

VIEWPOINTS 2005 – CATASTROPHE: VIEWPOINTS ON MARITIME DISASTERS
Presentation by Jonathan S. Spencer

(Based on remarks delivered at the annual seminar of the Association of Average Adjusters of the United States held at St John's University in Lower Manhattan on October 5, 2005)

Introduction

It is perhaps surprising, given the extent of the profession's involvement in the settlement of general average and hull & machinery claims, how rarely average adjusting is mentioned in jurisprudence. When it is mentioned, often it is in complimentary terms. For example, The Honourable Mr. Justice Mackinnon, speaking in 1935, is reported to have said that "Your profession is a singular one - not merely because the vast majority of your fellow-citizens have not the remotest idea what your duties are; but because, above any other profession that is not actually legal, you are required to have, and in fact possess, a very exact knowledge of a very special branch of the law."

The profession itself rarely becomes involved in litigation but the need for and effect of an average adjustment has been addressed in some reported cases.

Wavertree Sailing Ship v. Love [1897] A.C. 373 and *Crooks v. Allen* (1879) 5 QBD 38; 49 L.J.Q.B. 201 are generally taken as supporting the principle that when there is a general average, the shipowner is under an obligation to have an adjustment prepared. In *Chandris v. Argo Insurance Co. Ltd.* [1963] 2 Lloyd's Rep. 65, as reported in Lowndes, it was held that a contract incorporating the York-Antwerp Rules 1924, by implication, provided that an average statement should be produced in support of a claim for general average contribution, but not that a professional average adjuster must be employed.

In fact, the most tangible affirmation of our existence can be found in the York Antwerp Rules, certain of which reflect the clear assumption that the general average will be stated by an average adjuster, and in a significant proportion of hull & machinery policies and other policies on marine property, where the average adjusters are named within the policy conditions.

A statement of general average is not legally binding and is not conclusive of any party's liability to contribute (*Great Eastern Associates and Farrell Lines v. Republic of India*, 1978 AMC 1288). However, a statement of general average prepared by an average adjuster is, as summarized by Buglass, *prima facie* proof of:

1. The losses, damages, and expenses which, as factual matters, are the direct consequence of the general average act
2. The values attaching to such losses, damages, and expenses, and
3. The computations apportioning these losses, damages, and expenses between the parties to the adventure

(This is why a modern tendency by claims examiners to insist on seeing copies of all the invoices dealt with in an average adjustment is particularly vexing).

Also noteworthy is the *Joseph Farwell*, 31 Fed. Rep. 844, one of few American cases addressing abandonment of voyage, where the Court decided, in the particular circumstances applying, that

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there was a general average up until the completion of the discharge of the cargo, and instructed the Clerk of the Court to go off and prepare an average adjustment.

Despite being all but ephemeral in the annals of admiralty law, professional average adjusters these days are quite central to the settlement of general average and of various classes of blue water hull & machinery and loss of earnings claims, not to mention claims involving the liabilities of ship builders and repairers and, increasingly, claims involving brown water tonnage, which seem to be becoming increasingly complex and to involve larger and larger sums of money.

The purpose of this paper is to review the principal aspects of the average adjuster's involvement as the catastrophe develops. It must be appreciated that particularly in the US and particularly where a casualty involves, loss of life, pollution, or injury to persons or property, attorneys are likely also to be appointed, and clear communication between them and the average adjusters is essential to a smooth evolution of the case.

Appointment of surveyors

As soon as the average adjuster receives instructions in a given case, and has satisfied himself that the casualty is of a magnitude that makes it likely to give rise to a claim in excess of the deductible provided for in the hull and machinery policy, he will arrange the appointment of Surveyors on behalf of hull & machinery underwriters. Quite often, the identity of the preferred surveyors will be found in the hull & machinery policy or, by virtue of familiarity with the account, the adjuster will know which surveying entity is preferred by the underwriters. He will usually make the appointment on underwriters' behalf and will act as a conduit for the surveyors' advance advices, their reports and, frequently, their professional charges.

Depending on the nature of the casualty, the average adjuster might recommend the appointment of other surveyors. For example, in the case of a collision, it would often be prudent to arrange a speed and angle of blow survey, which has a forensic purpose, that of reconstructing the circumstances of the collision with the intention of establishing degrees of blame.

In the case of a general average, particularly one involving sacrifice of property (as opposed to the mere incurring of expenditure) or the forced discharge of cargo, with the concomitant risk of damage being suffered to cargo or to the ship during cargo handling, the average adjuster will recommend the appointment of a general average surveyor, also known as a surveyor in the general interest. Whilst the owners or insurers of individual items of property are likely to appoint their own, first-party, surveyors, the objective of the surveyor in the general average interest is to apply the same uniform set of criteria to measuring the damage and expenditure to be claimed by individual parties under the general average adjustment, and to comment on the reasonableness of steps proposed, and their cost, from the point of view of the commonality of interests of all the parties involved in the adventure.

The average adjuster will typically maintain a database of qualified surveyors worldwide.

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Allocation of losses and determination of coverage

At an early stage in the events, the shipowner is likely to require a preliminary analysis of whether he has full coverage for the losses that are in the course of being incurred and where those losses will lie. The average adjuster must ascertain where coverage is to be found under the hull and machinery insurances and whether any additional investigation is going to be necessary into the cause of damage to, for example, a piece of machinery, perhaps in the form of metallurgical testing, in order to establish exactly how a claim on underwriters is to be founded.

He must also make an early determination about whether a given casualty gives rise to general average. If the casualty does give rise to general average, the average adjuster will review the general average absorption provisions typically found in the hull and machinery insurances and will then attempt to ascertain the estimated contributory values of the ship, cargo and any other property such as containers and bunkers, and an estimate of the expenditure to be incurred, in order to make a preliminary recommendation as to whether the general average might be recoverable entirely within the absorption clause or whether a declaration of general average and the involvement of the owners of the cargo and other property is unavoidable.

It must be noted that invoking the absorption clause is discretionary. Even if the general average falls within the limits of the absorption clause, the shipowner might nevertheless elect to make a claim for general average against the cargo if, for example, the cargo comprises a single interest and the expense of collecting security and formally adjusting the claim makes economic sense or in order to minimize the negative effect of the claim on the owners' hull & machinery loss record.

In order to assess the full impact of the casualty from the perspective of general average, it has become increasingly important for the average adjuster to discover at an early stage of the case which version of the York-Antwerp Rules applies. For example, the allowance of wages at a port of refuge has been abolished under the 2004 rules, and if salvage is settled directly with the salvors by the individual parties to the adventure, it is no longer dealt with under the general average adjustment. (This means that if a very valuable piece of cargo is sacrificed during the course of salvage efforts, it no longer has to contribute to the salvage and receives a windfall benefit. Having participated actively in this debate for at least the last twelve years, I have had to conclude that I'm the only person in the world who is exercised by this.) The elimination of allowances for wages and maintenance at a port of refuge has more practical impact; often wages and maintenance make up the largest single allowance in general average when, for example, a vessel suffers an engine damage and is detained at a port of refuge in order to make repairs necessary for the safe prosecution of the voyage; the average adjuster will need to ascertain whether or not those wages and maintenance will be allowable in general average before he can guide the ship owner as to whether or not the cargo should be brought in as a contributing interest.

It should be noted that the 1994 and 2004 York Antwerp Rules embody a non-separation of interest agreement. If earlier versions apply, the average adjuster will need to determine whether or not a non separation agreement is required and, if appropriate, insert it into the general average security (discussed more fully hereinafter). A non separation agreement allows cargo to be forwarded in other vessels to avoid delay while permitting the shipowner to recover general average detention expenses as though the original voyage had continued. Special agreements

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can be struck addressing other expenses being incurred for the common benefit, providing for these to be shared among the contributing interests.

It was initially thought that the 2004 York Antwerp Rules would not be taken up by the ship owning community. What is happening in practice is that some chartering brokers are inserting them into charter parties to show how on the ball they are, without the least grasp of the damage they are potentially doing to their ship owning principals. Furthermore, there is an initiative in certain quarters to deem the 2004 Rules to be an amendment to the 1994 version, rather than the separate and distinct new version that they were clearly understood to be those present at the CMI Vancouver conference where they were adopted; the effect of this would be to make their application unavoidable under certain charterparty wordings.

An assessment must also be made of whether the cargo has any potential defense to the general average claim on the grounds of unseaworthiness since cargo's uncollectible proportion of general average expenditure gives rise to a claim on the P&I insurances. In these circumstances the effect of a further deductible must also be taken into consideration.

It should be noted that the great majority of general average absorption clauses in hull and machinery policies address only cargo's proportion of general average *expenditure*. If there is general average sacrifice of cargo, the shipowner is under an obligation to have a formal adjustment made up, in order to ensure that the owner of sacrificed property is made whole, unless he cares to pay for the sacrifice entirely himself. If the only sacrificial damage is to the ship, the owner has the option of claiming that damage in full under the hull and machinery policy.

If the shipowner carries any other insurances, such as insurance against loss of revenue or charter hire, the adjuster must make an early determination about whether the casualty is likely to give rise to a claim on those insurances and, if appropriate, put those underwriters on notice and give them the opportunity of arranging the attendance of their own Surveyors.

Also, with specific reference to casualties of great magnitude, the average adjuster must have an eye to whether or not the claim is likely to give rise to a constructive total loss of the vessel and, if it is likely to give rise to a constructive total loss, ensure that notice of abandonment is tendered to Underwriters in an appropriate form.

Special insurances

Any major casualty is likely to give rise to the need for special insurances.

For example, if general average expenditure is incurred, it is advisable to take out a general average disbursements insurance, also known as a diminution in value insurance. The reason for this is that the general average is adjusted on the values of the property at the end of the adventure. If the ship and cargo suffer another casualty on the voyage subsequent to the general average expenditure being incurred, the contributory values at the end of the voyage might not be sufficient to meet the general average expenditures, and the situation becomes worse if the property becomes a total loss. A disbursements insurance protects the expenditure against any diminution in value of the contributing property until the conclusion of the voyage and the cost of that insurance itself is admissible as general average expenditure.

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If cargo is put ashore as a general average measure at a port of refuge, for example in the course of firefighting operations or to enable repairs necessary for the safe prosecution of the voyage, it is advisable to arrange an insurance on that cargo while it is ashore, and, indeed, in the U.S., it seems clear from the *MORMACMAR** decision that the shipowner is under a legal obligation to take out such insurance. If he does not, he is liable to the cargo owner for any loss sustained to the cargo in consequence of shore perils.

Consideration must also be given to protecting the ship owner's liabilities towards the forced discharged cargo, since conventional P&I cover will not remain in force once the cargo is removed from the ship.

An exposure to unusual liabilities might also arise if, for example, the ship is drydocked with cargo on board. We have also seen cases where the ship is left in such a condition after the casualty as to constitute a perceived hazard to the repairers' facilities and to their employees, such that repairers have insisted on the ship owners taking out a special insurance for the potential liability arising therefrom.

Sometimes obstacles arise that can be satisfactorily removed by means of a lien insurance. Salvors or the owners of a colliding vessel have a lien *in rem*, and will usually insist on satisfactory security being given before they will allow the ship to sail from the first port or place at which she safely lies after the conclusion of the salvage services or following the collision. A prolonged detention at that place can sometimes be avoided by persuading the lien holder to allow the ship to sail under the protection of a lien insurance while satisfactory permanent security arrangements are put in place.

General average formalities

If the decision is made that a formal declaration of general average is unavoidable, and this is a decision that is usually made with great reluctance, then the average adjuster should be aware of any formalities that might be required of the shipowner in order to make the declaration of general average valid. In the U.S. and most other countries, no particular formalities are required and a notice is prepared and sent to receivers of cargo describing the casualty, the circumstances giving rise to general average, the identity of the appointed adjusters, the security requirements and the mechanism for providing that security.

In some countries, however, particularly in South America, there is a requirement that general average be declared in a specific form within a specific time before a specific court in order for claims successfully to be pursued against cargo. The average adjuster should be mindful of these and guide the shipowner accordingly.

If cargo is to be called upon to contribute to a general average, general average security will be required. This typically takes the form of an average bond signed by the cargo owner; and an average guarantee signed by the insurer or, if the cargo is not insured, a cash deposit. If a cash deposit is to be taken from uninsured cargo, and this is a problem that arises with some frequency in a hard cargo insurance market, the average adjuster has to make some quite reliable

* 1947 AMC 1611; also see 1950 AMC 2018, 1952 AMC 1088, 1954 AMC 691 and 1956 AMC 1028

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estimate of the eventual general average and of the value of the contributing interests in order to fix the amount of the cash deposit at a percentage of contributory value adequate to ensure that the general average contribution ultimately can be collected.

If sufficient information is available by this stage, a determination can also be made about the simplification of general average. For example, if the cargo comprises a number of higher value shipments, making up the great bulk of its total value, with numerous low value shipments accounting for the rest, it will often be economical to eliminate those low value shipments from the general average and bring only the high value shipments into contribution, demonstrating that they pay less in this way than if they were to contribute to the costs of collecting security from, ascertaining the contributory value of and applying for contribution to, the concerned in the numerous low value shipments.

A decision has to be made about the mechanism for collecting the security; the collection can be performed by the shipowner's personnel, by the shipowner's agents at the discharge ports or by the average adjusters. A determination must be made in each individual case as to which mechanism is going to result in the smoothest, most complete and most accurate results.

If the general average occurs quite close to destination or involves a large number of receivers of cargo, the ship owner will need to give consideration to whether or not to exercise a lien against the cargo, and detain it in his own possession and at his own expense until general average security has been proffered, or to deliver the cargo in the hope that the receivers and their insurers will reciprocate and provide general average security after delivery, in consideration of having received the cargo without delay.

If the casualty also entails a salvage under a contract in terms of which separate security must be given to the salvors, it will usually be more efficient for the salvage security to be collected simultaneously with the general average security, by the same entities, and this procedure must be resolved with the salvor at the earliest possible stage in the case.

The place of adjustment also requires to be established at an early stage. If the 2004 version of the York Antwerp Rules applies, and if there is no specific provision in the contract of affreightment, it will be behoove the ship owner to select a place of adjustment in the United States. Allowances for commission having been eliminated in the 2004 Rules, to the best of my knowledge the U.S. is the only place that local adjusting practice permits a similar advancing commission.

Cash flow

The financial consequences of the casualty will become clear at an early stage and the average adjuster will start assessing the potential of the claim for payments-on-account. This is a somewhat nebulous area because most hull and machinery policies are policies of indemnity, in other words, pay to be paid. However, hull and machinery underwriters are almost invariably willing to make payments-on-account and, although they insist that this is a commercial concession to the insured and not a contractual obligation, the procedure has now become a matter of routine. Accordingly, when there has been a significant outlay of capital, the average adjuster will obtain repair invoices or available estimates, seek the underwriters' surveyor's approval of the expenditure that has been incurred or is in the course of being incurred, and will

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draw up a payment-on-account recommendation in order to approach underwriters for an interim payment. In the case of major repairs, payments might be made directly to the shipyard on completion of the work or, if the repairs are truly protracted, arrangements can be made for underwriters to make progress payments as the work advances to the satisfaction of their surveyors.

Similarly, in the case of a general average, if parcels of cargo have suffered significant loss by sacrifice, the average adjuster might make arrangements for payments-on-account by the other contributing interests pending the completion of the final adjustment.

Preparation of the adjustment

Those of you familiar with average adjustments know that they include a narrative of the material events of the casualty and of the repairs, typically abstracts from the ship's log and reports by the ship's staff, together with particulars of all the expenditure claimed by the various parties as average. The average adjuster will already have assembled some of these during the early stages of the casualty, particularly if he has been engaged in preparing payments-on-account. In due course, he will identify what additional documentation and information is going to be necessary for the preparation of the final adjustment and he will get together a list of adjusting inquiries and give this to the shipowner.

If the claim involves a general average to which cargo is going to be required to contribute, he will also correspond with the concerned-in-cargo in order to ascertain particulars of the value of the cargo and the amount of the losses it has sustained. The practice of average adjusters in the U.S., though not necessarily in other countries, is to agree contributory values and damage allowances with the concerned-in-cargo before finalizing the adjustment.

The adjuster will likely put these various inquiries on a diary system, in order to issue periodic reminders with a view to completing the adjustment as soon as possible. Accusations of being slow have been laid at our door in the past but more often than not it is the ship owners and the cargo interests who bear most of the responsibility for delay. The average adjuster gains nothing by delaying the issue of an adjustment, and, indeed, is unlikely to earn a fee until he has finished his work.

In the course of assembling the documentation and turning it into a draft adjustment, the average adjuster must take additional steps, such as having the invoices for the expenditure to be included in the adjustment approved by the general average Surveyor, as appropriate, and by the surveyor acting on behalf of hull underwriters. Even this entails some mystery of art, because most underwriters will allow the average adjuster to use his own discretion in the adjustment of smaller bills, typically those under \$5,000 or so, whereas some American underwriters require the adjuster to have all invoices, however small, approved by the underwriters' surveyor.

So far as concerns information to be received from cargo, the situation has been ameliorated somewhat by the most recent versions of the York-Antwerp Rules, which allow the adjuster to estimate contributory values and allowances, if information has not been received from the cargo interests within twelve months after the termination of the adventure.

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However, if the issue of the adjustment becomes extremely delayed, the average adjuster must keep in mind time bar considerations. In most jurisdictions, actions under general average security become time barred only after several years, but the period in question might be only a year or two in some countries and in Puerto Rico it is as little as six months.

In the course of working on the draft adjustment, the average adjuster is quite likely also to sit down with a consulting surveyor in order to review certain aspects of the claim. These might include cause of damage, for the purpose of establishing the basis for the claim on the hull policy, or they might include marking up the repair accounts to identify any items not claimable, for example in terms of the exclusions contained in the Liner Negligence Clause. A consultant is often used to review allowances for consumables such as fuel and stores used in the course of removal passages, paints used in the course of repairs and so on. It would also be appropriate to use a consultant to determine deductions of thirds when dealing in general average with sacrificial damage to the ship.

Recourse would be had also to consulting ship valuers when dealing with general average claims, in order to ascertain the sound market value upon which the contributory value of the ship is based. It is important to understand that although increasingly ships are deemed to be insured for their full contributory value under the hull insurance policy, even if the value agreed in the policy is less than the actual market value, a phenomenon which is not uncommon in an era of appreciating ship values, nevertheless the value for general average contribution has to be based on the commercial value and not upon the value agreed for insurance purposes.

Once this phase of the work has been completed, then depending on the procedure agreed with that particular client, the average adjuster either will go over the draft adjustment with the ship owner before finalizing it, or will submit his proposed final adjustment to the ship owner for review. If it is an adjustment dealing with general average, the agreement of the principal cargo interest might also be sought. The adjustment will then be submitted to all the debtor parties for settlement.

If the claim arises from collision, the average adjuster might also at this juncture draw up the statement of the claim against the other ship, which is likely to include not only amounts claimable by way of general average and particular average but also uninsured losses. Indeed, the average adjuster's skills readily lend themselves to drawing up statements of claim in any admiralty action.

Settlements

Finally, the average adjuster will assist with the settlements. He will deal with any inquiries received from underwriters requesting clarification of any of the allowances in the adjustment and he will likely act as the repository of funds, turning these over to the claimants by stages as they are received.

If the claim arises from a general average, and this is contested by the concerned-in-cargo on the grounds of some breach of the contract of affreightment, he will likely try to resolve cargo's concerns, and if he is unsuccessful he will turn the matter over to the P&I club for them to pursue. This process might also entail a readjustment of the general average, separating the ship's sacrifices from the expenditures, since the sacrifices can be claimed in full from the hull

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insurers; the P&I club will only reimburse the uncollectible proportion of cargo's contribution to expenditures.

In due course he might prepare supplementary adjustments where, for example, certain repairs to the ship have been deferred until a future, scheduled maintenance period.

In collision cases, once a settlement is achieved, the average adjuster will draw up a statement dealing with the claim under the collision clause and showing an allocation of any recovery proceeds, together with attendant costs.

I might be faulted for having addressed inadequately the topics of catastrophe and disaster. However, any claim that occurs on a ship is a catastrophe and a disaster in its own way. The utility of the average adjuster's intervention is to make the disaster as uncatastrophic as possible for all concerned. This takes the form of ameliorating damage to cash flow to the fullest extent possible and making the best possible job of setting out fairly, clearly and accurately the financial positions of the respective parties.