AVERAGIUM

Newsletter of Harvey Ashby Limited, Average Adjusters & Claims Consultants
Summer 2000

Is this a warranty I see before me?

We have always stressed to our clients the importance of complying with warranties contained in their policies. These range in character from the 'warranted classed and class maintained' provision contained in the vast majority of marine hull policies, to survey warranties which require the approval of specified surveyors to certain operations conducted under offshore construction projects. The reason for this is not only the effect that a breach of warranty might have on the recoverability of a loss sustained as a result of the breach; but also the additional draconian penalty which can be applied by insurers.

The Marine Insurance Act [1906] provides that a warranty is a condition which must be exactly complied with and if it is not, the insurer is discharged from liability as from the date of the breach. It is, of course, always open to an insurer to waive a breach, or the policy may provide for some alternative penalty; nevertheless the fact, and the risk, remains that an insurer may avoid all liability under the policy from the date of the breach. In other words, in the event of a breach you may not have any insurance from that date!

Because of the far reaching consequences of a breach of warranty, English Courts have tended to shy away from determining that a particular condition is, in fact, a warranty rather than a condition precedent to cover; i.e. one which only affects the cover for that particular loss and not for any subsequent losses.

One of the difficulties is that the drafters of policy clauses are very free with their use of the word 'warranted' and use it in two senses. It is properly used where something is required to be done, or not done, or where the existence of certain facts is affirmed; for example 'warranted vessel classed and class maintained' or 'warranted towage arrangements approved by Ivor Notebook before sailing'. It is improperly used, for example, where the intention is to exclude perils; 'warranted free of capture and seizure'.

So, when is a warranty a warranty?

A recent case, before an English Court, involved the consideration of a 'sprinkler installation warranty' which required sprinkler installations at the insured's premises to be inspected by an approved engineer within 30 days of the renewal of the policy and for rectification work to be commissioned within 14 days of his inspection report. This condition was not complied with until 90 days after renewal and, following a loss due to a storm, the insurers contended that they were entitled to avoid the policy, and thus the claim, as a result of the non-compliance with a warranty.

This contention appeared to be supported by the inclusion of a general condition entitled "WARRANTIES" which spelt out that the breach of a warranty under the policy would be a bar to a claim whether or not it was material to any such claim.

"JUPITER" - Bay City, September 1990 (NOAA)

Nevertheless, the Judge decided that the warranty was not a warranty but a 'suspensive condition' the effect of which was merely to suspend cover from the time that the inspection was due until it was actually carried out.

Although there may be some equity in the decision, it seems to bring into doubt what exactly constitutes a warranty. This makes it difficult for insurance practitioners to draft policy wordings and to advise on their affect without having a Judge at hand.

Perhaps the remedy is for the draconian consequences of breach of warranty to be expressly overridden by the language of the policy. We are, at present, involved in the adjustment of an offshore construction loss under a policy which contains a provision to the effect that any breach of warranty shall not prejudice indemnification for any loss arising from circumstances to which the warranty breached has no relevance. Because of the nature of the coverage, involving a number of assureds, this policy has a further provision that any wrongful act or error or omission by an assured shall not operate to the prejudice of any other innocent assured.

The penalty for a breach of warranty under the above provisions is a more reasonable inability to recover any losses arising from the breach. It would seem that this is the approach that English Judges would prefer.

Welcome to the third edition of AVERAGIUM, Harvey Ashby Limited's Newsletter which we endeavour to publish twice each 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.

harvey ashby limited

Westwood Park, Colchester, Essex CO6 4BS, UK
Tel: (44) 01206 274081 Fax: (44) 01206 274099 email: hal@harvey-ashby.co.uk

Frustration or Justifiable Delay?

Consider the situation where a ship suffers an accident whilst loaded with cargo and the resultant damage necessitates putting into a port of refuge for the common safety of the ship and her cargo. This circumstance is a prime example of a general average act; the resort to a port of refuge in order to effect repairs necessary for the safe prosecution of the remaining voyage. Let us also imagine that the contractual provisions for the adjustment of any general average are the York-Antwerp Rules 1974 and that because of factors, such as the estimated time required to carry out necessary voyage repairs at the port of refuge, it is decided to tranship and forward the cargo to destination in a substitute vessel under an Non-Separation Agreement (NSA). Such an agreement has the dual benefit of enabling the cargo interests to receive earlier delivery of their goods than would otherwise have been the position if the shipowner had exercised his entitlement to deliver the cargo in the original vessel, once it was repaired and at the same time, permitting the shipowner to continue to recover in general average his detention expenses at the port of repair as if the cargo had remained with the original vessel.

A frustrated voyage!

Such a scenario is not unusual. The wording of the standard form of NSA states that it can be implemented only if the adventure could have continued by the original vessel, "*…for as long as justifiable under the law applicable or under the Contract of Affreightment.*" Reference to the governing law is necessary in order to decide the principle to be applied to determine whether implementation of the NSA is "*justifiable*."

The English Law principle was set out in the "Nema" (1981):- "*Frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract*."

In some cases, it is easy to apply the principle, for example, where the ship becomes a total loss so that performance of the contract is physically impossible. In other instances, particularly where delay is involved, it may be more difficult to determine, as there are nuances of degree involved.

One question to answer is – what is the correct date for applying the test of frustration under a NSA? For example, is it the date of signing the NSA or the date of transhipment? But would not applying the test on either of these dates deprive the above-quoted words in the NSA of their intended affect, as surely the parties should have thought seriously whether the circumstances give rise to frustration before they entered in to the NSA?

We are inclined to the view that, on the assumption that the NSA is signed by the parties to the adventure in the knowledge of the facts available at that time that continuing performance of the contract was justifiable, the adventure should only be regarded as frustrated if a further event occurs subsequent to signing the NSA or if further evidence comes to light. For example, an unforeseen delay arising from the original casualty or a new factor influencing the normal duration of the original voyage.

In the event of fresh circumstances arising, the Average Adjuster must review the post-NSA signing situation and test whether, at any stage, the voyage might have been declared as no longer justifiable.

In such situations the question of what period of delay would cause a voyage to become frustrated may well arise. The answer will depend upon various factors that must be taken in to account, such as the original anticipated duration of the voyage compared with the reality if the voyage is completed by the original carrying vessel, the nature of the cargo – e.g. whether or not is perishable or market sensitive, also the stage at which the voyage has reached when the intervening event giving rise to the vessel's inability to continue, occurs, e.g., whether the adventure requires 2 months or 2 days to complete.

In the recent case of the "Fjord Wind" (1998), the circumstances involved a part-loaded vessel that was delayed for approximately 95 days on a voyage with a normal duration of around 30 days. Although the Judge did not have to reach a decision on whether or not the voyage was frustrated in the light of his judgement on other aspects of the case, nevertheless, he did express his view. In particular, he stated that, "*…I think it quite possible that a delay of well over 3 months in presenting a load for a voyage expected to last about 30 days would have been regarded as sufficient to frustrate the adventure…*" and, "*…The fact that cargo has been laden on board should not in principle prevent the contract from being frustrated, and indeed there is authority to the contrary…*"

The incorporation in to Rule G of the York-Antwerp Rules 1994 of a form of NSA avoids the previous requirement necessary under the 1974 and earlier Rules for signature by the cargo interests to a separate NSA as part of the general average security. We have always advocated to shipowner clients that, it would be prudent if they obtained the agreement of their hull insurers before entering in to a NSA with cargo; this advice is given on the grounds that a NSA extends a general average situation where none would otherwise exist after a ship and her cargo part company and automatically makes hull insurers liable for their proportion of the ship's ordinary running expenses at the port of refuge for the duration of repairs. However, the latest amendment to Rule G in the 1994 Rules removes the necessity for signature to a separate NSA and, seemingly, any requirement for the shipowners to forewarn their hull insurers of the potential additional liability being incurred in general average, although of course the latter's obligation to pay ship's proportion of general average expenditure remains, but only as long as the prolonged voyage is, "*justifiable*".

Colchester Reef Light

Colchester Reef Light is a lighthouse which originally stood on Lake Champlain, a waterway bordering New York, Vermont and Quebec, a mile offshore from Colchester Point to mark the position of three reefs.

The lighthouse was built in 1871 at a cost of US$20,000, to a design which had won a lighthouse design contest and was utilised elsewhere in New England. It had four bedrooms on its upper floor and a kitchen and living room on the lower floor.

Colchester Reef Light used both light and sound to guide shipping. It exhibited a fixed red light visible for 11 miles from its original lens which remains in place. A fog bell was sounded by winding a clockwork mechanism, and it struck every 20 seconds when fog limited the light's visibility to less than three miles. No doubt the keepers and their families had many sleepless nights.

During its' working life the lighthouse was home to 11 keepers and their families.

On 29th January 1888, a baby, Myrtle Button, was born at the lighthouse. When his wife, Harriet, went into labour, Keeper Walter Button sent for a doctor by ringing the fog bell, a signal to his assistant on shore. Unfortunately, as they tried to cross the ice to the lighthouse, the doctor and the assistant keeper were carried by ice floes several miles to the north, leaving Harriet Button to have her baby without the benefit of a doctor being present.

To help provide food for his family Keeper Button kept a fruit and vegetable garden, along with a cow and a pair of horses, on Sunset Island about half a mile away. The children were often sent to work in the garden. Walter Button would blow a horn he had made from a conch shell as a signal to the children if a storm was approaching.

The Lighthouse today.

The Lighthouse on Lake Champlain.

In the winter Lake Champlain frequently froze over so that visitors often arrived at the lighthouse on foot or in horse-drawn sleighs. August Lorenz was keeper at Colchester Reef from 1909 to 1931, the longest stint of any keeper. He would row several miles to shore for supplies. On one occasion he became frozen to the seat in his boat and had to chop himself free.

The lighthouse was deactivated in 1933, when it was replaced by an automatic beacon and fell into disrepair. In 1952, Mrs Electra Havemeyer Webb purchased the lighthouse who had every part photographed and numbered for identification, before it was dismantled and taken to Shelburne, south of Burlington, by barge. Here it is to be found today as an exhibit at the Shelburne Museum.

The lighthouse is one of 37 buildings in the grounds of the museum that has been called "New England's Smithsonian." Inside the lighthouse are exhibits on Lake Champlain history, steamboats and lighthouse life. Nearby rests the old side-wheeler steamboat *"Ticonderoga"*.

[With acknowledgement to *New England Lighthouses: A Virtual Guide*: http://www.lighthouse.cc]

York-Antwerp Rules 2001?

The CMI (Comité Maritime International), which is the custodian of the York-Antwerp Rules, an internationally accepted set of rules governing the adjustment of general average, is currently undertaking a review of the current scope of general average.

There has been considerable debate over recent years, mostly encouraged by cargo insurers, as to whether or not general average ought to be abolished or, at least limited in its scope. It is felt by many that general average has developed too far from it's original concept of common safety to one which recognises common benefit and thereby, it is suggested, compensates shipowners for costs which are essentially losses by delay or increased costs of performing the contracted voyage.

Earlier this year the CMI circulated a questionnaire to all National Maritime law Associations requesting their views on the possible revision of the York-Antwerp Rules. The CMI intends to discuss the subject at a seminar in Toledo in September of this year with a view to a possible revision of the Rules at the next CMI Conference to be held in Singapore in February 2001.

A Few Words on Wordings

Policy wordings in the oil & gas sector of the insurance market have traditionally been manuscript in form, mainly written by brokers to meet the specific requirements of the risk and their clients. Some of these have developed into 'standard' wordings, lifted off the shelf but still, inevitably, subject to some amendment. Some brokers are good at crafting wordings, whilst others are not so good. The sad fact is that, almost invariably, claims people are rarely involved in drafting wordings and therefore the opportunity to take advantage of their depth of knowledge of claims and the shortcomings that they have seen in wordings whilst dealing with claims, is lost.

We have been involved in the drafting of energy wordings for over 20 years on behalf of brokers, assureds and underwriters and have always considered that our analytical skills and our experience in claims give us a unique perspective in this respect. This experience has assisted us in discovering gaps in coverage in respect of which protection could and should be provided and in correcting ambiguities that could give rise to dispute during the claims process. But, perhaps the greatest problem over the years has been the failure to write in plain English and the failure to consider the wording as a single document, rather than as an amalgam of clauses.

For example, we have recently had to consider an offshore construction wording that incorporated two warranty clauses. One of these appeared in the general conditions and dealt with matters that regulated a breach of warranty, such as 'a breach of warranty does not affect the insurance where the assured has no control over compliance'. The other clause, which was itself poorly worded, set out the conditions which must be complied with as a warranty. However, this latter clause only appeared in the section providing cargo insurance and thus, on the face of it, did not apply to the principal risks of fabrication, installation and hook-up. This mistake might have been easily corrected by incorporating all the provisions relating to warranties in a single clause, as a general condition applicable to all sections of the policy.

A common error is the misuse and/or confusion of terms. For example the terms Sum Insured, Insured Value and Limit of Liability are frequently used almost interchangeably, without deference to their proper meanings. Similarly the terms Insured, Named Insured, Additional Insured and Other Insured are frequently abused. These particular terms should be properly defined and used only in their proper context. This is, of course, particularly important where the breadth of coverage available is dependent upon the category of insured concerned. Another favourite is to define 'bodily injury' and thereafter consistently use the term 'personal injury'.

A potential problem arises from the fairly widespread practice of introducing positive cover through exclusion clauses. All Risk covers are invariably subject to a number of exclusions the intention of which is either to exclude a peril or category of loss which would otherwise be covered or to make it clear that a certain exposure is not covered. A good example of the latter is the exclusion of loss by delay – such loss would not be covered under an all risk property coverage irrespective of the exclusion, the only purpose of which appears to be to reinforce the position.

However, it is quite common to exclude damage caused by such factors as wear and tear, gradual deterioration, latent defect and faulty design – the consequences of which are also not covered under an all risks wording – but to then to add the following or similar words: "however, the foregoing shall not exclude any loss or damage arising from the above matters." The intent of this can only be to cover resultant damage caused by, say, wear and tear, i.e. excluding the part which is worn and torn. This would be fine if the quoted words acted as a limit to the affect of the exclusion, but what they are trying to do is to add cover because damage caused by, say, wear and tear is not fortuitous or accidental and is thus not covered by an all risks wording. Our concern here is that the exclusion purports to reinstate coverage which it cannot do as the coverage was not there in the first place. In our view, the proper course of action is for the perils clause to be extended to cover the risks intended to be insured that are not encompassed by the term 'All Risks'.

Well, you might say, what is the problem if the intent is clear? The problem is that the wording is the evidence of the bargain struck by the parties and, in the event of a dispute, it is the wording that a Judge will interpret. In any event, why agree to a wording that is potentially defective, if simple clarification is the remedy?

It is, perhaps, not surprising that more thought goes into the preparation of 'standard' wordings and that these, particularly the Institute wordings, are generally well crafted. However, what constitutes a 'standard' wording? One might assume that the London Standard Drilling Barge Form is a 'standard' wording but regrettably it is not. We have on file at least three versions of this 'standard' wording, all have the same title and date. We can only assume that this has arisen through the neglect of those who have amended the wording at various times, to change the title, date or to add a version number. Whatever, they have done the market a disservice as there is now, in reality, no such thing as a London Standard Drilling Barge Form.

So, the message is clear - ensure that wordings are drafted or amended by people with a proper understanding of insurance law and practice, that the wording is considered as a single document rather than a collection of clauses and that it is clear and unambiguous.

Comings & Goings

During the last six months we have received vsitors at Westwood Park from Holland and Belgium. We have visited Denmark, Malaysia, Singapore, Abu Dhabi, Dubai and Indonesia.

harvey ashby limited

Westwood Park
Colchester
Essex CO6 4BS
United Kingdom

Tel: (44) 01206 274081
Fax: (44) 01206 274099
email: hal@harvey-ashby.co.uk
website: www.harvey-ashby.co.uk

Michael Harvey
Home Tel: (44) 01440 788033
Home Fax: (44) 01440 788034
Mobile: 0780 123937

Brian Ashby
Home Tel/Fax: (44) 01732 454297
Mobile: 0780 123916

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