Reasonable cost of repairs under hull and machinery policies

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The shipping casualties that hit the headlines are generally the major total losses, particularly those associated with serious environmental damage. However, the main call upon hull and machinery insurance policies come from partial losses, or 'particular average' claims, resulting from damage to vessels and their machinery suffered due to the ordinary hazards of maritime trade. Once policy coverage has been determined, the crucial question is how much will the policy pay. The insurer will be looking to see repairs carried out with all possible economy, whereas the assured, particularly in the current buoyant freight markets, will want the vessel back in service as soon as possible. The Marine Insurance Act (MIA) 1906 states that the measure of indemnity is the 'reasonable cost of repairs' and this article examines how this phrase is interpreted in practice, in the context of policies subject to English law.

Introduction

Hull and machinery insurance is used to protect the shipowner's balance sheet against the total loss of his assets, or his cash flow and profits against the loss of funds necessary to pay for repairs. All policies incorporate a deductible whereby the assured bears the first tranche of any loss. The hardening insurance market of the 1990s saw deductibles increase very significantly and the trend was not reversed as the markets softened; evidently shipowners had become accustomed to retaining a portion of the partial loss risk. The majority of shipowners also retain the loss of earnings risk entirely. Loss of hire insurance remains relatively expensive and even when it is purchased it will usually incorporate a deductible period of 14 days or more. With modern repair techniques, serious hull damage can be repaired in relatively short periods; it is more often machinery damage, requiring the delivery or fabrication of spare parts, that will trigger a claim in a loss of hire policy.

In the majority of cases, therefore, the losses arising from the vessel being out of service will fall on the assured. In addition, following a casualty, a variety of costs may be incurred over and above the repair yard account; these all flow from the insured loss but a line has to be drawn in every case to determine whether any such costs fall on the hull and machinery policy.

Section 69 of the MIA 1906 states:

> Where a ship is damaged, but is not totally lost, the measure of indemnity, subject to any express provision in the policy is as follows:
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> (1) where the ship has been repaired, the assured is entitled to the reasonable cost of repairs, less the customary deductions, but not exceeding the sum insured in respect of any one casualty.

* *Chairman, Richards Hogg Lindley.*

At the time of the MIA 1906 it was still usual to deduct one-third off the cost of new materials used on repairs to allow for betterment. All modern types of policy now provide that 'Claims are payable without deduction of new for old' so that 'customary deductions' are no longer made, (for example clause 14 of Institute Time Clauses – Hull, 1 October, 1983).

Section 69 also needs to be read in conjunction with section 55, which states that 'unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against' and, under paragraph 2(c), 'that the insurer is not liable for ordinary wear and tear'. Nonetheless, the broad inclusive sweep of section 69 begs a number of important questions, upon which section 88 sheds little additional light by saying that 'where by this Act any reference is made to reasonable time, reasonable premium, or reasonable diligence, the question of what is reasonable is a question of fact'.

Case law

Given the large amounts that are often at issue, there is surprisingly little case law available to use as guidance. In *Stewart v Steel*[1] Maule J was considering the question of on what principle the expenses of repairing an insured ship can be recovered from underwriters.

> (They can be recovered), he stated 'where they are the expenses of repairs actually incurred, and properly incurred, to remedy a loss within the policy they are then a fit measure of the damage which the assured has sustained – he is then so much the worse for a peril within the policy. It is not sufficient that they should be actually incurred in order to recover them; it is necessary also that they should be properly and prudently incurred. Suppose they are actually incurred, but incurred with a view to a job, in order to put money into the pockets of carpenters and shipbuilders, friends of the owner or his agent, these would be expenses actually incurred, but not properly incurred, and, therefore, not chargeable to the underwriters, as a proper measure of damages.

The actual outlay is therefore reliable evidence of the reasonable cost providing it has been properly incurred, see also *Aitchison v Lohre*.[2]

Writing in his 'Treatise on Marine Insurance', published in 1881, the Liverpool average adjuster Richard Lowndes said:

> The repair must be made with reasonable economy and in a judicious manner, unless indeed it be a part of the disaster that the ship has been driven into a place where economy and even honesty in repairing is unattainable by the assured or his servant the captain.

Every shipowner and surveyor will no doubt have their own private list of ports across the world where economy and honesty are scarce commodities. While the first two extracts emphasise that the costs must be prudently incurred, this last quotation extends the idea a little further in realising that there are practical limits to a shipowners' ability to ensure that repairs are effected at a reasonable price. This suggests that there is no universal standard; one must look at the circumstances of the individual case and the particular place that the vessel happens to be. This is a recurring theme.

Referring again to Lowndes's 'Treatise on Marine Insurance', he had this to say about the reasonable cost of repairs and extra expenses incurred to expedite repairs:

> Suppose that extra expenses is incurred in order to obtain special despatch in repairing, as, for instance, by working at night, is this claimable from the underwriter? The underwriter objects

[1] (1842) 11 LJCP 155.
[2] (1879) 4 Asp MLC 168.

> that he never pays for loss of time, and therefore has no interest in such expenditure. The shipowner retorts, 'You're not paying for loss of time is an injustice which, at least, I should have the right to minimise'. Here we come upon a real difficulty. The not paying for loss of time is a necessary consequence of an erroneous notion that a ship, regarded as a mere structure of wood and iron, has a sort of value which is in some way separable from the value of her future earnings; so that damage done to a ship, and loss of the ship's employment for a time, are two distinct things, and the insurance of the ship covers the former only and not the latter. So long as this notion is prevalent, it would be premature to discuss the question whether an underwriter on ship ought to pay for the ship's loss of employment whilst repairing. In the meantime, the practical solution of the smaller question here put seems to be that the shipowner is entitled to repair his ship in that manner which a prudent man would employ if uninsured: and, therefore, if the extra payment for despatch is no more than he would reasonably incur for his own sake apart from insurance, the underwriter should be liable for it.

A very reasonable proposition, on the face of it. If an owner would incur extra expense to carry out repairs for his own account it is reasonable to suggest that he should not be prevented from carrying out repairs in the same manner when the damage in question forms a claim on the hull policy. However, such a view was far from universally acceptable and there remained a body of opinion that considered that any cost tainted with the intention of avoiding delay could not be recoverable from hull underwriters, unless, of course, compensating savings could be shown. Before moving on to illustrate this contrary body of opinion it is worth drawing attention to this early reference to the idea of the 'prudent uninsured owner' as a yardstick by which to measure reasonableness. It is a useful test, but one that is not without its limitations, as we shall see later.

Field v Burr[3] concerned a vessel that suffered damage as a result of collision in way of a cargo hold as she arrived near her destination in the Thames. Part cargo was discharged into lighters and a temporary repair was carried out at Tilbury Dry-dock. When owners came to discharge the remainder of the cotton seed cargo it was found to be so damaged by sea water that the receivers rejected it and the sanitary authorities, under the then current Public Health Act, ordered the ship to 'abate the nuisance and remove the seed'. Considerable extra expense was incurred in discharging this remaining cargo at its destination and the shipowners claimed this expense as part of the reasonable cost of repairing the ship. Collins LJ was clearly not impressed by the Lowndes concept of the ship as a freight-earning instrument. He said:

> The sole point left for decision is, whether the assured on hull and machinery can throw upon the underwriters the expense of discharging at the port of destination a cargo which, having become putrid by the action of the perils of the seas, has lost its identity, and in respect of which, therefore, no freight is payable by the consignee. The mere statement of the point would seem to carry its own answer. It is true that the ship was itself damaged and likewise the machinery by the peril which destroyed the cargo; but all this damage has been fully satisfied by the underwriters, and the right of the plaintiffs may, I think, be tested by considering what their position would have been if the sea water had got access to and spoilt the cargo without physical damage to the hull. How can the presence of a putrid cargo in the ship be said to be a damage to the hull? The fabric of the ship is not injured by it; so far as it affects the ship at all, it is by interfering with its use until it is removed. But this is not damage to hull, which is the interest insured, but damage to the Shipowner, in his business as carrier. And though, in the opinion of some writers, it would be more scientific to regard the ship merely as a freight carrying instrument ... and therefore to treat interference with its freight-carrying capacity as a damage to ship (instead of looking only to the physical injury to the fabric) this view has clearly not been adopted in our law.

[3] (1899) 8 Asp MC 529.

The dig at the Lowndes approach was a direct one, with references being provided for the offending pages from which the previous extract was taken. That his view was seen as leaning too far to the commercial side is perhaps not surprising. In the early case of *Robertson v Ewer*,[4] Lord Mansfield said:

> On a policy on ship, sailors' wages or provisions are never allowed in settling the damages. The insurance is on the body of the ship, vehicle and furniture; not the voyage or the crew.

For some time through the late nineteenth century it appears to have been accepted practice to allow the shipowner the cost of a surveyor to superintend repairs on his behalf. The next case to be considered deals with this point; we are therefore looking at an expense which is in principle agreed to form part of the reasonable cost of repairs. The debate concerns how much of that expense can be recovered from underwriters in the particular circumstances of this case. *Agenoria Steamship Co v Merchants Marine Insurance*[5] dealt, in part, with the cost of sending the shipowners' surveyor from the UK to Melbourne to superintend damage repairs. Kennedy J considered the problem in the following terms:

> Is this charge for a surveyor, or any part of it, properly allowable in the account against the underwriters?
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> The effect of the evidence upon my mind is that the question of the chargeability to the underwriters of the cost of a surveyor sent out from this country by the owners in connection with the damage repairs of an insured vessel at a foreign port as their representative is rightly held in practice to depend on each case upon the particular circumstances. Were the circumstances of the case such that these underwriters ought to be charged with this very heavy expense of sending out a surveyor from Liverpool to Melbourne to superintend the repairs of the vessel? Upon the whole, I think not. It is, no doubt, common ground that Melbourne is a place at which the execution of repairs is costly and troublesome, owing to the predominance of the labour interest. But it is a large and flourishing port, which contains several firms who can undertake such repairing work as the (vessel) required ... (and) there are skilled marine surveyors.
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> It seems to me that in these circumstances I cannot properly saddle the underwriters, after their clear protest against the adoption of such a course, with the expense of £756 for a superintendent of £4,000 worth of work.

The judge may have had the prudent uninsured owner test at the back of his mind, but the question he addresses is what can underwriters reasonably be asked to pay, and not what a prudent uninsured owner would be prepared to pay.

The prudent uninsured owner test has been applied in other contexts, for example in *Macbeth v Maritime Insurance Co*[6] regarding a constructive total loss, and in *Carras v London & Scottish Assurance*[7] regarding a freight policy claim. It was defended robustly by AB Dann in his Chairman's address to the Association of Average Adjusters in 1976:

> The prudent uninsured shipowner is spoken of by Lecturers at Insurance courses as though he were convenient fiction. He is a very real fact. Not only is there at least one great British Shipowner who is insured for total loss only but there are a considerable number more with insurance cover on very limited conditions or with very large deductibles to say nothing of those whose vessels are insured with captive insurance companies reinsured only with large deductibles. If a shipowner insures his vessel with a deductible of say £50,000 he is an uninsured owner for losses below that sum. Assuming he is prudent in what he does by way of repairs he offers us a practical guide as to what is the reasonable cost of repairs that should be recoverable by his insured counterparts when their vessels experience comparable casualties.

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[4] (1786) 1 TR 127.
[5] (1903) 8 Com Cas 212.
[6] (1908) 24 TLR 403.
[7] (1936) 52 LCLR 34.

Prudence, like many things, is relative, and one needs to examine in what respects an uninsured owner will exercise prudence. Certainly, he will exercise prudence in carrying out repairs with appropriate economy, but equally he will exercise prudence with regard to the commercial welfare of his company. He will balance one against the other and, on occasion, he will opt for a course of action that favours commercial considerations over economy of repair costs. If he does so, to what extent should his hull underwriters suffer from the sacrifice of economy in repair costs in favour of a shorter repair period?

In 1916, FD Mackinnon KC was approached by underwriters for an opinion regarding overtime on repairs. During the First World War the Admiralty insisted that repair yards worked overtime when repairing merchant ships that had been requisitioned by the government. In the case put before counsel the shipowner had not requested or wanted overtime to be worked, but it was, and he had to pay for the excess cost.

Counsel's opinion was brief and uncompromising.

> In my opinion the underwriters are not liable for this part of the claim. And I think there are two grounds on which they should escape liability.
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> As regards particular average loss underwriters are liable for 'the reasonable cost of repairs'. I do not think the question has ever arisen in any reported case whether an owner can order his repairs to be done so expeditiously as to involve payment for overtime and then claim that the cost including overtime was the reasonable cost of repairs ... It must be remembered that underwriters are never liable for any allowance to the shipowner by way of demurrage, or compensation to the shipowner for the loss of his ship's earnings while repairs are being effected. The time the vessel takes to repair is therefore solely a matter for the shipowner, or the club in which he insures against the particular form of pecuniary loss. In my opinion it would he held that the reasonable cost of repairs is the cost of repairing during ordinary working hours, and would not include the cost of overtime.

Clearly, this is a strict view of the matter, but it was not necessarily one that was shared by all counsel. In 1928 counsel's opinion was taken by adjusters on the question of whether the owner of a liner was entitled to recover the cost of temporary repairs and overtime in order to enable the vessel to maintain an operating schedule. William Jowitt KC pronounced as follows, again very briefly but with completely opposite effect to Mackinnon's opinion:

> The owner is entitled to recover the reasonable cost of repairs. The only question of law which is involved is whether the fact that the particular vessel is a liner and therefore has to keep scheduled dates is a circumstance to which a court can have any regard in arriving at the reasonable cost of repairs. We think that the answer to this question is yes more particularly if the underwriters knew or had the means of knowing that the particular steamer was a liner and therefore presumably running to a schedule.
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> Assuming nothing proved against the owners' contention that the overtime or the double set of repairs were necessary to enable the vessel to keep her schedule, we think that the owner should recover.

Because of the rarity of decided cases dealing with this topic, it may also be helpful to look at a case dealing with a slightly different area of law. The case of *Foscolo Mango v Stag Line*[8] dealt with the question of what constituted a reasonable deviation under a contract of affreightment. The difficulties surrounding the word 'reasonable' were illustrated by the fact that the case went all the way to the House of Lords and, once there, the views of the Law Lords were far from uniform. The vessel was bound from Swansea for Istanbul with a cargo of coal. At Swansea, the vessel's departure was delayed because, as Lord Buckmaster put it, 'the (stokers) aboard the ship were not in possession of their full energies owing to excessive

[8] (1931) 41 Ll Rep 165.

drinking before they joined the ship'. Because of this delay the vessel deviated and made an unscheduled call at St Ives, following which she was lost, resulting in a claim from cargo relating to an unreasonable deviation.

Lord Buckmaster discussed the problem as follows:

> The real difficulty in this case, and it is one by which I have been much oppressed, is whether in the circumstances the deviation was reasonable. In construing such a word it must be construed in relation to all the circumstances, for it is obvious that what may be reasonable under certain conditions may be wholly unreasonable when the conditions are changed. Every condition and every circumstance must be regarded, and it must be reasonable, too, in relation to both parties to the contract and not merely to one.

Although this is a contract of affreightment case, the idea of judging what is reasonable by reference to both parties, rather than just one, (the shipowner, prudent or otherwise), can be helpful in many instances. It certainly echoes Kennedy's judgment in the *Agenoria Steamship* case, where he brought the underwriter into the equation, rather than merely considering the matter from the standpoint of the prudent shipowner. Additionally, it gives further authority for the idea that there is no universal standard of reasonableness but that each case must be judged according to the circumstances prevailing at the relevant time and place.

During the early 1950s the question of allowing airfreight on spare parts as part of the reasonable cost of repairs was hotly debated in the London Insurance Market. On the one hand, it was argued that airfreight was only used to avoid delay to the vessel and insurers therefore could not be liable for the extra cost of sending spare parts by air in order to avoid delay, except in so far as other savings could be shown. On the other hand, it was argued that it was the shipowners' business to employ his ships and any steps reasonably taken with this in mind should be allowed as part cost of repairs.

This controversy was dealt with in the Chairman's address to the Association of Average Adjusters in 1952 and was then, in 1954, the subject of a famous opinion given by Robert Aske QC on the underwriters' behalf. Counsel's view was that the cost of airfreight, when reasonably incurred, should be allowed as part of the reasonable cost of repairs; part of his lengthy explanation behind this opinion reads as follows:

> . . . the business sense of the matter is that the damaged ship should be brought back into service as soon as practicable, and I think the courts will say that this must have been in the contemplation of the underwriters when they wrote the risk. There is something fantastic in the concept that, under a contract of insurance, it is contemplated that a ship capable of earning freight should remain immobilised for weeks waiting for spare parts, which can be sent by air and the detention thereby reduced to a matter of days. The contention that the underwriters receive no benefit from the extra expense and the consequent saving of time does not counter these considerations. The policy is not designed to confer benefits on the underwriters (except premiums). The suggestion that the owner should be paid less because he benefits from the quicker repairs is, in my opinion, irrelevant, and indeed based on a fallacy. The question is not whether he benefits, but whether the cost of repairs is reasonable.

Sending items by air is now commonplace and much more a matter of routine than in 1954 – airfreight charges are generally allowed in particular average without question. However, counsel's reasoning, and his broader approach, are important and bring us to the last law case for consideration.

There is one exception to the absence of modern authority on this topic, and it is a very significant one, *The Medina Princess*[9] The judgment in this case, given in 1962, runs to several

[9] [1965] 1 Lloyd's Rep 385–524.

hundred pages and is a truly formidable document. The plaintiff owners were looking to prove that the vessel was a constructive total loss and much of the argument concerned which costs could be brought in as part of the estimated reasonable cost of repairs, in order to see whether the total cost reached or exceeded the insured value.

Interestingly, one of the points touched on in that nineteenth century quotation from Lowndes (less than honest repairers) featured in *The Medina Princess*. One of the parts requiring attention was the steering engine. Roskill J describes the events as follows:

> The ship succeeded in reaching Djibouti after the steering gear had been patched up by those on board. The master (Capt Osborne) then made a bargain with a gentleman whose name I have already mentioned, Mr Bezikis who agreed to make good the steering engine in four days or thereabouts at a cost of what was described as £420 'no cure no pay'. I have to decide whether I allow this claim for £420 ... the only real defence (once I was satisfied that the necessity for these repairs was caused by negligent want of lubrication) was that the amount charged by Mr Bezikis and claimed for by the plaintiffs was excessive. I suspect that it was. Nevertheless, I do not think it would be right to disallow any part of this figure of £420. Captain Osborne was at mercy. I do not suppose having seen Mr Bezikis in the witness-box, that he would be altogether slow to take advantage of Captain Osborne's predicament.

The judge clearly took the view that in certain circumstances a charge, which in the ordinary course of events would be considered excessive, can be properly allowed as part of the reasonable cost of repairs – 'reasonable' in this context having the sense of something the owners were unable to avoid.

Throughout the case counsel for the defendant underwriters, Mr Brandon, argued that when section 69 used the phrase 'reasonable cost of repairs' it is referring only to the reasonable cost of *permanent* repairs: nothing else could be included, for example towage, salvage, cost of discharge of cargo or even the cost of temporary repairs. Mr Dunn, counsel for the plaintiff shipowners, understandably argued for a much wider interpretation as to what could be included in the phrase. Roskill J referred to the earlier case of *Irvine v Hine*,[10] in which the cost of temporary repairs and towage were allowed and said:

> ... it is clear that all concerned in the case thought that what I would call Mr Dunn's broad approach was the right approach to adopt, namely 'what would have to be expended to put the ship right', including (in this case) the cost of temporary repairs and of towage ... I reject the suggested narrow approach which Mr Brandon invited me to adopt ... I think it would be wrong to hold that certain categories of expenditure must of necessity fall (without) the reasonable cost of repairs. I think it is a question of fact in every case what the phrase includes.

The present consensus

Although the specific circumstances of each case always need to be kept in mind, it is, thankfully, not necessary for claims practitioners to examine every cost in the light of first principles. A general consensus exists which reflects a balance between the views expressed in the extracts quoted above. For example, air freight costs for spare parts on scheduled flights are generally allowed without question, although on occasion, the need to charter an aircraft specially gives rise to higher than usual costs and a closer examination of the circumstances are required.

Insurers have consistently maintained that overtime (which may add 25 per cent or more to repair costs) and temporary repairs can only be allowed to the extent that overall savings in repair costs are achieved, for example by reducing the number of days of dry-dock hire or

[10] (1950) 83 Ll L Rep 162.

permitting deferment of repairs to a cheaper location. However, there are important concessions to this general rule which recognise, if not the concept of freight earning instrument, at least some elements of the 'prudent uninsured owner' test and the idea that the insurer should give some recognition to the nature of the subject matter insured.

First, temporary repairs and overtime are allowed without regard to savings if the vessel is a 'liner'; the accepted definition of this term goes beyond passenger vessels to any vessel sailing to a fixed and advertised schedule, eg container ships and ferries. Echoing the Jowitt opinion quoted earlier, insurers made this concession on the basis they are deemed to know the nature of the vessel's trade when the insurance is effected. It has sometimes been argued, without success, that this concession should be extended to other types of vessel engaged in highly time sensitive operations, eg oil platform supply vessels. While any such extension of the concession has been generally resisted by insurers, appropriate special clauses are sometimes negotiated as part of the policy terms.

Secondly, if a vessel is lying idle awaiting a spare part which has a lengthy lead time and a temporary repair will enable her to re-enter service, the cost of such a temporary repair will generally be recoverable. Thus the view that insurers can never be concerned with issues relating to delay is balanced by the view that it would potentially be unreasonable for a valuable vessel to suffer an inordinate delay for want of an available temporary repair. Although these allowances are referred to as concessions, it would seem reasonable to suggest that most would have a good chance of being looked at favourably by a court in appropriate circumstances. While *Field v Burr* is clearly a strong authority, the cost being claimed (discharging damaged cargo at its destination) there was only remotely connected with the repair process, which both overtime and temporary repairs are clearly an intrinsic part of.

In his Chairman's address to the Association of Average Adjusters in 1992 John Crump (formerly a distinguished average adjuster but then working for Lloyd's Claims Office) reviewed a number of other claims practices which were either not well supported by principle, or even entirely inconsistent therewith. His general message was that:

> Equity cuts both ways and when the interpretation of the facts is stretched to fit an alleged practise which is itself of doubtful legal authority the time has perhaps come to cry halt.

The need to balance equity and commercial expedience against principle and certainty is as old as the Lloyd's market. One genuine concession that departs from principle relates to the hire of temporary generators. Where a vessel is unable to proceed to sea because of generator damage and a significant delay is expected awaiting spare parts, it is accepted market practice to allow the hire of a temporary generator, as being analogous to a temporary repair. It must be doubted strongly that a court would be inclined to go this extra step for an expense which does not remedy the damaged condition of the vessel in any way and is strongly tainted with avoidance of delay, but the practice is firmly entrenched and answers a commercial need.

There are some costs about which no clear consensus has yet to emerge, for example the cost of pollution containment/clean up associated with the dry-docking of a badly damaged vessel. Here the shipowner can find himself caught between the property insurers arguing that such costs are a matter for liability insurers (usually the Protection and Indemnity Club concerned), and the liability insurers refusing to meet a cost that was incurred as a direct result of the act of docking a vessel for repairs.

Cost versus time

Although *The Medina Princess* gave useful weight to the practical consensus on the way many costs are dealt with, the court was not required to provide an updated view on the

relationship between the shipowner's agenda regarding time under repair and the insurers' natural emphasis on minimising costs.

Shipping is often cited as a pure market in which supply and demand are continually seeking to achieve equilibrium. Certainly it is difficult to think of another capital intensive business which is subject to such volatility. For example, figures from Clarkson Research show that the owners of a 2,750 TEU ungeared container vessel would have seen its earnings drop in late 1998 to US$12,250/day, rise during 2000/01 to $23,000/day, fall to US$6,900 at the beginning of 2002, before soaring to the 2004 level of US$37,000 – all in the context of a daily operating and finance cost of around US$14,000/day. Even greater fluctuations have been seen recently in the tanker and bulker markets driven by meteoric growth in China. It is therefore entirely understandable that shipowners will want to maximise their earnings while the going is good by deferring repairs if possible, or by carrying them out quickly if they must be done.

With regard to deferment of repairs a special committee made up of representatives of insurers, shipowners and average adjusters reported in 1916 that 'although there may be particular cases which will have to be dealt with according to the special facts, the general basis of the liability of underwriters for damage to ships is limited to the reasonable cost of the repairs effected at the first reasonable time and place after the occurrence of the accident, and if ship be on a round voyage, then not later than on termination of such round voyage'.

Much has changed since those days and it has been accepted for many years that a shipowner can defer repairs to the 'first reasonable opportunity', which is generally accepted to be the next routine overhaul or dry-docking period when the vessel is scheduled to be out of service. With many vessels now operating on five-yearly dry-docking cycles this can give rise to an unduly 'long tail' for some claims from insurers' perspective, although it is unlikely that repairs that can be deferred for such a period would often involve very significant costs. However, any aggravation in the damage would normally be for the shipowner's account unless it could be shown that the deferment nonetheless resulted in no overall increase in costs.

In the Institute Time Clauses, 1 October 1983 (which remain the most commonly used of the London Insurance Market Clauses), under clause 10 Notice of Claims and Tenders the insured is required to give notice to underwriters of any potential claim. Under clause 10.2 the underwriters are 'entitled to decide the port to which the vessel shall proceed for docking or repair ... and shall have a right of veto concerning a place of repair or a repairing firm'. The underwriter may also require tenders to be taken, an allowance being made at the rate of 30 per cent per annum on the insured value for time lost in the tendering process (clause 10.3). In practice, the right of veto is rarely exercised by underwriters at the time, and I cannot recall having made allowances under the tender provisions of clause 10.3. Underwriters will generally prefer to wait for the advice of their appointed surveyor as to whether the course of action adopted was reasonable, having regard to all circumstances, and argue the point when the claim is presented. Avoidance of disputes is therefore best achieved by keeping the attending surveyor informed as to the repair options that are being considered and reaching agreement before any action is taken.

A shipowner's preference for a particular yard or region in which to repair may not solely be motivated by considerations of the duration of the repairs. Particularly on newer or specialist vessels, quality of workmanship and available technical expertise may be a significant factor. When the comparison is on cost alone, the differences are remarkable. All repair costs are subject to negotiation but in very rough terms steel costs per kilo for a major repair would range from US$1.20 for China to US$5.5 for Europe (with significant regional variations) and rising to US$10 in the United States. The cost of repairs for a grounding damage requiring 500 tonnes of new steel could therefore range from US$600,000 to US$5m. In addition to the variation in cost between regions and yards within regions, quoted repair times may range

widely; it would not be uncommon to find the most efficient of the world's yards quoting half of the time offered by some others for a major repair. The time taken to remove the vessel to the yard will also be looked at closely by the shipowner (the actual cost of such a removal would be recoverable under the hull policy), together with any possible delays in obtaining a dry-docking slot at a popular repair yard.

The potential conflict between shipowners' and insurers' interests is obvious; where a separate loss of earnings insurer is also insured there is sometimes the danger of a three-cornered fight. How are these conflicts resolved in practice? As the absence of recent litigation demonstrates, the short answer is by application of commercial common sense and goodwill and it is an important part of the average adjuster's role to bring consistency and principle to the debate.

A shipowner must demonstrate that the costs are prudently incurred which will mean taking tenders for repair and, subject to special factors, he would generally be expected to accept the most economical (taking into account the overall cost which may include temporary repairs, removal expenses etc), without regard to considerations of time. On the other hand, a shipowner is not obliged to accept a repair of inferior quality, since that would be less than full indemnity.

On the balance between cost and time, the likely views of a court can only at present be a matter of speculation. However, the 'reasonable' approach demanded by the MIA 1906 and the limited case law available to us suggests that a mid-point would be found. It would be unreasonable to give an assured *carte blanche* to spend an unlimited amount to secure the fastest possible repair. Equally, it would be unreasonable to expect an assured to be burdened by severe financial or commercial consequences that were wholly disproportionate to the savings in costs. As always, it is likely that any determination would be guided by the facts of the case.