CHAIRMAN'S ADDRESS

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Stuck in the doldrums?

(A consideration of whether the ABS Loss of Charter Hire Insurance wording is still fit for purpose.)

Choosing a subject always presents some difficulty for the Chairman. Seeking inspiration, as we are in the year of Diamond Jubilee celebrations for Queen Elizabeth, I checked the address of 60 years ago. My momentary enthusiasm was dashed by Mr Godfrey Broughton-Edge who lamented that his predecessors had had the wide choice of subjects and greater leisure time available to prepare the address. While I wholeheartedly agree with his sentiments, if he felt he had a problem after 80 or so previous addresses, it certainly has not diminished after 142 of our general meetings. No help there then. With no apology, I have chosen loss of hire insurance as my general subject, this morning. It is not one covered in previous chairmens' addresses to this Association. This seems a significant omission but one thoroughly in keeping with the subject – still a youngster as a class of marine insurance, only 75 years old or so and one in which pragmatism on claims often rules the day.

Shipowners, operators and managers are faced with the risk that the income stream flowing from the ships that they are operating will dry up in the event of marine casualty. This is whether they are operating bulkers on the spot market or have LNG vessels time-chartered for 10 or 20 years, whether they are in container shipping, operating offshore supply vessels, involved in dredging or offshore construction, chartering out super yachts, ferry companies, and many more. A casualty that prevents the vessel from earning income, whether it be charterhire, voyage freight or other forms of earnings, is a very serious issue for a shipowner; in fact not earning for a single day was a disaster, one shipowner most emphatically told a group of my younger colleagues last year. A major casualty or combination of casualties can ultimately threaten the financial foundations of the owning and operating companies through an inability to meet the running costs of the vessel, the financing charges as well as the anticipated profit, if the vessel or vessels cannot trade. There are different ways of insuring losses of earnings. I am concentrating on what is known as loss of hire insurance. I will not be discussing business interruption insurance with which ships involved on projects such as power generation may be more appropriately insured. Nor will I be covering specialist areas such as cruise cancellation and passage money insurances or sophisticated insurances where the shipping income depends not only on the vessel performing but also the performance or non-performance of the project itself which may be affected by a casualty leaving the vessel undamaged.

No, I am dealing only with what might be prosaically described as standard loss of hire insurance. An assured pays a premium in consideration for the insurer insuring his loss of earnings on an agreed basis per day say 10,000 supposing his vessel is prevented from earning as a result of what might broadly be described, at this stage, as an accident. An excess of, say, 14 days is deducted from the period claimed and there will be an upper limit of number of days such as 90 or 180 that the assured can claim. Whilst the type of business is generically called "loss of hire", a rather wider range of business is written on this basis than just vessels hired out on time charter. It would cover vessels on the spot market, liner vessels and others. This is better described as loss of earnings even if it is written on a loss of hire policy form. I will be talking about this wider subject. The most well-known forms of insurance policy on which this business are written are Norwegian Plan, Part 1 and Chapter 16 of the current 2010 Plan, the A.B.S Loss of Charter Hire Insurance 1.10.83 either excluding or including war and the American "Loss of Charter Hire Form, SP-40B (Aug 1961)" sometimes known as the Lazard form. Norway is easily the pre-eminent market for loss of hire insurance and naturally they prefer to use the Plan which is soon to be relaunched as the Nordic Plan. It is a coherent set of policy conditions that is periodically revised to meet assureds' and insurers' changing business requirements. By contrast, while there is considerable loss of hire business written, there is no emphasis on London being a specialist centre for such a class of business. Some is written on an accommodation basis where the hull insurers accept the loss of hire as part of the package. Currently there is quite an amount of loss of hire being written to back war risks policies. I am aware of several Lloyd's entities specialising more than others in loss of hire. Outside the traditional London market structures, both Dex and MSMI took sufficient interest in this area to formulate their own policy wordings but, alas, are no longer in the market. London, though it collectively writes a very considerable amount of such business, does not in any way match Norway and nor does it particularly set out to. Most of the business is written on the ABS conditions. These have not been revised since 1983 and hence the question whether they are fit for purpose in 2012. This is part of a wider question as to whether London will again become a "go-to" leader in loss of hire. This is a wide question and not for this morning.

Why the deep-seated reservations about loss of hire in this market? Lloyd's first started writing loss of hire business around 75 years ago in the mid-1930s. Post-1945 the business rapidly expanded and there were several boom and bust cycles in the 1950s. The closing of the Suez Canal in 1956 during the crisis between Britain and Egypt caused charter rates to crash and somewhat inevitably the level of claims rose. By 1959, very significant problems had emerged in the London insurance market. RWS Bradley, an underwriter, addressed the Insurance Institute of London that year tracking the cycle that had already appeared within the 1950s and noted there was $4,500,000 of outstanding claims at that time. This could by my calculation equate to close to 200 claims of middle size severity i.e 50 days, using a 1950 claim as a measure. Bradley called for a standardisation of policy forms, identified excesses of ten days as being too low, and in his words "the question of negligence in regard to machinery damage is perhaps the worst bogey in this type of insurance". Does it sound a familiar story? In a sense not much changed in the period up to the 1980s, though there were periods of good profits. By the later 1980s however, the London market got itself into the position where they really burnt out with seven day excesses and extremely low premiums. It was an offer that shipowners generally could not resist as it seemed a reasonable bet that claims would exceed premium paid on individual fleets. This period in the later 1980s killed wide-spread enthusiasm for loss of hire as a significant product within London.

Now for the present. The pre-conditions for establishing a successful underwriting centre for any class of business are the availability of capital, the collection of sufficient statistical data on which to base underwriting decisions and a set of policy conditions which are robust, attractive to consumers of the product and provide certainty when it comes to a claim. I am not qualified to offer much in the way of advice on what can established in respect of the first two pre-conditions. I recall when broaching this subject several years ago, one hull and machinery underwriter said to me that underwriting was difficult enough in his area and his management and capital providers would not thank him for suggesting another even quicker method of losing money. However I can give a perspective on the policy conditions and whether they are robust. The majority of London loss of hire policies are written on the A.B.S Loss of Charter Hire Insurance 1.10.83 conditions either excluding or including war. Its origin is in the forms of the late 50s and 60s. It was the form of A.B Stewart, a leading marine underwriter with a syndicate of the same name. It was published in 1971 and revised slightly in 1983 to the version used today. There has been no attempt to revise it since and although it has a LPO or Lloyds Policy Office number, it is not amongst the policy forms that Lloyds Market Association keeps under review. Is it still fit for purpose? In answering this question, I will concentrate on the following four areas, (1) what triggers a claim – in other words what is covered, (2) what is the measure of indemnity under the policy, (3) costs of mitigation and (4) recoveries.

First what is covered and what triggers a claim. Clause 1 sets out the main body of what is covered by the policy. There are two sub-sections under which an assured must demonstrate to his loss of hire underwriters that the vessel was prevented from earning hire in consequence of a number of events. The first is Clause 1 (a) which states:

1) If in consequence of any of the following events:
(a) Loss, damage or occurrence covered by I.T.C. Hulls 1.10.83/ Norwegian Hull Form/AIHC 2.6.77, and also by Institute War & Strikes Clauses - Hulls 1.10.83 or American Institute Hull War.

So the inapplicable sets of hull clauses will have been deleted or alternately the relevant one specified in the covering policy form to leave only one set of marine and war conditions, if the latter is to be covered, as underlying the policy conditions. For today's address, we will assume I.T.C Hulls 1.10.83 are the underlying hull conditions. Leaving aside for the moment, clause 1 (b) which deals with breakdown, the rest of the clause provides:-

"occurring during the period of this insurance the Vessel is prevented from earning hire for a period in excess of .....days in respect of any accident, then this insurance shall pay ..... of the sum hereby insured for each 24 hours after the expiration of the said days during which the Vessel is so prevented from earning hire for not exceeding a further ..... days in respect of any one accident or occurrence (and not exceeding ..... days in all during the currency of this Insurance..."

The concept is clear. If the vessel is prevented from earning hire through loss, damage or occurrence arising from perils stated in clause 6 of ITC Hulls 1.10.83, such as perils of the sea, fire, or crew negligence, and that resulting period of loss of earnings exceeds the excess period, such as 14 days, then insurers pay the daily indemnity per day of the period set by the policy up to the maximum of say 90 or 180 days, or whatever might be set by the policy.

Whilst the concept is clear, this does not mean that automatically because the vessel has had a damage covered by the hull policy, the loss of hire policy pays during any period of necessary repairs. We saw this in 1994 Queen's Bench case of the "*Capricorn*" (Cepheus Shipping Corporation v Guardian Royal Exchange [1995] Vol.1 LLR 622.). You will recall the "*Capricorn*" was a reefer vessel which was laid up in the close season when it sustained a generator damage which was immediately repaired. The vessel had been insured on the prevailing Norwegian policy form, "chartered or unchartered". The court found that there was no claim as she could not have earned hire during the period of repairs and therefore had not sustained loss during the close season – being laid up. The assured has to show that there was a loss of earnings arising from the casualty or at least the vessel was deprived of the opportunity of earning income. This case also gives us pause for thought when considering the measure of indemnity which we will come to later on, but it does make it very clear that even with the wording describing the risk as "chartered or unchartered", the loss or damage must actually directly cause the vessel to be prevented from earning hire.

I will pause briefly at a conundrum of the ABS conditions. There are a number of these; probably more than the number of actual clauses. This is whether partial loss of hire is covered. If a ship sustains a damage to say a turbocharger and has to slow steam to destination where repairs are carried out, the charterers may well be able to deduct or adjust hire payable to compensate for their loss during the slow steaming. Alternatively because of an accident to a crane, the vessel cannot meet its contracted discharge rate and hire is deducted by charterers. Is this a claim under ABS? The assured would argue that the ship is prevented from earning hire and say the insurers should recompense this. The argument against this is that the vessel is not actually prevented from earning hire, as required by the ABS wording and whilst it can be acknowledged that there has been a loss to the assured, this is not because the vessel is unable to trade. This in itself may turn on the terms of the charterparty. Is it just that the vessel cannot earn hire at the full rate specified by the charter? In such circumstances, one hopes to fall back on usual or customary practice, but it would be very difficult to point to any practice by insurers of invariably paying such claims for slow steaming. This uncertainty is often obviated in practice by the assured and his broker ensuring that the point is covered in additional policy wording.

Does one need actual damage to have taken place which requires repair before the loss of earning period counts as a claim on the policy? This is a question that has come up more often in recent years with the seizure of vessels by Somalian pirates. The delay in release of the vessel whilst a ransom is negotiated and delivered may cause a loss of hire or earnings depending upon any charterparty terms. Damage to the vessel in the incident will probably be negligible and certainly not what causes the delay and consequent loss of earnings. Similarly a vessel stranded fast on mud in one of the major rivers of the Latin American sub-continent can lead to significant periods where it cannot earn but physical damage is not sustained to the vessel. The Court of Appeal judgement in the "*Wondrous*", Ikerigi Compania Naviera SA v Palmer [1992] 2 Lloyd's Rep. 566, is sometimes cited as an authority that supports the view that there must actually be a loss or damage to the vessel in order to give rise to a claim on a loss of hire policy. If there is no damage, then a claim cannot be made. I will discuss this case further shortly. The Norwegian Plan 1996, in Chapter 16 (1) allows for this possibility by listing four situations where although the vessel is not damaged, cover is given for the vessel being wholly or partially deprived of income; because it has stranded, been prevented by physical obstruction from leaving a port, salvage of

cargo or as a consequence of general average event. However is the ABS cover really only limited to cases where the vessel is damaged as some commentators have suggested.

The "*Wondrous*" was chartered to load molasses at Bandar Abbas in March 1987. After 16 months she had loaded two-thirds of her cargo. She did not sail until October, 1988. The reason for the delay was that the vessel had not had local customs clearance to leave. The High Court rejected the loss of hire claim on the grounds that the failure to comply with the customs regulations led to her detainment and this was excluded by the Institute War clauses referred to in the loss of hire policy. The Court of Appeal upheld this decision but specifically reversed the decision of Hobhouse, J. who had stated that a requirement for loss or damage was not germane to a claim for loss of hire. The brokers' policy wording, which was not the same as the ABS wording, stated:

"*.....this policy shall only pay if in consequence of the risks enumerated in the Institute War and Strikes Clauses Hulls – Time 1.10.83".....the vessel or craft be prevented from earning hire.....* ". Clause 1 of the Institute War and Strikes Clauses Hulls – Time 1.10.83 stated that "*this insurance covers loss or damage to the Vessel caused by.....*"

In the majority judgement, Lloyd LJ, in reference to the judgment in the court of first instance, did not agree that the "*loss of or damage to the vessel is not "germane" to a loss of hire policy...*". This was on two grounds.

The first of these was that the risks of the Institute War and Strikes Clauses Freight Time could have been chosen rather than those of the hull policy conditions which limited recovery to loss of hire where there had been loss or damage to the ship. This is an interesting idea. Those freight clauses cover "loss of the subject-matter insured caused by" the listed perils. The subject-matter insured would of course be loss of earnings or hire. However this concept may have limited application, since unlike the brokers' clauses, ABS incorporate the whole hull policy form. If one incorporated the whole policy form of the Freight clauses, the disadvantage to this course of action is that the perils enumerated in these clauses are subject to the "Loss of Time" exclusion within the policy form which excludes any loss arising which is proximately caused by delay. The very nature of loss of hire claims is that they involve delay and the difficulties with claiming on freight policies for delay and the exclusions for losses consequent on time are well known.

The second reason of the Court of Appeal was that there were other references which suggested damage to the vessel was a prerequisite to a claim. In particular provisos (a) and (c) were cited. These were reading from the excess wording onwards "*for a period in excess of (14 consecutive days)....in respect of any one occurrence provided that: (a) such occurrence occurs to the insured vessel or craft..... and (c) repairs if actually carried out in respect (of) damage (are) completed within 12 months of the expiry of the policy.*".

Lord Justice Lloyd stated "*This shows that the parties were contemplating loss of hire resulting from damage to the vessel, and the consequential need for repairs, as being the primary, and I would say only, cover afforded by the policy.*"

ABS has a broadly similar wording to these provisos in clause 8. This type of clause has been in London market loss of hire policies certainly since the 1950s. Its original purpose was to prevent owners accumulating unrepaired damages during good freight markets which were

then dealt with and claimed for during lean times. Financially this was undesirable for insurers.

The brokers' clause does seem to leave open the possibility that repairs might not need to be effected with the phrase "if carried out". The Court of Appeal has not given any succour to the idea that this phrase could be interpreted to mean that there is a possibility that repairs may not be needed in the claim but it is unclear the extent to which this was argued. Clause 8 is the only clause in the ABS wording that contemplates the necessity for repairs and therefore damage to have occurred. The balance of the clauses, in the somewhat haphazard fashion of the ABS conditions, mention repairs only incidentally on three occasions such as effecting repairs (temporary or permanent) with due dispatch under clause 12.

Loss of hire insurance has always been seen as being back-to-back with hull and machinery insurance. The understanding pre-"*Wondrous*", as far as the ABS wording was concerned, was that the trigger for a claim on a loss of hire insurance was the "insured peril" and not the fact that damage was caused by an insured peril.

Mr. G.D. Kemp, a respected marine insurance broker writing slightly later than Bradley in 1963 for the Chartered Insurance Institute, in a comprehensive and well regarded paper entitled "Loss of Hire", reviewed the existing policy forms and stated:

"*The first Clause will detail the perils and will read to the effect "If in consequence of loss, damage or occurrence covered by I.T.C. etc. or Breakdown of Machinery occurring during period of this insurance, the vessel is prevented from earning hire in excess of X days any one accident, this policy will pay.....".* He goes on to say in explanation "*One would think that loss or damage may be sufficient but what about a General Average deviation to a Port of Refuge This is why the word "occurrence" is added and, I think this is probably one of the only places in marine insurance that the word is used."* His stress on the word "occurrence" in addition to "loss|" and damage" in the policy wording is important.

Geoffrey Hudson, an Honorary Fellow and very distinguished past Chairman of this Association, writing in 1978 in a paper entitled "Claims on Loss of Earnings Insurances" about clause 1 of the 1971 ABS wording which is very similar to its 1983 successor in this respect, stated

"Provided time is lost thereby, an "occurrence" covered by the stated forms of hull policy will found a claim, even though no damage be sustained to the ship and no repairs are required. Thus if a ship runs aground and is put off-hire, time begins to run against the Loe insurers. And, of course, if after the ship is refloated, it is found that she is in need of repairs, the time lost in effecting those repairs may be aggregated with the time lost whilst aground in computing the total period in respect of which the indemnity is payable."

This was known to be in contrast to the contemporary American and Norwegian policy forms where the loss covered was due to the vessel being deprived of her earning capacity "as a consequence of damage sustained".

In summary, I believe London market loss of hire conditions have always anticipated the possibility that the vessel might not be damaged and yet be prevented from earning hire and thus a valid claim for loss of earnings would be payable as a result of there being a casualty covered as an insured peril under the relevant hull or war policy. I would submit that the loss of hire policy wording considered in the "*Wondrous*" has more restricted coverage than ABS as it only refers to "occurrence" in the context of "any one ocurrence" when defining the excess to be applied to the claim. For this reason the judgement may not be authority for an overriding concept that one has to have damage to a vessel before one can claim on an ABS loss of hire policy. However the point is hardly free from doubt so once again the astute assured and his broker should clarify matters with additional wording.

Apart from the cover provided by the specified hull policy conditions under 1 (a), there is another wide area of supplementary cover offered by clause 1(b) "*Breakdown of machinery, including electrical machinery or boilers, provided that such breakdown has not resulted from wear and tear or want of due diligence by the Assured,*". I do not intend to discuss it this morning beyond pointing out that it provides some of the cover offered by an Additional Perils Clause in respect of machinery. As the breakdown itself is covered rather than the cause of the breakdown and please see Giertsen v.Turnbull, 1908 S.C. 1101 and the Court of Appeal case of the "*Afrapearl*" (Portolina Compania Naviera Ltd. v Vitol S.A. Inc.[2004] Vol. 2 LLR 312 C.A) as to what might be defined as a breakdown, it provides the opportunity for the assured to claim on a current policy. This avoids running the risk of contravening clause 8 of the ABS conditions, which I have already referred to. This allows him to claim up to three separate periods of loss of hire for any one accident "provided that the repairs are completed within 12 months of the expiry of this insurance". In practice, very often this period of one year may be extended by the policy documentation to say two years. However there is the potential for progressive damage claims and those where the damage might have occurred in prior policy years or at least part of them, to be time-barred.

Moving to what is the measure of indemnity or what the policy actually pays, this is the area where ABS is weakest. There is no simultaneous repairs clause of the type that can be found in the Lazard conditions or 16-12 of the Norwegian Plan. Nor is there provision made for time spent on removals. Yet I would expect to adjust a claim on ABS as if there was a simultaneous repair clause included in the policy and it has been my practice to assume that a Lazard type clause is implicitly included in the ABS conditions. It is needed to deal with the situation where the vessel is taken out of service especially to effect damage repairs but allows for the possibility that owners' work is effected concurrently which was sufficiently important to be immediately necessary for seaworthiness or to maintain class. This would promote a division of the loss of time between insurers and owners. It also allows for damage repairs being deferred and carried out during a scheduled period of owners' work; again ensuring the claim for loss of time is divided appropriately between insurers and owners. However there is no supporting wording in the policy wording. Does case law provide a precedent? Only so far. If one took the concepts espoused in the "*Capricorn*" case, referred to earlier, to their logical conclusion, you could wonder what the court would make of a claim for loss of time during damage repairs carried out at a scheduled docking. Ignoring an excess, if a vessel required 14 days at such a docking to carry out both damage repairs and owners work, we would apportion the loss of time 50/50 between insurers and owners leaving a claim for seven days. In "*Capricorn*", the court found that there was no claim on the policy as she, a reefer vessel, could not have earned hire and therefore had not

sustained loss during the close season – being laid up. Would the answer have been any different at a scheduled docking when the vessel would also not have been earning hire? The concern in this line of thought has not been allayed by the recent case of Sealion Shipping Ltd & Anor v Valiant Insurance Company, [2012] EWHC 50 (Comm). It has much to interest marine practitioners, particularly in respect of misrepresentation, non-disclosure and due diligence issues. However a word of caution, as it is under appeal. It features a claim on the ABS 1/10/83 conditions, for 30 days off hire at a substantial 70,000 dollars per day. There was an initial problem occurred during routine overhaul of the port electric motor in February which led to the insured damage or event. A further damage occurred to the starboard motor in March in swapping the motors to mitigate the loss and bringing a spare on board. In April a further problem occurred to the starboard motor. Repairs to the original damage to the port motor took the full off hire period but they were carried out partially in a drydocking for owners' work in April. This was advanced from June and owners took advantage to do a drydocking and intermediate general survey. The insurers argued that the claim for the loss of earnings arising from the original damage should be cut down because of owners' concurrent repairs, excess periods for those repairs to be borne by the assured and attempts to minimise the time under repair prolonged the period claimed. The court found in terms of causation, the whole period of delay was caused by the original damage and the unsuccessful attempts to mitigate the loss by substituting motors did not fail due to the assured's fault and could have significantly mitigated the original claim. Furthermore on the authority of the "*Ferdinand Retzlaff*" (1972) 2 Lloyd's Rep.120, the fact that the owners brought forward class and drydocking work did not reduce the claim on insurers as far as the court was concerned. This was a collision claim where owners' repairs were brought forward a few weeks and done at the same time as collision repairs. This decision followed the line of authority of the *Ruabon* [1900] A.C. 6; HL, *Chekiang* 25 Ll. L. Rep. 173; HL, CA and *Carslogie* 2 Lloyd's Rep. 441; [1951].

As a practitioner, this application of case law relating to tort does not sit completely comfortably with the concept of loss of hire being at one or at least complementary with hull and machinery insurance. In hull and machinery claims, we are used to the application of the Association's Rule of Practice D5 on drydocking where at a routine docking the drydock dues are split between average and owners dependant on the number of days each class of repairs required. This Rule is of course based on the authority of the "*Vancouver*", [1886] 11 A.C.573 as well as the "*Ruabon*". We also take account of owners' work which is immediately necessary to maintain the seaworthiness of the vessel carried out concurrently at a special docking for damage repairs. These concepts are broadly reflected in the "Simultaneous Repairs Clause" previously referred to from the Lazard form copied in your papers. I have not met a fellow practitioner who would suggest that it is wrong to imply a simultaneous repairs clause into the ABS conditions. It would be very difficult in English law to prove in court that any such practice was in accordance with custom and usage and therefore binding on insurers. In a dispute, I would hope that it was accepted that claims would be adjusted as if a simultaneous repairs clause was included. However what would be the exact wording of the clause? There are a number of variations on how claims could be adjusted under such a non-existent clause so there is room for disagreement. I can highly commend, for those who have not come across it, Martin Rahn's excellent chairman's address entitled "Not for the Do-it Yourselfer" given to the U.S Association of Average Adjusters in 1990. He highlighted some of these dilemmas and he was discussing the subject in the context of a clear "Simultaneous Repairs" clause. He discussed several situations where either a second accident occurred while the vessel was under repair or concurrent

damage repairs were carried out with reference to the application of policy excesses. These contain elements of the issues involved in the Sealion v Valiant case discussed earlier. This is a crucial area of loss of hire insurance in which to have no clear policy wording. One should not exaggerate the problems that could arise. Application of general marine insurance principles, equity, and previous practice mean there are relatively few insuperable differences of opinion. However it is far from ideal to have the situation where many claims are settled pragmatically. Over a period this could also be weighted to the insurers' disadvantage.

Obviously a key element in writing of loss of hire insurance is the control and mitigation of the claim. Insurers will wish to encourage the assured to take all necessary steps to mitigate the consequence of a loss. Clause 12 of ABS is the nearest that the form comes to dealing with this issue. It states:" *The Assured shall effect, or cause to be effected, all repairs (temporary or permanent) with due diligence and dispatch. Underwriters to have the right to require the Assured to incur any expense which would reduce Underwriters' liability under this insurance provided such expense is for Underwriters' account."*

It places a duty on the assured to proceed with repairs with due diligence. That is the limit of the duty. There is an implication that temporary repairs would be acceptable but there is no discussion of how these might form a claim. There is specifically no suing and labouring clause both requiring the assured to generally minimise the loss and agreeing to indemnify the assured for when he pays out money in order to avoid a loss which falls on the policy. Again a suing and labouring clause would usually be imputed. But on what basis would reimbursement be? Would a policy excess be applied to a claim? What if the sue and labour measure brought the claim below the excess? The second sentence entitles the insurer to require the assured to incur expense that would reduce their liability provided the insurer pays for it. However the onus is on the insurer to be on top of the claim rather than making it a duty on the assured. Importantly there is no clause dealing with taking tenders for repairs, loss of time during the process and what happens if there is a difference of opinion between assured and insurer on the process. By contrast the Norwegian Plan, under 16-9 "Choice of repair yard" and 16-11 "Extra costs" incurred in order to save time, deals more completely with these issues. However the second part of clause 12 which gives the right to the insurer to require any expense to be incurred by the assured is quite a powerful control for an insurer supposing they are minded to use it.

The last main area for discussion this morning is the way recoveries are dealt with and what should be credited to insurers on paying a loss of hire claim. The ABS conditions specify in clause 3: *"In all cases where a recovery is obtained from third parties in respect of loss of earnings or demurrage such recovery shall be apportioned between the Assured and the Underwriters as their respective interests may appear."* This is clear in as far as it goes. So if insurers pay a loss of earnings claim following a collision and a recovery is obtained from the other vessel for charter hire lost while the vessel was put off hire during repairs, then the insurer would be credited with any daily hire recovered beyond the excess period. Obviously if the daily hire recovered was in excess of the daily indemnity under the policy then that surplus would be retained by the assured. However there are problems when the recovery item is only the wages of crew say in general average; such recovery being made from cargo insurers' by way of their contribution and as a claim is paid on the hull policy for ship's proportion. Is the recovery of wages actually a recovery in respect of loss of earnings or demurrage, the subject matter insured of the policy? The loss of hire insurer under 79 (2) of

the Marine Insurance Act, 1906, where he has paid, is "..... subrogated to all rights and remedies of the Assured in and in respect of the subject-matter insured as from the time of the casualty causing loss...". Is the charter hire or freight indivisible so that wages cannot be divided out and a recovery should not be credited as it is only a recovery of the shipowners' expense and not a recovery of the subject matter insured, which is the gross hire. Alternatively the other view is that from freight the shipowner pays all expenses including wages and gets his overheads and some profit. It is agreed that freight cannot necessarily be divided up and thus identified with the various elements that the shipowner has to recover by this freight. However a loss of earnings can be considered in the context of a loss of hire policy as the loss of the constituent parts – direct expenses, overheads and profits. If any of these items are recovered by owners then that is a recovery in respect of the subject matter insured in terms of section 79 of the Marine insurance Act, 1906 and earnings in terms of clause 3 of the policy form. Case precedent is limited on the point. For present purposes, it matters little to state which view is correct although I veer towards the latter. For one thing pragmatically it works as an approach supposing the vessel is not under a charter. However suffice to say, that I have heard the controversy on this point being aired in earnest on a claim in the last month; the same controversy that was very current when I started my career. It would be helpful if the policy form clarified this and I can see no good reason, in equity, why if insurers pay out the daily indemnity for loss of earnings, they should not be credited with any recovery for wages from general average or in removals from hull insurers. Otherwise the assured is over indemnified or compensated.

Now I have spent a considerable part of this address highlighting some shortcomings of the ABS conditions for loss of hire. Are they still fit for purpose? Well first stop on considering this might be the FSA and the London insurance market's definition of contract certainty:- "Contract Certainty is achieved by the complete and final agreement of all terms between the insured and insurer by the time that they enter into the contract, with contract documentation provided promptly thereafter." Furthermore back-up Principle A is that at offer and acceptance "All terms must be clearly expressed, including any conditions or subjectivities." The ABS conditions are an agreed London market set of conditions, so unless the surrounding contract documentation presents a problem, ambiguities presented by the underlying conditions are of little consequence. Furthermore it would be fair to say that a very considerable business is written on these conditions or similar, and the majority of claims are settled without problem; often with a fair degree of pragmatism but settled nevertheless. So they must be fit enough for purpose. However unlike Chapter 16 of the Norwegian plan, they do not constitute a modern fully thought through set of policy conditions; the type that the more adventurous London insurers might use to build up the current activity for the loss of hire market to a more vigorous level. Some insurers have produced new more comprehensively worded sets of conditions. For various reasons, usually not to do with the quality of the wording, they have not been successful. They have followed the tradition of A.B.Stewart, in naming the clauses corporately so they have not had wider appeal for other insurers. However if the London market is to ever think of increasing its share of this class of business or even expanding the market, it needs to have a sounder long term base in the form of some modern well drafted market conditions. In the meantime ABS conditions are still workable but, in the spirit of do-it yourselfers, it requires assureds, brokers and insurers to ensure the covering policy documentation fills in the obvious cracks and stops up the holes.