

The State of the Union from an Outsider's Viewpoint*

It is indeed a pleasure to address you this morning as Chairman of the Association of Average Adjusters of the United States, and I want to thank the members for allowing me the honor of being your Chairman for the past year. It indeed has been a pleasure working with your Executive Committee and its Chairman, Ray Miles and the Association's Secretary, Eileen Fellin. I am sure all of you know that I am an attorney, and past president of the Maritime Law Association of the United States. I address you this morning with no representation that I have any of the significant qualifications of an Average Adjuster. I address you as the Brits would say as the "non-executive" chairman of the Association. Thus I have a role to play as Chairman but I have no expertise in the art of an Average Adjuster's practice or in running the operation. I would like the Association to accept my comments today as an attempt to open a dialogue on the issues I address.

With that said let me present to you observations which I have developed over my almost 50 years of practice in the field of maritime related litigation.

EDUCATION

First let me address the issue of education. I have spoken on this subject in the past to other marine related organizations and in my opinion it is worthy to address again. The "marine world" (that is owners, brokers and insurers) is failing to prepare young men and women in the fine art of marine adjusting. Marine insurance companies are disregarding the expertise required and the importance of having qualified adjusters adjusting losses. When a vessel owner sustains

* Address delivered by the Association's Chairman, Raymond P. Hayden, Esq., at the October 1st 2009 annual meeting

serious damage to his vessel it takes knowledge or expertise solely within an Average Adjuster's training to do a proper adjustment. I become concerned when an Adjuster acting on behalf of an owner sends out his adjustment and it goes to numerous insurers on the slip requesting their proportionate share under one of their policies or to insurers who are on policies spread over several years and the marine insurers do not have a claims person on their staff who has the ability to properly review or question what the owner's adjuster has done, let alone spread the loss to the various reinsurers on their own policies. What is the cause of all of this? The cause is simply the lack of preparation or training, the insurer's failure to encourage young claims personnel to undertake the required training and educational instruction to become full Average Adjusters. It takes time, effort and dedication on the part of a young claims person to study and to pass the various Associations' exams. They need not only the encouragement, but also the financial support from the companies for which they work. Without offering training to young adjusters willing to dedicate their lives to such an important position, marine insurers, owners and brokers are losing out by not having fully qualified adjusters on their staff. Insurance companies which many times are now being run by "bean counters" do not recognize when the claim is proper, improper or correctly adjusted. The new theory of having adjusters who can handle all phases of insurance adjusting – that is property, energy, marine, inland marine, personal injury, etc., creates a situation where their adjusters know a little about everything, but do not acquire the necessary technical expertise to handle a serious marine loss. Any organization handling marine losses – be it the owner, broker or insurer – really needs to have on its staff a full Average Adjuster who is qualified and able to handle, review, etc., the most complex claims. In many organizations this is currently lacking.

For now, let's leave the thought of the failure of companies to encourage and support their young staff to become full Average Adjusters and let's talk about the other side of the issue.

The Average Adjusting Associations of the world need to do more to encourage, prepare, and train young adjusters for taking the examinations which will allow them to become full Average Adjusters. Full members are a dwindling breed and the breed needs to be replenished. Cloning is too slow to be helpful.

The Association needs to address or provide the training, materials and classes which will assist young claims people in moving forward. I commend the Association of Average Adjusters of the United States for moving forward on this issue with a collection of treatises and documentation and seminars which it is making available to interested parties and is recommended for students of the marine industry in the United States. Steps have been taken in the last several years to divide the examinations into sections or levels of expertise. The availability of the material for studying needs to be better publicized.

There is a great need for competent, qualified Average Adjusters and I encourage each and every one of you here today, whether you are a Junior Member, a Resident Associate Member, or not currently a member, to take the steps necessary to become a fully certified Average Adjuster and a leader in the industry. If you are an executive of an insurance company, a broker or a shipowner, encourage your claims personnel to study for, and take the exams which will allow them to become a full Average Adjuster and properly protect your particular interest.

ISSUES THAT NEED TO BE ADDRESSED

Let me speak to you about another questionable, yet serious issue that Average Adjusters are in the middle of which needs to be addressed before it's fully out of control. Many times there is ample indication that the sacrifice is clearly the result of the unseaworthiness of the vessel and this raises a serious question of the propriety of a General Average declaration and yet it is declared without being questioned. The question that arises is whether an Average Adjuster should discuss with an owner the proprieties of a General Average declaration under such circumstances before undertaking a full blown adjustment. I recognize that if the adjuster does question the owner's declaration he will most likely not be doing the adjusting for that owner for very long. It is also true that owners do not always fully disclose the condition of the vessel which might have contributed to or cause the sacrifice.

For a General Average to be stated where it is clearly not a proper General Average situation is unacceptable. I fully understand that when an owner declares General Average, the adjuster is happy to have the account, gets paid for taking security, reviewing the records and adjusting the General Average. Situations ultimately arise whereby the adjustment is suddenly rejected by cargo interests for not being a proper General Average situation and the situation then turns not only ugly, but expensive for all concerned. I recognize that there are cases where the propriety of the General Average is not clear until long after the General Average is stated. Yet, there are cases where unseaworthiness is clear from the outset that the General Average should not have been declared in the first place, and an adjuster does it without questioning its propriety. I suggest that there needs to be some discussion on the issue and a need to review the entire process and the development of a clear understanding of the Average Adjusters' responsibilities under these circumstances.

A separate and second issue is the declaration of and issuance of a full blown statement of General Average which is uneconomical considering the amount claimed to be sacrificed and is, therefore, a huge waste of money. It is time for General Average claims and subsequent adjustments of this nature to be reviewed and the issue addressed before it simply gets out of control. Discussions on this issue would be timely, particularly in cases involving container ships.

The next issue that needs to be addressed is where there is a proper General Average event, for instance, on a large containership and the amount of the General Average loss is minimal in comparison to the cost of stating the General Average and the inconvenience to the thousands of cargo interests. There must be a better way than spending many thousands of dollars in collecting security and stating a General Average to cover shipowners or cargo whose interests were sacrificed when they will ultimately recover but minimal amounts. For instance where the costs of stating the General Average will exceed \$500,000 and the GA sacrifice is less than \$1,000,000. In such a situation the stating of General Average is out of sync in today's world. There is available to shipowners General Average Absorption Insurance under their hull policy and it may be the answer. However, all too often such insurance does not satisfy this issue in the area between low order sacrifices (where the General Average Absorption Clause is clearly relevant) and significant sacrifices following a major casualty. Do we need new rules to cover this in between area or is it possibly just not proper to declare a General Average? That question having been asked, should economics of the process alone become part of decision making when declaring General Average? I'm not challenging how it is done, the adjustments are proper, but there must be a more economical way under such circumstances.

I have mentioned the General Average Absorption Clauses as being something that are not being used to their full potential. My contacts advise me that such clauses are frequently invoked in low order General Average adjustment for containerships. Where the General Average Absorption Clause can be invoked, the clause might not be invoked as much as it could or should be because of the high deductibles in the policy or because of the low coverage offered under the Absorption Clause and the concerns of owners that they may be greatly stung if they underestimated the General Average costs and expenses early on. I recognize that some General Average Absorption Clauses cover from the ground up, that is without a deductible and others take over after the deductible is depleted. This difference in wording is alone an issue that needs to be addressed, as it is of great interest in deciding whether or not to declare General Average.

I submit that it is extremely difficult for an adjuster to have sufficient knowledge early on and be able to recommend whether or not the Absorption Clause should be invoked and advise an owner to decline the formal declination of General Average and collection of security. I think the difficulty facing containership operators is their high deductibles and the fact that General Average Absorption Clauses are not high enough to clearly spell out to the owner early on that he will not be out of pocket for a large deductible or for a huge excess General Average costs above the General Average Absorption amount.

I would suggest that the answer may be that owners, hull underwriters and adjusters need to agree on a dramatic increase in the values assigned to the General Average Absorption Clause.

This might be accomplished by increasing the amount that will be absorbed by the hull policy over and above owner's deductible and/or doing away with the deductible in General Average situations under policies that pay only above the deductible amount. This problem appears to be particularly true with large containerhips that carry thousands of containers where even the simple task of collecting security makes the cost of settling minor order General Average prohibitive. In General Average situations involving large amounts the issue is a simple matter and of course the General Average needs to be stated. This is an issue that needs to be addressed by hull underwriters and owners as to what is an appropriate cover under the General Average Absorption Clause.

There are two other issues which I consider of significant importance to those appointed as the General Average Adjuster. First, the General Average Adjuster is, obligated to collect security for the benefit of those who have incurred sacrifices on the venture. General Average Adjusters do this by taking security from cargo before the cargo can be released. Many times they do not insist on security from the vessel interests or fail to obtain it from the charterers for the bunkers or the freight at risk.

In today's economic hard times, however, it is equally important for the Adjuster appointed to handle the General Average that he make certain that security is posted by these interests for their appropriate share of any potential General Average expense. It is not a problem where the only costs to be made good are costs of the owner if the vessel interests do not post security. However, in today's world where high value cargo is the subject of the sacrifice and cargo will be the recipient of payments from the General Average fund for their sacrifice, the guarantee of the owner's payment becomes an absolute necessity, just as much as security from the cargo interests. This is particularly important in the days of high deductibles, a

weak economy, and the bankruptcy of many shipowners and charterers. The Average Adjuster cannot risk being unable to collect funds from the bankrupt shipowner or charterer whose bunkers or freight are at risk. His duty as an Average Adjuster is to collect the necessary security from all parties and the failure to take security from the owners in instances where the sacrifice has been the cargo, cannot be tolerated. I would not like to see an Average Adjuster late in the process of an adjustment say I have no security, or I cannot settle the adjustment because I failed to take security from the vessel or charterer's interest. I recognize that an owner's P&I Club, under some circumstances, covers uncollectable General Average, but when a shipowner goes bankrupt, he is more than likely behind on his calls, etc., and that will certainly affect any P&I Club's willingness to contribute towards uncollectable General Average contributions from other parties.

Another matter that is becoming a growing concern and needs to be addressed by General Average Adjusters is that they must treat all parties equally, the shipowner, the cargo owner, the bunker owner and the freight at risk. The Average Adjusters must treat all those interests equally by sharing all information gathered with all parties. I refer typically to requests made to Average Adjusters for copies of the General Average surveyors' reports, including drafts, etc. I have noted in the past a reluctance of the Average Adjuster to provide copies of the relevant information to interests other than the vessel owners. I have been aware of occasions where the surveyor's drafts or reports have been forwarded to the hull underwriter and owner for review before they are issued. Favoring one interest over another is improper on a General Average Adjuster's part and sooner or later the Average Adjusters are going to be called to task for doing so. I think the Association of Average Adjusters needs to address this issue.

This issue, of course, becomes substantially more complicated when the Adjuster has also been appointed as the Adjuster to deal on behalf of the owner with owner's hull underwriters for the repairs after a casualty. One recognizes that when an owner appoints an adjuster to work with hull underwriters to adjust a loss, the Adjuster has the allegiance to the owner, but I submit that this changes when an Adjuster is appointed as the General Average Adjuster, I believe that the General Average Adjuster then has a duty to all interests and not just an allegiance to the owner.

I recognize that Leslie J. Buglass, one of our Association's former esteemed members and a distinguished Average Adjuster, long ago indicated that a General Average Adjuster owes his allegiance to the owner, but I think that Mr. Buglass was wrong. A General Average Adjuster owes his allegiance to all parties in the adjustment and should not be favoring any one interest over one party to another.

I hope my comments will be grounds for a dialogue between the various interests and would welcome comments from those present here today.

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Chairman
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October 1, 2009