



## **2009 CHAIRMAN'S ADDRESS**

### **“Why Me?”**

#### **(Which policy pays in cases of progressive or discovered damage)**

This is the plaintive cry of the Underwriter who has been congratulating himself on achieving a claims free period with a favourite Shipowner client, only to find that an adjuster is showing a claim against a policy he had thought had been put to bed two years ago. Financial pressures mean that nobody likes long tail business even if reserves are in place; unreserved old claims are the ultimate bad news.

The intention of this Address is to look at why this happens, to consider the limited legal authorities that might offer guidance and to review the solutions that are generally brought to bear.

The general rule in any form of insurance is that the insured event and the damage sustained should both come within the period specified by the policy. However, real life is never that neat and marine policy wordings and claims practitioners have to cope with the fact that...

- damage occurring during Policy A may go undiscovered until Policy B is on risk.
- a casualty may occur in the final days of Policy A so that its effects are still being felt during Policy B or cannot be quantified until after Policy A has ended.
- damage may occur, without becoming apparent, over a period of time that spans more than one policy.

However inconvenient this may be, it is important that solutions are found that can be clearly understood and consistently applied. This is not the first Chairman's Address to look at the problem of what is normally referred to as

“incidence of loss”, and I am much indebted to Fellows past and present for their assistance in putting together this latest review.

Straying for a moment from our more familiar marine territory, an American book (Clarke on Law of Insurance Contracts, 4<sup>th</sup> Edition) gives some examples of how non-marine policies may deal with the problem. Such policies may adopt any of the following critical points as the basis for a claim:

### **Impact date**

For example, when a worker is exposed to asbestos dust.

### **Manifestation**

Under a fidelity policy covering dishonesty of employees, a loss is discovered during the policy period, but the actual theft had occurred earlier.

### **Triple trigger**

Any insurer who was on risk at either the time of impact, or during continued exposure or at the point of manifestation, becomes jointly and severally liable with the other Insurers on risk at any of those points.

### **Claims made**

Often used for liability insurance, particularly professional indemnity.

To achieve any of these solutions, clear express wording in the policy will be needed, or a market understanding may be reached between the insurers involved in a particular class of business. An example of this latter approach can be seen with regard to the Association of British Insurers Domestic Subsidence Agreement. Subsidence of domestic properties is clearly a nightmare area for problems of long term damage with uncertain dates both of initiation and discovery. The Agreement makes the date of notification determine which policy the claim falls on. If the current Insurer has been on risk for more than a year at the date of notification, no contribution is sought from the previous Insurer; conversely if the current Insurer has only been on risk for eight weeks or less at notification, the claim falls on the previous Insurer. Between eight weeks and one year, the loss is shared equally between the two Insurers.

Each of these trigger points has its own advantages and disadvantages from a commercial or practical point of view, and some will be more appropriate for certain classes of insurance business than others.

There is an interesting section in the Commentary to the 1996 Norwegian Plan which mentions that when the 1964 Plan was being thoroughly overhauled, incidence of loss was one of the topics that was looked at closely. The option of going for date of discovery or manifestation as being decisive for all claims was felt to be very attractive in terms of its simplicity. However, it was rejected for a combination of reasons:

- this was contrary to general Norwegian insurance law and most international insurance practice.
- Insurers would be reluctant to accept Assureds or vessels on risk they might know little about, perhaps requiring time consuming and expensive pre-risk surveys.
- the moral hazard involved in the possibility of Assureds deliberately deferring “discovery” of a damage to a new policy, perhaps with wider conditions.

As a result, while “discovery” forms a part of the Norwegian Plan solution, the 1964 approach was largely retained.

Similar debates took place in the London Market when the decision was made to drop the poetic but hopelessly archaic wording of the S.G. Form in favour of the self contained perils clause in the 1983 Institute Hull Clauses.

The S.G. Form said that assurers were contented to bear and take upon themselves perils of the seas, whereas the 1983 clauses spoke of loss or damage caused by such perils. If a vessel grounded during policy A, and this also initiated damage that only took effect during policy B, most adjusters under the S.G. Form would have applied the whole claim to Policy A. Eminent adjusters took different positions as to the effect of the new clauses. There was much talk of the status quo being maintained, but it was evident that people had rather different ideas as to what that status quo actually consisted of. In the 26 years since the 1983 Clauses came in, the practice has generally been to give increasing weight to the words “loss or damage caused by”.

Before proceeding further it may help to give some practical examples:

### **Unknowns**

During Policy C a vessel dry-docks for the first time in nearly four years. When last dry-docked during Policy A, the bottom was free of damage but it is now found that part of the bottom has been set up over a wide area. No grounding incidents have been recorded during the intervening period.

### **Ticking Bombs**

During Policy A, a ship’s engineer carries out a routine overhaul for the emergency generator and refits a bearing incorrectly. The next time the generator is started up for a routine check, during Policy B, the bearing seizes causing damage.

## **Progressive Damages**

### **(Terminal)**

During Policy A, a ship's engineer carries out maintenance work on the main engine cylinder lubrication system and negligently resets the metering equipment. During Policy A, and later during Policy B, the main engine operates with insufficient cylinder lubrication resulting in abnormal wear to cylinder liners etc. which have to be replaced.

### **(Repairable)**

During Policy A, the vessel undergoes a Class Survey including tailshaft examination, following which repairers replace a stern tube seal incorrectly.

Initially, the seal functions adequately but during Policies B and C progressive abnormal wear of the tailshaft liner takes place. This damage is discovered during the next routine dry-docking at the end of Policy C and the liner is machined etc. to make good the damage.

These examples are of course stated in very simple terms and relate to commonplace types of damage. However, it should be remembered that similar problems can occur with a wide range of insured property from specialist vessels to drilling rigs and pipelines; nonetheless, the same principles can be applied.

## **Death blow principle**

This needs to be referred to in any discussion of the topic, but I need only do so briefly because the principle was reviewed in detail by Alan Birch in his 1989 Chairman's Address which looked at the leading cases on this point, including the often mis-understood *Knight v. Faith* (1850). The principle accords with common sense – a vessel must be regarded as effectively lost when “it has been so affected by perils insured against that nothing can save it from ultimate destruction” – these are Lord Summers' words in the “*Clan Matheson*” (1943). Thus if a vessel has received its death blow due to insured perils towards the end of Policy A, that is where the loss falls, even if it is not until the inception of Policy B that it finally sinks or the extent of the loss is finally quantified. The same logic must surely apply to a part of a vessel as to the whole, but we will return to this point later when discussing the question of parts already being effectively condemnable prior to discovery of damage.

When it is applicable, the death blow principle lets the Insurers on later policies off the hook, but there are many situations in which the origin of a claim may in some way pre-date the inception of the policy or policies on

which it will ultimately, and legitimately, fall. For convenience I will refer to these as pre-inception perils – under ITC Hulls 1/10/83 we are looking at latent defect and negligence of crew/repairers/charterers.

### **Pre-inception perils**

Bearing in mind the general rule of insured peril and resulting loss both falling within the time-span of the policy, we need to look for the basis for saying that these pre-inception situations can give rise to liability under marine policies.

Coverage in respect of latent defects is an obvious example where the origin of a claim – the latent defect – is likely to pre-date the inception of the policy. There must of course, as confirmed in the “Nukila” (1997), be damage during the currency of the policy on which the loss is claimed. Amongst practitioners there has never been any doubt that the same approach will apply with other Inchmaree perils in Clause 6.2 of the ITC Hulls, such as negligence of crew or repairers.

However, unlike latent defect cover, this has never been confirmed in the Courts and some legal sources – notably Arnould – have questioned whether an act of negligence during Policy A can give rise to a valid claim when the resultant damage falls on Policy B. The latest (17<sup>th</sup>) Edition of Arnould also expresses doubt as to whether the negligence perils should be treated in the same way as latent defect and therefore prevailing over the doctrine of inherent vice.

The editors consider that the wording of Clause 6.2 in relation to negligence of crew, repairers or charterers is not sufficient to over-come the general rule of both peril acting and loss occurring during the period of the same policy. The point is not a new one, having been raised by Anthony Diamond Q.C. in a 1986 lecture entitled “The law of marine insurance – has it a future?”, and it is conceded in Arnould that there are strong commercial arguments for treating negligence and latent defect claims the same way in a marine policy.

The commercial argument is simply that, if you do not, you create a very significant gap in cover. In my “ticking bomb” example, there would be no recovery under Policy A because there was negligence but no damage, and no claim under Policy B because of the general rule that I have referred to, and/or the doctrine of inherent vice: a real “Catch 22” for the Assured.

Reference is made in Arnould to the non-marine case of Kelly v. Norwich Union (1989) which involved subsidence damage to a bungalow. The relevant dates were as follows:

1971            Mr. Kelly purchased the bungalow.

- 1974/6      Dry, hot summers caused desiccation of the clay subsoil.
- 1977            Insurance policy inception, covering bursting of water mains landslip and subsidence, coverage continued to 1981.
- 1977/80      Three different leaks in the mains water pipe occurred.
- 1981            Mr. Kelly claimed under the policy in respect of subsidence damage to the building.

Unfortunately for Mr. Kelly, the first leak in 1977 occurred before he had taken out the initial policy and neither he nor the experts called to give evidence could establish what proportion of the damage was attributable to that first leak. The Assured therefore had to argue that he could still recover if damage caused by an insured peril occurred during the cumulative term of the policies, even if the peril occurred before that term began.

This argument was rejected by the Court of Appeal, primarily on the grounds that the Assured had to show that the specified peril occurred during the term of one or other of the policies.

It should however be noted that the policy contained general wording, promising to “indemnify..... the Insured in respect of events occurring during the period of insurance.....”. This is a different proposition to the “This insurance covers loss of or damage to the subject matter insured” that prefaces Clause 6 of ITC Hulls.

In giving his reasons, Lord Justice Bingham said:

*“I think it contrary to common understanding that an event may qualify as an insured peril if occurring before the policy term. This common understanding is reflected in the traditional language of the Lloyd’s ship and goods voyage policy annexed to the Marine Insurance Act 1906:*

*Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage: they are of the seas.... etc.*

*It would be somewhat startling if a claim would lie for damage suffered during a voyage as a result of perils which had occurred before the insurers came on risk....”*

The nature of the old S.G. perils is that they would generally have an immediate impact on the insured property. However, the original Inchmaree case in 1887 demonstrated that the modern mechanised era of shipping needed cover in respect of different perils, which may at times operate in a very different way. In the days of annual dry-dockings and machinery that needed daily attention, it is likely that the impact of pre-inception perils of the kind featured in our examples would have been relatively rare. However, very different circumstances apply today with much longer dry-docking

cycles and machinery service intervals often measured in thousands rather than hundreds of hours.

Lord Justice Bingham continued:

*"The researches of Counsel unearthed no reported case in which an insurer had been held liable to indemnify the insured although the specified peril occurred before the insurer came on risk. While ultimately all must turn on the wording of the policy in question, it would in my view need compelling language of a kind not found here to lead to so unusual a result."*

Whilst the absence of litigation on hull claims can properly be a source of pride for the London Market, the downside is of course the lack of judicial guidance than can be referred to. However, I would not agree that in hull insurances such a result would be regarded as unusual or, to commercial men, undesirable.

Successive revisions of the Clauses have left the Inchmaree perils largely untouched and no restrictive words regarding incidence of loss have been added, which would no doubt have been the case had the established practice given rise to difficulties. In the specialist world of Hull insurance, the common understanding has evolved differently to remove the possibility of the Assured being unable to recover from either of two successive policies.

The 2003 International Hull Clauses were a very successful attempt to resolve uncertainties or gaps in case law by putting additional wording into the policy document. For example, latent defect cover has been pushed back more towards a pre-"Nukila" position, with clear guidance as to how related common charges should be dealt with. If there had been any concern on the part of Insurers regarding claims in respect of pre-inception perils, we would have expected Insurers and their legal advisors to have acted upon such concerns by introducing appropriate wording. Having drafted the Association's comments on the initial 2002 version of the International Hull Clauses, I have to say that it was a point that never occurred to me or the other Fellows involved, as something that needed attention.

Every indication is that the position under the Inchmaree perils in 6.2 has never been open to doubt in the minds of Insurers.

The point was dealt with by Mr Philip Birch (a senior London Underwriter and Chairman of the committee responsible for drafting the 1.10.83 clauses) at a Conference held to introduce the new clauses. He began by describing the existing position under the Inchmaree Clause of the 1.10.70 ITC Clauses:-

*"The cover is, therefore against loss or damage occurring during the policy period although it may be that the cause of such loss or damage is something which happened long before the policy attached. Say, for example, a shaft is misaligned through some negligent act of the crew performed during the currency of policy but this misalignment is not recognised and the*

*shaft continues to turn for many months until finally it breaks during the currency of policy B. The claim for damage caused by crew negligence will fall on policy B which is current when the shaft fails, not on the earlier policy which was current when the negligent act took place. The reason is perhaps easier to understand if the state of affairs at the end of the policy A is considered. The shaft is misaligned and a small claim is perhaps due in respect of the cost of realigning if that cost would exceed the deductible but otherwise there is nothing which could be described as loss or damage. It is not even certain that the shaft will break because the misalignment might be discovered and put right beforehand.*

*To sum up, firstly the general principle is that the peril and the damage must occur during the policy period. This applies equally to the S.G. policy and the new one. Secondly, the "death blow" principle outlined from Knight v Faith is applicable to both the S.G. policy and the new policy. Finally, because of the nature of certain of the perils taken from the Inchmaree clause - latent defect, negligence of repairers, for example, - loss or damage may be recoverable under the policy current when it occurs although the cause may antedate the inception of this policy. This has always been the case with Inchmaree perils and will continue to be so."*

### **Apportionment of losses**

Having established that more than one policy may legitimately be asked to respond to a claim, the next stage is to decide how each policy's share might be determined.

In his famous book on Marine Insurance, Donald O'May referred to the theoretical difficulties involved and continued:

*"In practice, average adjusters are required to produce equitable and practical solutions based on the facts of individual claims and the theoretical difficulties endemic in the topic are generally settled by agreement with underwriters."*

In waving this particular magic wand, adjusters have little in the way of clear authority to guide them and I will refer only to two such cases.

The first is a New York Arbitration concerning a vessel called the "SS Natalie". The Arbitrator, Russel T. Mount, was asked to consider where a loss should fall between successive Underwriters.

The vessel was purchased by the Assured in 1956 and put under a Port Risks policy while she underwent a dry-docking at New Orleans. The tailshaft was withdrawn and the shipyard was negligent when replacing the seals. The vessel then began trading under hull policies on full conditions. The repairers' negligence resulted in progressive corrosion damage to the tailshaft which became apparent when the vessel was next dry-docked, at Long Beach, 14 months later. The tailshaft was withdrawn for machining but this was unsuccessful due to the presence of a fracture and the shaft was condemned.

There was a technical difference of opinion as to how the damage had progressed; the Lloyds Agents' surveyor in attendance at Long Beach, considered that the damage had progressed evenly and constantly over the 14 month period. A firm of New York surveyors, consulted by the Assured,

were of the opinion that galvanic action would have begun to induce the fracture within a few months.

The Arbitrator concluded that the Port Risks insurers were liable for the damage to the seals caused during the negligent fitting by repairers, but that they were only liable for a small proportion of the tailshaft damage based on the time they were on risk. With regard to the subsequent hull insurances, the position was complicated somewhat by American law regarding a warranty of seaworthiness under a Time Policy, but the Arbitrator was plainly of the view that these should otherwise pay a pro rata share of the balance of the tailshaft costs on a time on risk basis. In reaching this conclusion he was largely guided by the decision in the “Exmoor” (AMC 1905) which dealt with liability for cargo damage. His findings have been criticised by some authors but I would suggest that it represents a reasonable, if imperfect, attempt to deal with a difficult problem.

Secondly, *Municipal Mutual Insurance v. Sea Insurance* (1998) involved a dispute between insurers and re-insurers who covered the liabilities of the Port of Sunderland. In 1985 two dragline excavators (used in open cast mining) were landed at the port to be stored pending sale. However, no buyers were found and the excavators remained there for several years, during which time extensive pilferage and vandalism took place. The owners took the Port to Court and were awarded £1.7m plus interest and costs in respect of the Port’s negligence as bailees. As you can see by the amount, ‘pilferage’ rather understates the matter – some of the parts required cranes and flat bed trucks for their removal, suggesting that the Port security was more than a little lax. The thefts took place over a three year period which coincided with three re-insurance policies, each with a £500,000 excess. The trial was to determine the liability of these re-insurance policies for the total claim of £3m paid by the original liability insurers.

In the High Court, the judge came to the view that each re-insurance contract covered liability in respect of loss or damage whether or not it occurred during the period of that contract and there could or should be contribution between the re-insurers for different years. He was therefore effectively adopting a kind of “triple trigger” liability mentioned by the American author, Clarke. This approach was described in the Court of Appeal as “surprising”, with Lord Justice Hobhouse saying:

*“When the relevant cover is placed on a time basis, the stated period of time is fundamental and must be given effect to..... This is so whether the cover is defined as in the present case by reference to when the physical loss or damage occurred, or by reference to when a liability was incurred or a claim made. To succeed the Plaintiffs must satisfy the Court on the balance of probabilities that there was loss or damage in any given year.”*

Lord Justice Hobhouse concluded that there was insufficient evidence to agree that the damage in the first and third years would have exceeded the

policy excess. With regard to the second year, the excess was undoubtedly exceeded – the assessment of by exactly how much he described as “very much a jury question” and on the balance of probabilities he found that two thirds of the overall loss probably occurred during that period.

This case is occasionally cited to suggest that the Court was rejecting the approach adopted by adjusters of apportioning losses over policy years in appropriate cases. On the contrary, I believe the case validates our approach, the objective of which is to find an equitable way of allocating damage to the policy year when it occurred.

## **Method of Division**

### Progressive Damage

We often talk of apportionment of progressive damages over policy years but that suggests rather too strongly an automatic time on risk calculation which, in my view, is not so much a default position, as a last resort. The suggestion in many text books is that a time on risk apportionment is invariably used but this is not in fact the case.

Damages sometimes need to be divided between policies because they are progressive in nature so that the damage occurs over a period either continuously (abnormal wear to a tailshaft because of incorrectly fitted seals) or sporadically (incorrect treatment of boiler feed water). Clearly time is going to be a factor but technical advice may tell us a number of things that would influence our treatment:

- i) That the progression of the damage was not evenly spread over time – for example loose holding down bolts may initially cause very minor fretting, but eventually the fretting increases the clearance and the rate of damage increases. Technical advice might therefore suggest a division of 10% in year one, 30% in year two, and 60% for the third year that concluded with the discovery of the damage.
- ii) That there came a clearly identifiable stage when the cost of repairs did not increase or the part(s) in question required replacement – often referred to as the stage at which the affected part became “condemnable”. (Some care is needed with this concept – on one level a latently defective part is condemnable the day it is (mis)cast, because its eventual failure could be said to be inevitable. However, this is not how latent defect cover is intended to work and cases such as the “Nukila” have emphasised a pragmatic rather than a philosophical approach). If such a stage can be identified with reasonable certainty, then generally any apportionment should stop there.

Notwithstanding these considerations, a straight time on risk apportionment may sometimes be used if the amount of the claim does not warrant the investigation required to produce a more scientific result, or if it is felt that such investigations might produce a very similar answer.

Frequently, progressive damage is mixed with damage that occurs at the time of a final breakdown. For example, incorrect cylinder lubrication may result in abnormal liner wear over a period of several months; eventually this leads to a piston seizure and serious crankshaft damage. Although there has been a sudden failure, that does not take away from the progressive nature of the liner damage. One often hears reference to the Institute Additional Perils Clauses (or their predecessor, the Liner Negligence Clause) providing cover for “failure in service”, which of course they do in so far as there is damage caused by accident, negligence, error of judgement etc., but these words “failure in service” do not actually appear in the Clauses.

In this example the crankshaft damage would fall on the policy current at the time of the final incident, and the liner damage would be apportioned according to the principles outlined above. However, there are exceptions to this practice that should be noted. One, relating to Clause 1.1.2. of the Institute Additional Perils Clauses, is dealt with later, and the second relates to cases where the damage that has been progressing and then results in a sudden failure is relatively minor – for example an incorrectly fitted connecting rod bolt has been cracking due to fatigue for a lengthy period before it fails, causing a major crankshaft damage. In such cases the adjuster will generally take the view that it is not worth the time and cost of trying to separate out the progressive damage, and will show all the damage on the same policy.

The third exception involves catastrophic failures where there is a sudden and complete disintegration or explosive breaking apart of machinery. Even if the pre-existing damage (pre-dating the policy when the “big bang” occurred) may be more extensive than a simple bolt, it may be appropriate to take the pragmatic view that the earlier damage is absorbed by the later event – e.g. the abnormally worn part is blown to pieces when the seizure occurs. Judicial support for this approach can be inferred from *Phillips v. Nairne* (1847).

### Unknown Damage

A typical scenario would involve a vessel entering dry-dock after an interval of several years and bottom damage is found. No recorded groundings are shown in the log books or ISM documentation; this is not unusual because with large vessels, the bridge crew may be unaware that the fore-part of the vessel, which may be some 300 metres away, has hit a sandbank while entering port. Despite the lack of records there are likely to be clues that

can be gleaned from the appearance of the damage, particularly from the presence or absence of corrosion or marine growth – such enquiries may also be necessary from a deductible point of view. Owners will also be able to give details of any divers’ inspections carried out for Class or hull cleaning purposes which might establish a “free of damage” date that is more recent than the last dry-docking.

All these will help to narrow down the range of uncertainty, so that one is making the allocation to the policies on the balance of probabilities rather than just a rule of thumb. In theory you could continue the investigations to look in detail at the vessel’s trading history to eliminate periods when such damage is unlikely to have occurred, but in practice, insurers are content to accept a level of enquiry that is proportionate to the amounts involved.

What may sometimes appear to be a rather “broad brush” approach, also reflects the need to bring all the insurers along with the proposed division; if there is any uncertainty the effect is spread widely, rather than making a possibly arbitrary selection of one policy which is likely to be disputed. The aim is to produce a solution that is both equitable and cost effective.

### **Specific Wordings**

Where considered necessary, the Institute Clauses do include additional wording that gives express guidance. For example, with Institute Builders Risks Clauses:

*"PERILS*

5.1 *SUBJECT ALWAYS TO ITS TERMS, CONDITIONS AND EXCLUSIONS this insurance is against all risks of loss of or damage to the subject-matter insured caused and discovered during the period of this insurance including the cost of repairing replacing or renewing any defective part condemned solely in consequence of the discovery therein during the period of this insurance of a latent defect. In no case shall this insurance cover the cost of renewing faulty welds.*

Or the Institute P&I Clauses Hulls – Time:

*"1 PROTECTION AND INDEMNITY*

1.1 *The Underwriters agree to indemnify the Assured for any sum or sums paid by the Assured to any other person or persons by reason of the Assured becoming legally liable, as owner of the Vessel, for any claim, demand, damages and/or expenses, where such liability is in consequence of any of the following matters or things and arises from an accident or occurrence during the period of this insurance."*

As I mentioned earlier, the Institute Additional Perils Clauses 1/10/83 also contain a specific exception to the normal treatment discussed so far; this is in Clause 1.1.2., which makes reference to recovery of a defective part. This particular wording has never been regarded as satisfactory. Its origins lie in

long running disagreements regarding the old 1930's Liner Negligence Clause and a pre-"Nukila" view of latent defect coverage, which restricted any recovery to consequential damage to separate parts that did not themselves contain the latent defect.

In 1995, Insurers submitted a question to our Association's Advisory Committee regarding a vessel insured under the Institute Additional Perils Clauses 1/10/83.

The vessel was built in 1990 and traded happily during the next three years, covered by Policies A, B and C. However towards the end of Policy C, a propeller blade broke off and the vibrations caused damage to the main gearbox before the engine could be stopped. A metallurgist reported that the blade had failed due to a (latent) casting defect in the propeller which had progressed during service.

Insurers accepted that the gearbox damage fell on Policy C but had received advice from the Salvage Association that the propeller would have been condemnable prior to the inception of Policy C. Insurers therefore considered the propeller damage should be treated as a progressive damage falling on Policies A and B.

However, the Advisory Committee quite rightly, I think, took the view that the point was governed by the express wording of the clause which said (see clause 1.1.2) that:

*"this insurance is extended to cover ..... any defective part which has caused loss or damage to the vessel covered by Clause 6.2.2 of the Institute Time Clauses - Hulls 1/10/83."*

The damage to the gearbox had been caused by a latently defective part – the propeller blade – and was therefore covered by ITC Hulls 6.2.2. Under the wording of Additional Perils Clause 1.1.2 that defective part (the propeller blade) then itself becomes a claim on Policy C.

As a passing comment, you may sometimes encounter situations in which, given a policy subject to ITC Hulls and the Institute Additional Perils Clauses, there may be more than one route by which an assured can claim, which may in turn affect the decision as to which policy pays. There would seem to be no reason why Assureds should not choose the route that is the most convenient or economically favourable for them. This may also occur with some Loss of Hire wordings. Overall, the message is that close attention must be paid to the actual wording of the policy in front of you.

In this brief review it has only been possible to consider simple examples and solutions and it may be that you have been sitting there saying "we know all this, what is he going on about?" If that is the case then I am delighted. Historically, there has been a broad consensus within insurance markets on these issues and it is very important that it is maintained. Sadly, in recent years we have seen several instances when Assureds have

been left hanging between insurers for different policy years, sometimes within the same market. It would be very damaging to the marine claims business if instead of NIMBY's we start to get NIMPY's – Not In My Policy Year.

If the consensus needs refreshing or fine tuning in any way then I am sure that the Association of Average Adjusters will be happy to work with any of the relevant market bodies to achieve this. In the absence of alterations to policy wordings we must rely on market practice and we must remember that this needs to be very clear if it is to be regarded as a binding usage rather than just a matter of widely held opinion. See the often quoted passage in *Cunliffe-Owen v. Teather & Greenwood* (1967):

*“ Usage’ as a practice which the Court will recognise is a mixed question of fact and law. For the practice to amount to such a recognised usage, it must be certain, in the sense that the practice is clearly established; it must be notorious, in the sense that it is so well known in the market in which it is alleged to exist, that those who conduct business in that market contract with the usage as an implied term; and it must be reasonable.”*

So remember, say “No” to NIMPY's.

Ladies and gentlemen, thank you for your kind attention.

R.R. Cornah

14<sup>th</sup> May 2009.