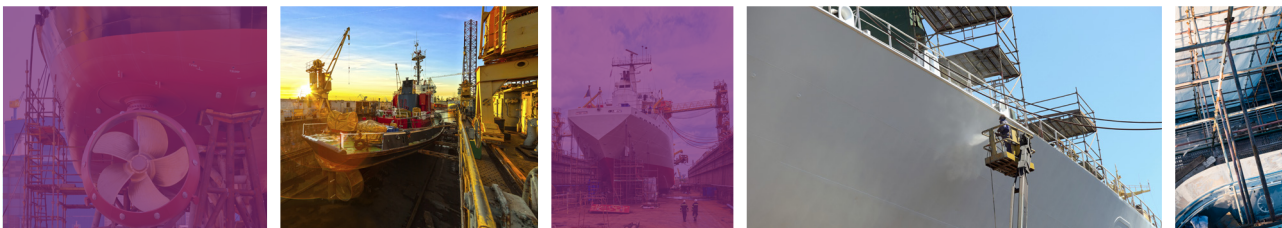


Shipping

April
2016



Welcome to the April edition of our Marine Insurance Bulletin

We start this bulletin with a discussion of the potential changes that might arise in the York-Antwerp Rules that govern the calculation of general average. A number of major changes have been proposed including concerning the potential for readjustment of salvage, commission and rate of interest to be used.

Next we consider the Enterprise Bill that follows the Insurance Act 2015 and is viewed by some as completing the reform of insurance law. If the Enterprise Bill becomes law then insurers may find themselves liable for damages for late payment of a claim.

Our third article considers a new market for many marine insurers, that of yacht insurance. We consider some of the main differences between hull insurance policies and yacht policies. We also highlight some of the potential pitfalls for insurers entering this market.

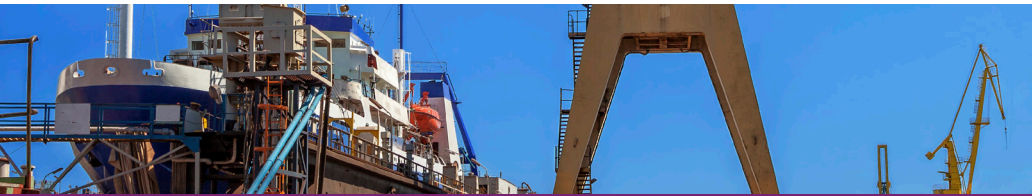
Finally we consider the explosions at Tianjin six months after they occurred. We review the evidence that has come to light concerning the cause of those explosions. We also look at the impact both on Chinese insurers and international insurers.

Should you require any further information or assistance with any of the issues dealt with here, please do not hesitate to contact any of the contributors to this bulletin, or your usual contact at HFW.

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hfw 2016: the year of a new York-Antwerp regime?

At the 2012 Beijing Conference of the Comité Maritime International (CMI), an International Working Group was formed and tasked with trying to develop a set of revisions to the York-Antwerp Rules 2004, which had not found favour in the shipping community¹. The aim was to have a set of revisions ready for rectification at the 2016 New York Conference.

The International Working Group of the CMI continues their efforts in trying to find an international consensus between stakeholders for changes to the York-Antwerp Rules of 2004. Work on these new rules has been continuing apace following recent meetings of the International Working Group in Istanbul in June 2015 and more recently in London last December. It remains to be seen whether a new set of rules will be the result of the 2016 conference, and even more so whether those rules will find favour with the international community – the support of BIMCO in their standard form documents will be crucial.

First, one of the biggest issues has been the treatment of salvage under Rule VI. Historically there has been debate as to whether or not there should be changes to prevent salvage being readjusted in general average and to deal with so called “differential salvage cases” – cases when, as a result of settlement, one party to the salvage pays much more or much less than it should have based on finalised contributory values. It would now appear that there is a consensus for a revised Rule VI which would prevent

contractual salvage being readjusted in general average unless:

1. The salvaged values and contributory values are significantly different.
2. There are significant general average sacrifices of salvaged property.
3. The salvaged value is manifestly incorrect.
4. Any of the parties paid more than they should have done.
5. Any of the parties settled on substantially different terms to those which they should have done, such as differential salvage.

If such a rule can be adopted it would be a substantial step forward and would provide some comfort to the property insurers as a compromise from the 1994 regime.

Secondly, an agreement on the controversial question of commission under Rule XX also seems to have been reached. Commission of 2% would continue to be omitted on the basis that an allowance for the cost of raising funds to pay for general average disbursements/sacrifice remains, probably in Rule XXI. Rule XXI would also be modified such that the rate used for calculating interest is based on the 12 month ICE LIBOR rate for the currency in which the adjustment is going to be prepared, plus a 4% uplift. This is a departure from the York-Antwerp Rules 1994 which applied a fixed rate for interest of 7% and which was never popular with insurers.

Thirdly, there has also been a general consensus reached that a set of draft guidelines for the York-Antwerp Rules should be produced. This would be to:



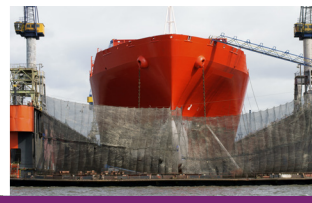
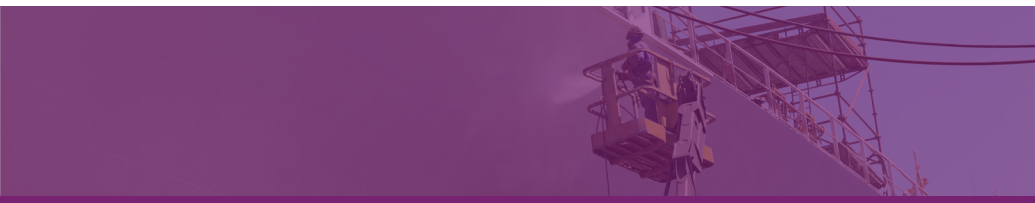
It remains to be seen whether a new set of rules will be the result of the 2016 conference, and even more so whether those rules will find favour with the international community – the support of BIMCO in their standard form documents will be crucial.

ALEX KEMP, SENIOR ASSOCIATE

- Give guidance on the application of the rules.
- Provide commentary on some matters that are deemed notable but not appropriate for inclusion in the Rules.

A version of these guidelines has already been produced and placed on the CMI website. At present the draft would seem to address the basic principles of general average, security documents and specific guidance on Rules VI and XXII. It has also been suggested that these guidelines would also include commentary on the role of the adjuster and general interest surveyor.

¹ See our previous article from June 2013: <http://www.hfw.com/Marine-Insurance-Bulletin-June-2013>



Lastly, other interesting changes include revisions to:

1. Rule B such that the definition of common maritime adventure is revised in circumstances where there is a tug tow operation.
2. Rule E such that there is a 12 month limit on the provision of evidence in support of notified claims or values. In the event that this evidence is not provided the adjuster is at liberty to estimate the extent of any allowance or contributory value.
3. A possible modification to Rule F to take into account the pending Court of Appeal's decision of the *LONGCHAMP*² which is due to be handed down later this year after the New York conference.

HFw's perspective

It is our view that the issuance of guidelines are to be welcomed as such guidance on the practice and application of the York-Antwerp Rules can only lead to greater certainty and consistency of application around the world.

As for the other proposed amendments to the Rules, we await the outcome of the New York conference in May this year with some interest and will report afterwards.

For more information please contact **Alex Kemp**, Senior Associate, on +44 (0)20 7264 8432, or alex.kemp@hfw.com, or your usual contact at HFw.

hfw Enterprise Bill: an enterprising bill for insurers

The Insurance Act 2015 (the Act) received Royal Assent last year and has been praised by commentators as being a long awaited and much needed reform to insurance law.

Alongside the praise, the Act has been criticised by some as having missed an opportunity to reform parts of insurance law, in particular, the insured's rights to damages for late payment of claims.

In the consultation phase, prior to the Act being given Royal Assent, the Law Commission referred to the decision in *Sprung v Royal Insurance (UK) Ltd*¹. In this case the Court of Appeal held with "undisguised reluctance" that it was unable to award damages to an insured for late payment of a claim.

The proposed change, to make insurers liable for late payment, was dropped from the final text of the Insurance Contract Law Bill in order to ensure that it could be passed using a special procedure for non-controversial Bills.

The return

However, damages for late payment of claims is being revisited in the Enterprise Bill (the Bill). This Bill is predominately intended to encourage the setting up and growth of small businesses. The Bill proposes three new areas of law in relation to insurance:

1. Implied term that claims will be paid in a reasonable time

It will be an implied term of every



...damages for late payment of claims is being revisited in the Enterprise Bill.

MATTHEW WILMSHURST, ASSOCIATE

contract of insurance that, if an insured makes a claim, the insurer must pay any sums due in respect of the claim within a reasonable time and that damages may be payable if there is a breach of this implied term.

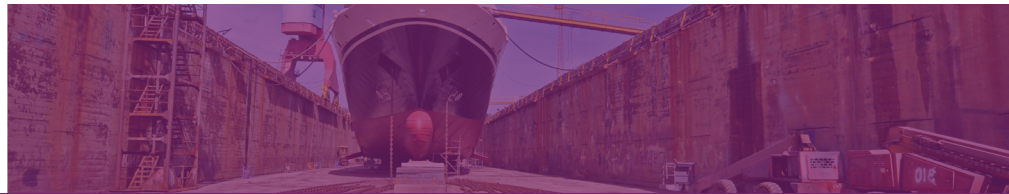
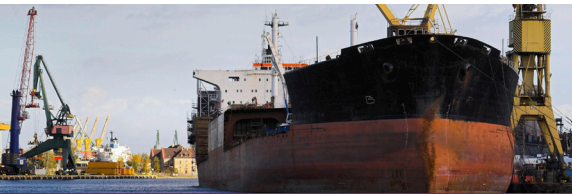
"Reasonable time" will include a reasonable time to investigate and assess the claim. The Bill provides that a "reasonable time" will depend on the circumstances, and gives guidance by way of a non-exhaustive list of factors which may need to be taken into account including:

- The type of insurance.
- The size and complexity of the claim.
- Compliance with relevant statutory or relevant rules or guidance.
- Factors outside the insurer's control.

This change will be achieved through an amendment to section 13 of the Act.

2 2014 EWHC 3445 (Comm)

1 [1999] Lloyd's Rep. I.R. 111



...insurers will have to look carefully at claims handling processes and pay particular attention to property claims where the damaged asset is income earning, and in liability claims where the insured may lose valuable customers by not being able to settle a claim.

2. Time limit in respect of claims for breach of the implied term

In circumstances where an insurer settles a claim, but not within a reasonable time, there will be a one year time limit in which an insured can bring a claim against insurers for damages for breach of the implied term. The one year time limit starts running on the date that insurers pay the final amount due in respect of the claim. This change will be achieved through an amendment to section 5 of the Limitation Act 1980.

In circumstances where an insurer fails to pay a valid claim, there will be a six year time limit for an insured to bring a claim. This will run from the date on which the insurer should have settled the claim.

3. Contracting-out

Whilst it will not be possible to contract out of the proposed changes in the context of consumer insurance, it will be possible to contract out in relation to a non-consumer insurance, save for in circumstances where the insurer's breach of the implied term was deliberate or reckless.

HFW's perspective

If the Bill becomes law in its current form, then there is a big unknown as to the number of insurance claims which could be caught by the proposed amendments to the Act.

Nevertheless insurers of commercial assets will have to decide whether to attempt to contract out and only time will tell how successful they are at this.

Whatever happens, insurers will have to look carefully at claims handling processes and pay particular attention to property claims where the damaged asset is income earning, and in liability claims where the insured may lose valuable customers by not being able to settle a claim. In the future, failure to pay promptly may result in an expensive claim for damages.

For more information please contact [Matthew Wilmshurst](#), Associate on +44 (0)20 7264 8115, or matthew.wilmshurst@hfw.com, or your usual contact at HFW.

hfw Yacht to be careful: unusual features of yacht insurance policies

As the shipping downturn continues, many marine insurance companies which ordinarily only provide insurance to cargo vessels are attracted to break into a new sector – yacht insurance. This article provides a guide to some of the more unusual clauses found in standard term yacht insurance policies that do not appear in ordinary hull insurance policies (the International Hull Clauses).

Introduction

When proposing to enter a new market it is important that the insurer understands the vessels it is due to provide insurance for and the insurance terms. Yacht insurance policies contain some unique clauses, rarely found in other policies.

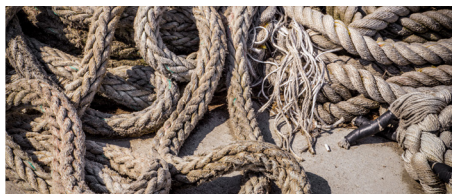
What has happened?

Yachts are becoming increasingly popular, and are an international status symbol that many aspire to own. Yacht insurance is accordingly a growing market. The Institute Yacht Clauses (IYC) are a widely used set of standard terms for yacht insurance. Yet yachts can vary enormously in shape, size, and use – as a result, the policy wording often depends on detailed refinement by the insurer/broker to match the yacht, and its intended use. Some of the most important clauses to be considered are below.

The key points

Clause 3 – navigating and charter hire warranties

Unlike cargo vessels, which are ordinarily allowed to trade



...yachts can vary enormously in shape, size, and use – as a result, the policy wording often depends on detailed refinement by the insurer/broker to match the yacht, and its intended use.

JENNY SALMON, SENIOR ASSOCIATE

internationally, always within IWL¹ unless otherwise agreed, yacht owners are obliged to give warranties as to where the yacht will operate in the policy's schedule. It is common that navigation is restricted to certain geographical areas, such as the Caribbean or the Mediterranean. It is also common for cover to be time-restricted. For example, yachts allowed to operate in the Caribbean are often not covered for damage occurring due to weather during hurricane season (June 1 to November 30). Also a yacht needs to be covered for any journeys transiting between two separate areas where it is permitted to navigate – coverage for the Caribbean and Mediterranean does not permit the vessel to transit the Atlantic.

Clause 5 – speed warranty/Clause 19 – speedboat clause

For those more used to insuring cargo vessels Clause 5 of the IYC will be a surprise as the assured has to provide a warranty that the yacht is not capable of travelling in excess of 17 knots. If it can, the insurance will not attach. In those circumstances Clause 5 will need to be deleted, and Clause 19

incorporated. This clause provides much more limited cover, reflecting the increased risks faster yachts pose. Some examples of restricted types of claim are those arising due to an accident when the boat was racing; claims for loss or damage to the rudder or propeller due to latent defects, negligence, or heavy weather; and claims for fire or explosion caused by inboard machinery.

Clause 11 – liabilities to third parties

This clause provides the owner of the yacht with the ability to insure both the hull and liability to third parties. Effectively thereby making the insurer not only a Hull insurer but also a P&I insurer. Insurers who normally insure only hull for commercial vessels will therefore have to consider carefully whether they wish to take this step.

As the Insurance market is aware, third party liabilities can be potentially large, and difficult to predict, even in relation to yachts.

The clause also extends P&I cover to situations where someone other than the assured is navigating or in charge

of the yacht, as will commonly be the case on larger yachts, as long as the assured writes to the insurer in advance requesting this.

How will this affect me?

There are a number of notable clauses in the IYC, of which a few have been considered here. How risk is allocated under the policy will depend on how those clauses are adapted, if at all by the parties. That negotiation process will be heavily influenced by both the specifications of the yacht, and the assureds intended use of their yacht, and changes to this.

It is likely that for a hull insurer branching out into yacht insurance it will, at least initially, be relatively labour intensive with, for example, potentially notifications being provided each time a yacht changes geographical location.

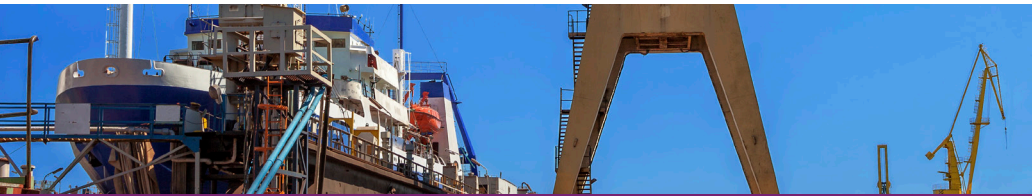
HFW's perspective

For any insurer intending to start insuring yachts it is important that all pertinent information is obtained from the owner both of the type of yacht and the geographical location that the vessel is intended to sail.

A decision will also have to be made as to whether to cover P&I risks. Where an insurer is not sure if a policy accurately reflects their intentions, as experienced marine insurance lawyers we can clearly explain the terms of the contract in order to ensure that the insurers obtain the necessary protection.

For more information please contact **Jenny Salmon**, Senior Associate on +44 (0)20 7264 8401, or jenny.salmon@hfw.com, or your usual contact at HFW. Research conducted by Richard Alam, Trainee Solicitor.

1 Institute Warranty Limits



hfw Tianjin port explosion: six months on

On 12 August 2015 dramatic images and video footage of two explosions in Tianjin Port (Port), North Eastern China started to catch the world media's attention. Quickly the enormous scale of the explosions became apparent and those in the shipping industry recognised that it looked suspiciously like a huge dangerous cargo incident. However, it became increasingly difficult to find out more as the authorities cordoned off the area.

Now, more than six months after the explosions, is a good time to take stock of what we know.

Cause

The Chinese authorities have investigated and have found that the "initial flaming substance" was nitrocellulose. The location of the explosion was Rui Hai International Logistics' (Rui Hai) warehouse where 32.97 tons of nitrocellulose and lacquer pieces had arrived¹. The official report on the incident and press reports blame Rui Hai, which had been operating illegally without a licence to handle hazardous chemicals up until two months before the incident. It is estimated that at least 3,000 tonnes of hazardous chemicals were being stored in the warehouse.

Enormous incident

According to the International Union of Marine Insurance's report of 2 February 2016, the "severity of the blasts coupled with the exceptional amount of insured goods stored on site made this event the biggest man-made loss ever to occur in Asia and the largest marine loss in history. Industry estimates are



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CAROLINE THOMAS, SENIOR ASSOCIATE

that the losses will range between US\$5-6 billion of which around 50% are likely to fall under the marine umbrella."

While not all of the losses are insured, many are. Domestic and international (re)insurers alike have received claims and are bracing themselves for more. More than six months on significant uncertainty remains in where the final loss tally will settle and even where certain losses fall. In particular there are questions being raised, for example, as to whether the insurance for the damaged cars will fall under cargo or property contracts.

Losses

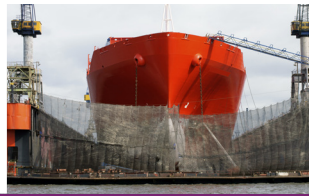
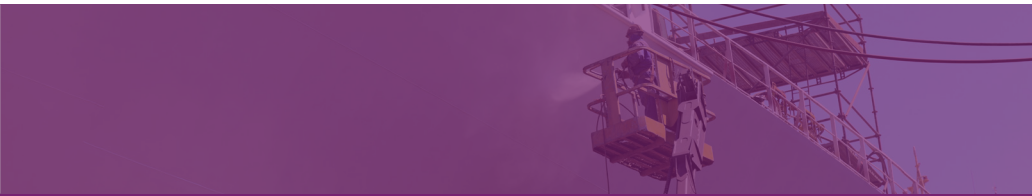
The categories of losses broadly can be summarised as follows:

- **Residential, industrial and warehousing property damage, including contamination.** Such damage may trigger cover under direct local property policies.

- **Business Interruption (BI), Contingent Business Interruption (CBI) and Supply Chain Disruption.** Damage to property, disruption to shipping logistics at the Port and prolonged utility outages resulting from the explosions will likely lead to claims. These claims may be substantial since 2013 figures rank Tianjin as the 3rd port in the world for cargo volume and 10th for container throughput.

- **Thousands of brand new cars** were stored at the Port, which accounts for 40% of all Chinese car imports and exports. The main manufacturers who have reported as being affected are: Jaguar Land Rover (almost 6,000); Hyundai (4,100); Chrysler (3,000); VW (2,748); Renault (1,500); Mitsubishi (600); Mazda (50) and BMW (unknown).

¹ Translation of the Investigation Report of the Tianjin Explosion on 12 August Serious Fire and Explosion in the Hazardous Goods Warehouse of Ruihai (Source: State Administration of Work Safety Website)



- **Containers of all shapes and sizes** were located at the Port at the time of the incident. The value of loss or damage to containers is estimated to be up to US\$60 million.
- **Liability policies** will be triggered if claims are brought against insured parties who were legally responsible for the losses.
- **Reinsurances** will likely be triggered, for example quota share or excess of loss policies.

Insurance Issues

Complex coverage and subrogation issues arise under the relevant (re)insurance policies. Double insurance issues also arise as some losses may be covered by more than one policy.

The Insurance Association of China (IAOC) issued a protocol for the processing of claims arising from the incident. This includes a specific procedure for insurers to follow depending on the type of claim, for example corporate property; employers' liability and family property. Furthermore, a procedure has been suggested for the apportionment of claims across multiple policies.

How HFW can help

Our team of specialists, including in Hong Kong and Shanghai, have many years of experience in handling the legal issues arising from major incidents such as the Tianjin explosion.

We have a very strong (re)insurance team and are able to advise on the various issues this incident throws up including coverage and subrogation.

For more information please contact **Caroline Thomas**, Senior Associate on +852 3983 7664, or caroline.thomas@hfw.com, or your usual contact at HFW.

Conferences and events

Multimodal 2016

Birmingham

10-12 May 2016

Presenting: Matthew Wilmshurst

Informa Marine Insurance Forum

London

17-19 May 2016

Presenting: Jenny Salmon

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