The term "wages" comprises the gross amount of all those payments made by the Shipowners to the members of the crew on a monthly, weekly or other periodic basis including leave pay, overseas allowance etc. and the employers' contribution to State and other Insurance and / or Pension Schemes which relate to those payments, and also payments of overtime to the crew in pursuance of their normal watchkeeping and / or other duties which may loosely be termed regular overtime.

This definition adds to the York / Antwerp Rules definition a requirement for the payments to be made on a monthly, weekly or other periodic basis.

The matter would therefore appear to be relatively settled in that wages includes all payments to the crew made on a periodic basis including such items as national insurance or pension contributions as well as regular overtime etc.

However, not all fishing boat crews are traditional employees.

Avid watchers of The Deadliest Catch on Cable TV's The Discovery Channel will know that it is not uncommon for the crew to be paid a share of the voyage profits as either their whole or a substantial part of their earnings. Whilst some of these "Share fishermen" as they are

known have a dubious contractual arrangement with the owner at best, others will often have a contract which identifies them as “Independent Contractors”.

How then do we or should we make allowances for wages where such arrangements are in place? Where someone is compensated for their labour by a specified share of the profit from a voyage, how do we make allowances for those wages during a general average detention or under the Institute Fishing Vessel Clause 9? Is any allowance possible as, if the vessel is not fishing, there is no profit to be shared?

In *Thompson v H&W Nelson* in 1913 it was determined that an agreement to pay a 5% commission on bar sales to a steward on an ocean steamer came outside the definition of a seaman’s wages in relation to the Merchant Shipping Act 1894. In that case, the agreement to pay the commission was not recorded in the Ship’s Articles but even so, the payment of the commission could be enforced.

In the example of bar sales, however, the sales existed, the commission was actually earned and the steward was only looking to enforce its payment. In the case of a fishing vessel which is out of action due to an insured casualty, there is no catch for the crew to share the profits in. I think, therefore, on a strict interpretation of the term “wages”, there would be a good argument for saying that nothing was payable even where a payment was made by a fish boat owner for what amounted to an ex-gratia settlement in the absence of any legal obligation to pay.

That said, I doubt that it was in the mind of the 1971 Advisory Committee to specifically exclude people employed on such terms despite the fact that the payments are not made “*…..on a monthly, weekly or other periodic basis*”. I think the 1971 Committee, in relation to particular average claims, was only trying to set a limit on what constituted wages for those more traditionally employed such that Clause 16 did not necessarily exclude specific and exceptional bonus’ paid to the crew for work such as bilge cleaning prior to hot work where that is required for insured damage repairs.

But a closer look at share fishing and independent contractor arrangements can sink us further in to the grey.

The reasons for these arrangements can be not only to establish a method of payment but also to try and circumvent some of the employment regulations which increasingly play a part in most people's working lives. Obligations towards Health and Safety and holiday entitlements would be examples.

In many parts of the world, share fishing arrangements are coming under the microscope. Where they are an attempt to avoid workplace legislation there is an understandable desire by Government agencies that this should not persist. The nature of the relationship needs to be examined in all cases but where a person spends the vast majority of their time working for the same principal, using their equipment and under their direct supervision, it is increasingly hard to see them as true independent contractors as opposed to employees. As employees they are generally able to take advantage of the labour laws which, in many counties, would include payment of a minimum hourly wage.

It is also relevant to remember that Clause 9 of the Institute Fishing Vessels Clauses owes its parentage to the old British Trawler All Risks Clauses of the 1950s and 60s. At that time, there would have been few, if any, salaried fishermen and so the clause must have been intended to have application to share fishing arrangements.

If we were therefore to consider allowing payments to a crew of a vessel who are paid on commission the question is, therefore, how much should we allow? Whilst they are not fishing, they are earning no commission but they may be legally entitled to at least the minimum wage.

I am not sure that it the role of the adjuster to become a fishing crew employment law specialist. One maritime lawyer who I consulted in the writing of this commented that the advice he had received from his father when he started in the profession was never accept instructions from prostitutes or the crew of ships. I, for one, am happy to heed his advice.

I think that the answer here is to simply look at what is reasonable and what is actually paid by the Owners. A reasonable fish boat owner might pay the crew an amount based on what they could reasonably have expected to have earned over the period of repairs. Such an amount will not be static and will likely be reflective of fish prices at the time, the time of the year, the part of the fishing season they are at the time and the contemporary performance of other fishing boats in the fleet or competitors. Evidently, if the repairs are

undertaken during the off-season when the boat would not be working anyway and the crew not earning any commission, then no payment would necessarily be required.

The clause is a simple clause which seeks to allow a fish boat owner to retain and pay his crew during insured damage repairs. However, as we have seen, this can become surprising complex depending upon how the crew are customarily remunerated. Whilst we have looked at two employment options (salaried employees and independent contractors or share fishermen), there is no doubt that there are other models out there.

I cannot believe that the drafters of the clause intended to significantly discriminate against one form of employment in preference to another and so long as the insured is making a reasonable payment in line with his contractual and legal obligations, one might expect some underwriter sympathy. I would be relatively certain that underwriters do not take the employment status of the crew into account as an underwriting criteria despite the marked impact the wages of a 40 man crew might have on a claim. It therefore remains open for the underwriters and the brokers to make it plain what the intention of the cover is for any particular fleet and either delete the wages clause altogether (and possibly substitute that from the ITC (Hulls)) or clarify what insurers are content to pay in the event that the crew are not compensated by means of a traditional wage.

The questions of what constitutes "maintenance" was also addressed by the 1971 Advisory Committee Opinion where they stated that:

The term "maintenance" comprises the cost of provisions, laundry etc. for the crew together with the cost of providing accommodation on shore in certain cases.

Where the crew remain on board, generally, adjusters make an allowance of a certain dollar amount per man per day in respect of maintenance. The amount may vary depending on the location and the relative cost of provisions or the likely cost to the shipowner of providing for his crew.

As previously mentioned, in the very early years of this Association, there was a Rule of Practice for the allowances to be made in General Average under the York-Antwerp Rules in respect of the cost of maintenance of the officers and crew. This attempt to standardise the allowances lasted for several years. The allowances for officers ranged from £16.00 to

£24.50 in modern money depending on the type of vessel and £5.00 to £8.50 for crew depending on where they came from.

One occasionally gets a mass of restaurant receipts from a shipowner where the crew have dined ashore. They tend to vary from receipts from the local Burger King or KFC to those from more traditional restaurants. Apart from being of some anthropological interest into the dietary habits for seafarers, the daily allowance (which not only covers food but also other husbandry items) is generally to be preferred.

In some cases, maintenance can include the cost of putting the crew up ashore where the repairs make the vessel uninhabitable. Such cases are relatively rare.

Allowances for maintenance, therefore, rarely give rise to many issues whether in fish boats or elsewhere.

The second aspect I would like to explore with regard to fishing vessel and their claims is General Average. As mentioned, fishing vessels generally have a fishing voyage profile which sees them leaving Port A to some point in the oceans where they start fishing and, following their campaign, returning to whence they came. This is a similar voyage profile to offshore supply vessels, anchor handling tugs, some scientific vessels and even bunker barges which service out-side port limit anchorages.

For many, the idea of a General Average on a fishing vessel will come as a surprising concept. In most cases the vessel and her catch are owned by the same people and there is therefore no obvious "common maritime adventure" which, generally requires two or more parties to be involved.

This, however, does not prevent a general average following the decision of Montgomery v Indemnity Mutual Marine Assurance Co in 1902 and which became enshrined in Section 66(7) of the Marine Insurance Act as:-

"Where ship, freight, and cargo, or any two of these interests, are owned by the same assured, the liability of the insurer in respect of general average losses or contributions is to be determined as if those subjects were owned by different persons"

There could be an interesting situation with regard to share fisherman. As a reminder, these are those crew members who are compensated by a portion of the voyage profit.

Were the vessel to be lost, in addition to any concerns about their life, their share of the catch profits would also be lost. I have never heard of a situation where the crew have been asked to contribute in respect of this as something akin to freight at risk, but, in theory, and subject to the terms of their contract. It may be possible. That said, it may take a brave shipowner to try and enforce such a contribution.

The General Average and Salvage clause in the Institute Fishing Vessel Clauses (Clause 8), states, that claims should be adjusted in accordance with the York-Antwerp Rules 1974 if so required by Underwriters and that the insured value without deduction for any damage, shall be taken as the Contributory Value.

This last point is a significant concession by insurers in that more normally the ship's contributory value would be based on her damaged value which, assuming that the vessel is fully (or over) insured as against her market value, would be a lower sum generating a lower contribution.

In the absence of the ability of underwriter's to require the general average be adjusted in accordance with the York-Antwerp Rules 1974, the adjustment would be drawn up according to the law and practice where the adventure ends – most likely where the catch is discharged. This may present a number of challenges to all involved and, in practice, all general averages on fishing vessel which I have been involved with have been adjusted in accordance with the York-Antwerp Rules.

The catch on board the vessel may or may not be insured. Whilst it is common for larger vessels to have catch insurance in view of the accumulation of catch value which can occur towards the end of a long campaign, it is not universally insured and rarely on smaller, inshore fishing boats. Where the catch is insured, it generally comes with substantial deductibles although these rarely apply to general average contributions.

The vast majority of general average situations on fishing vessels do not get recognised and go unadjusted and unaccounted for. This is usually through the parties not being aware of the issues. In many cases it is not particularly relevant. Most fishing vessel salvages or tows to port are undertaken by sister vessels or other vessels in the local fishing fleet with salvage awards being determined by the ridicule delivered by one's peers and a number of crates of

Heineken required to keep everyone happy rather than resort to complex arbitration proceedings.

Even when there are major issues things often just get resolved. Two years ago when a fishing vessel got caught in the growing icefield around the Antarctica as winter approached following a main engine issue, a US Coast Guard ice breaker spent several days getting to them and bringing them out. Having prepared the insurers and owners for the receipt of an eye-watering salvage demand, the Coast Guard surprised everybody and simply expressed 'their gratitude' to the vessel for getting herself stuck as it afforded a rare opportunity for some real life training. I suspect a few slabs of Speights Beer also passed hands.

That all said, over the last few years, I have observed an increasing trend for such salvages not to be done on a gratis basis. With large fishing vessel values being in the millions of dollars and the lost catch value of having to stop fishing and aid another vessel running, in some case to over US$ 100,000 a day, this is now a significant game. In addition, these vessel have to go further and further to find their fish with a trip from NZ to the South Pole fishing grounds taking a week and representing a significant investment in time and money before you start fishing.

So, what are the issues if the vessel has a casualty and has to return to her home port to effect repairs following a main engine issue (say). The return may be under the tow of another vessel or, assuming the vessel has two engines, she may be able to limp back, slowly on one.

If there is a General Average, the shipowner can claim the costs of getting to and from a port of refuge under York / Antwerp Rule X and the wages and maintenance of the crew and some other items during the resulting prolongation of the voyage under Rule XI.

If the casualty happens on the outward voyage, before she reaches the fishing field and starts to catch fish. There is no common adventure yet as there is no catch. I do not consider that one can include the potential earnings from the voyage as a quasi-"freight at risk" as I have seen muted occasionally.

The Institute Fishing Vessel Clauses have no "Ballast GA" clause as the Institute Time Clauses (Hulls) do. Such a clause allows a shipowner to claim from his hull and machinery insurers many of the additional amounts which he would be able to claim as General Average even

when there is no General Average as the vessel is in ballast – there being no common adventure.

For a fishing vessel therefore, the return to its home port or other port of refuge would be considered as a removal for repairs and adjusted as a Particular Average event. Given the policy Wages and Maintenance Clause which pays for the wages of the crew during those repairs, the insured is not significantly disadvantaged by the absence of a Ballast GA Clause in the policy.

Equally, if the vessel suffered a casualty during the trip home and once full of fish, the situation would not present any unusual difficulties. One would adjust the claim on the same basis as a cargo vessel which suffers a casualty and is towed in to her port of discharge. Only any additional costs of entry (such as the net cost of any towage) would generally fall to be considered as General Average. But if the vessel can slow steam in on one engine, there is no deviation in the voyage, probably no extraordinary expenditure and no general average.

The difficulty comes where the vessel suffers a casualty mid-fishing campaign.

A fishing vessel heads south from New Zealand towards the Southern Ocean fishing grounds and arrives after a week-long ballast voyage. She sets her nets and starts fishing and catching fish for what is expected to be a 4 week campaign followed by another week long trip back to New Zealand to discharge her catch, rotate the crew and start again.

However, after two weeks and with half the expected catch on board, she suffers a breakdown to one of her two main engines which cannot be fixed at sea. Remaining in the challenging environment of the Southern Ocean with only one main engine is not considered safe and the vessel picks up her nets and slow steams back to New Zealand on one engine.

On arrival back at her home port, the catch on board is discharged and the vessel undertakes the repairs to the main engine in the normal way.

Is there a general average?

We have some of the ingredients.

- There is a common maritime adventure between the vessel and her catch as we have discussed.
- The vessel and her catch are in peril as remaining where they are with only one engine is not considered safe.
- The decision to return to New Zealand was voluntary and reasonable.
- The operation has been successful in that the vessel and her catch have survived.

So what can we allow?

As far as the catch on board is concerned, it may well look at the issue as one where the moment it arrived on board the vessel, it was destined to be discharged at the vessel's home port. It became the equivalent of a cargo which had a designated port of discharge. All that has happened is that the vessel has travelled to that port and discharged the catch. The additional costs of getting to the port (such as towage costs if incurred) may be allowed as General Average but there has been no *prolongation* of the voyage as is required by Rule XI(a) of the York-Antwerp Rules to justify an allowance for wages and maintenance of the crew. In fact there has been a contraction of the voyage.

The 14th Edition of Lowndes and Rudolf states it simply:

"*If a ship can be said to have entered a port or place of refuge when, for the common safety, she enters a port which she would in any event have entered as a port of call, there is no prolongation of the voyage within the meaning of*"… Rule XI(a).

As such no allowances in General Average can ever be made for the wages and maintenance of the crew or similar expenses in GA after the vessel has caught her first fish and therefore has cargo on board with the home port as it's port of discharge.

It is my birthday next month and I am therefore a Gemini – the twins. This has meant that I rarely consider that there is only one way of looking at such problems and looking from the other end of the telescope, as far as the vessel is concerned, there <u>has</u> been a deviation. Had the casualty not occurred, she would have continued trawling around the Southern Ocean for a few more weeks.

The physical deviation may not be that great or hard to quantify. Whilst we will know the latitude and longitude where the vessel was when she started back to New Zealand, we will

not necessarily know the latitude and longitude that she would have been at two weeks later when she would have started back to New Zealand had the casualty not occurred.

What we do have, however, is a deviation in time. Not that familiar to Doctor Who fans which requires a tardis, but the fishing boat's return trip is taking place two weeks earlier than expected.

When the fishing boat owner invested the time and money to send his vessel down to the Southern Ocean, he expected to get a return based on a 4 week campaign. This has been cut short and he has not got a full return on his investment.

An alternative approach would be to say that, in theory, the owner could have sailed the vessel back to the home port (or another port of refuge) undertaken the necessary repairs and then returned to the fishing grounds to complete the voyage without having discharged the catch he had on board. Had he done that, we would likely seen the whole deviation as a general average deviation without as many issues unless he would not have been able to get back to the fishing grounds during what remains of a particular season.

This would require us to take the view that the home port only becomes a "port of call" once the vessel is full or at least nearly full and the vessel is heading in that direction.

Whilst no owner is likely to pass up the opportunity of discharging his catch when he can and emptying the vessel so that he can make full value of the next voyage, if there is anything we have learned in the last year or two is that alternatives which would be allowed as general average, however apparently unreasonable, have to be considered.

If one takes this approach then the deviation back to the home port is all General Average unless the vessel was full at the time of the loss. With the discharge of the catch at the home port, the original "voyage" is abandoned and the general average allowances cease on the completion of the cath discharge in accordance with the York / Antwerp Rule XI(b).

The nonsense of this, for me however, is that there comes a singular point in time when there is sufficient fish on board to say that the return home is to a "port of call" and no (or limited) General Average allowances can be made. Before that singular point in time, the return is a deviation and the allowances in General Average can be substantially more generous. This "All or Nothing" result does not fit with the concepts of equity and fairness which are the DNA which underpins General Average.

As I said at the start, fishing vessel claims are not always that straight forward and raise issues which are grey at best. The average adjusters I asked, expressed opinions from there was never a GA deviation once catch was on board to there was always a GA deviation. The only thing they essentially agreed on was there either was a general average deviation or there was not. In other words, the owner either recovered the full costs associated with returning to the home port (wages and maintenance of crew, fuel and stores port charges etc.) as general average or he received nothing.

I believe that this is one of those situations where trying to shoe-horn "proper shipping" concepts in to fishing vessel or some offshore supply boat and similar claims produces a nonsensical and inequitable results.

With fishing vessel claims we have what might be termed a "benevolent shipowner" in that he is generally also the owner of the cargo. We also, very likely have a "benevolent cargo insurer" (not words which often appear in the same sentence). The cargo or catch insurer is often also either the hull insurer or at least the Lead or holding a significant share of the hull cover.

It ought, therefore, be possible to generate a wording whereby some equity is achieved for both hull insurers and the insured. Allowances based on the percentage of expected catch on board at the time of the loss would seem sensible. If he has caught very little, then the allowances would be more generous than if he was almost full. The current "all or nothing" approach will almost certainly unduly benefit the insurers or the insured to the expense of the other and be properly equitable in very few cases.

Such a modification to the adjustment of general average would normally require the agreement of cargo. In this case, as mentioned, with our benevolent cargo insurer, this may be possible and the catch and hull policies could have similar clauses. Alternatively, and more simply, the hull cover could include a general average absorption clause leaving the catch policy to respond solely to claims for damaged catch and leaving catch contribution to GA and salvage with the hull insurer. In most cases, catches proportion of GA is relatively small and so this should not be a significant issue.

As always, if the insurers or the insureds, through their brokers, do not like the way certain expenses or situations are being adjusted, it is always open for them to amend the wording

or manuscript a clause to suit their needs. Such an approach would most likely require a lead from the more sophisticated markets of the world where marine insurance remains a speciality. Whilst there are specialists, in many parts of the world fishing vessels are often broked and insured by people who are more confident discussing the cover available for farm irrigation systems and cattle in transit than general average.

The last area of the Institute Fishing Vessel Clauses to consider is clause 15 which states that:

No claim to attach hereto for loss or of damage to fishing gear unless

1. *Caused by fire lightening or violent theft by persons from outside the Vessel*
2. *Totally lost as a result of the total loss of the Vessel by insured perils.*

Pretty self -explanatory one might think.

However, one thing we have learnt in the last few years is the phrase "No claim" (which starts this clause) does not necessarily mean "no claim".

The *"Brilliante Virtuoso" Pt 1* suggested that the clause in the Institute Time Clauses (Hulls) which says *"In no case shall a claim be allowed in respect of scraping gritblasting and / or other surface preparation or painting of the Vessel's bottom except…."* to a limited extent in a limited number of circumstances would prevent an owner including the full cost of painting the vessel in determining whether a vessel is a CTL.

The circumstance I have come across is where a vessel's nets get caught on the sea bottom in rough weather and consequently the vessel as a whole is in peril with a restricted ability to manoeuver. The Master orders the nets cut away and the insured present a claim for their replacement as General Average sacrifice on the basis that the Fishing Vessel clause about fishing gear is not intended to cover General Average situations and had they not cut away the nets, the whole vessel would have been totally lost and the nets etc, accordingly, paid for as a part of the sum insured.

A preliminary point would be as to whether the nets were already effectively lost when they were cut away. If they were (and were therefore effectively worthless at the time of their "sacrifice") then there can be no allowance in General Average under the York / Antwerp Rules as a result of Rule IV which is helpfully entitled "Cutting away Wreck".

However a fish boat owner would point to the fact that nets catching the bottom is a common occurrence and happens on average up to about once a week whilst fishing. With a net set on a large fishing vessel costing well in excess of US$ 100,000 (the trawl wires alone cost US$ 72,000), fishermen have become very adept at techniques for freeing the nets or at last substantial parts of them. They would therefore be very confident that, were it not that the vessel was in peril, they would be able to recover the net or a substantial part of it and it is not, therefore "wreck" within the meaning of Rule IV.

My view remains that any such claim cannot be sustained under the Fishing Vessel Clauses. In this case "no claim" should mean "no claim".

The reason for clause 15 is that insurers are aware of the risks to fishing gear once it is over the side and do not want to run the risk of its loss or damage (or, at least, not without a specific policy endorsement and additional premium).

We therefore have a situation where, if the net gets caught and is lost or damaged with the fish boat in no significant immediate danger there is no claim on the policy.

I do not think that the fact that the vessel is necessarily in potential immediate strife as sole a result of being attached to the net really changes the situation much. In most cases, by simply cutting the net away, the vessel is free to go and out of unusual danger. This is very similar to the position with a tug and tow and which the more recent sets of York-Antwerp Rules deal with under Rule B. There a tug is not in common peril with a tow if simply disconnecting from the tow would put her back in safety.

The position would possibly be different if there were a circumstance where a fish boat was in peril herself (being blown on to a lee shore) and had to let the net (which was not caught on the bottom) go in order to preserve herself. However, the clause is unforgiving in my view and has a "one size fits all" element.

The problem with trying to provide for one situation over the other is that if insurers were to allow General Average sacrifice of nets, then the door would be open and a fish boat which catches her net on a calm day would likely still be able to make a claim for sacrifice on the basis that she could not remain there for ever and would be in peril eventually.

Interestingly, there would be an argument for charging the catch insurers for their share of the loss of the nets as the catch policy would not have the benefit of the exclusion.

As always, it is in the power of the insurers, brokers and insureds to make the situation evident with the wording and either expressly include General Average sacrifice or exclude it.

The title of this address was “Fishing – shades of grey”. I hope by looking at some of the issues which fishing vessel claims produce, we can bring clarity not only to those claims but also to those areas of “proper shipping” which they touch.

In the last few weeks, we have heard of an initiative from the London Market to review, once again, the Institute Time Clauses (Hulls). This is laudable and one can only wish them luck and skill in both developing the wording and then getting the markets of the world to adopt them. It seems strange that the cargo market appear to readily adopt the new Institute Cargo Clauses but the Hull markets cling to the 1983 version of the Hull Clauses with such vigour.

If the ILU does manage to get a new set of Hull clauses widely adopted, it would be hoped that they would continue on the good work and turn their eye to some of the less frequented pages of Witherby’s such as the Institute Fishing Vessel Clauses.

Thank you.

Willum Richards

10 May 2018