

ADJUSTING AVERAGES

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Introductory Remark: *These notes were compiled following participation at talks to university and secondary school students on career prospects in Hong Kong's maritime industry during the HK Maritime Awareness Week, 25th/29th October 2010. Hong Kong is a leading maritime centre in the world, having a very successful maritime industry with a comprehensive net work of maritime services which are well known for their efficiency, competitiveness and professionalism. Within the industry, Average Adjusters belong to a unique and small profession...*

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The Average Adjuster adjusts averages – so what are averages? – they are losses or claims arising from maritime casualties – and what is adjusting? – it is the assessing and stating of those claims. So, in essence, the Average Adjuster adjusts marine claims – insurance, general average and liability.

Average Adjusting has been suggested to be the second oldest profession, but as reflected in the following rhyme which appeared many years ago in the magazine *Punch*, has been shrouded in an unnecessary mystique:

*Now some men go to sea – ho, ho!
And some work on the land,
But I've a job that – s'welp me bob!
You'll never understand.*

*For I am an Average Adjuster,
And nobody knows what I do.
Do I add one here, subtract one there?
To make the sum come True?*

*Now that's a secret I won't tell,
For if I did I know full well,
Any Tom or Dick who had the trick,
Could adjust an average too.*

Indeed, in his address to the average adjusters in 1935, Mr. Justice Mackinnon said:

"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 pre-requisites of a quality professional average adjuster are expertise, experience and independence. With his established reputation of impartiality and background of knowledge, he offers a non-litigious, non-adversarial method for settling claims by acting as an impartial intermediary between the parties concerned. In this respect, the conventional average adjuster has a two-fold duty:

- (a) To the assured and/or the claimants in general average – to see that the claim presented is fully supported by the evidence, and that it is as complete as possible, i.e. that nothing is missing
- (b) To the underwriters and/or the general average contributing interests – not to submit, without making appropriate note of reservation, any item of claim which cannot be supported either in law or in practice.

It should be noted that an average adjustment is not binding upon the parties concerned and it is open to the respective parties to disagree with the average adjuster’s conclusion as to whether there is a claim in principle and/or to take issue with the average adjuster’s treatment of the figures. However, it is true to say that the vast majority of claims go through as adjusted, the adjustment being accepted as correct settlement between the parties concerned. In this connection, a former chairman of Joint Hulls Committee addressing on the hulls claims in the London market said:

“The use of a reputable and highly qualified average adjuster to prepare the claim can significantly speed the agreement of the claim. An adjustment prepared by a respected firm made up of highly qualified individuals will receive favourable treatment by the claims adjusters. While the adjustment may well be queried, the underwriter knows that claims which are not covered by the policy have not been submitted and that the claim preparation is thorough and well researched. This will prevent the unnecessary questioning of the adjustment due to insufficient research of the claim.”

The profession has changed with the passage of time; yet the unique skill and expertise of highly qualified average adjusters must endure to meet the changes in the requirements of a modern shipping industry and insurance market.

Brief History of General Average

The story of general average starts some 2,500 or 3,000 years ago whilst marine insurance has been transacted for centuries. All those early claims must have been adjusted by someone, somehow.

In those far off times, merchants usually travelled with their cargo on board the ship. In spite of all safety precautions, disaster could suddenly threaten these little ships. Following grounding of a vessel, the only way to refloat her was to deliberately thrown overboard some cargo. There must be many fierce arguments between the merchants as to whose cargo were to be jettisoned, until presumably the shipmaster with common sense made an important decision which was subsequently embodied in the law of the Island of Rhodes about 2,500 years ago:

“If in order to lighten a Ship, merchandise is thrown overboard, that which has been given for all shall be replaced by the contribution of all.”

Assume that Cargo B was chosen to be jettisoned and the vessel refloated to resume her voyage, the contributions to the sacrifice were settled by the parties to the adventure upon safe arrival at destination, probably by the shipmaster adjusting and apportioning the sacrifice over the values of the property saved and/or made good as follows:

Ship valued @	\$200	pays	\$50
Cargo A valued @	100	“	25
Cargo C valued @	300	“	75
	<u>\$600</u>	pays	<u>\$150</u>
Cargo B jettisoned on amount of loss@	200	“	50
	<u>\$800</u>	pays	<u>\$200</u>

It will be seen that everyone whose property was at risk had sustained the same degree of loss i.e. 25%.

The essential fairness of the general average system has been followed virtually by all countries with maritime trade throughout though the law in each country varies. Efforts made to attain international uniformity started in the year 1860 resulting in agreeing upon the York-Antwerp Rules which are today widely accepted throughout the world. Almost every Bill of Lading or contract of affreightment provides for general average to be adjusted according to York-Antwerp Rules. These rules have been reviewed and revised from time to time but the latest set, York/Antwerp Rules 2004 was unfortunately approved without a consensus between shipowning and other interests, hence receiving negligible support. Currently, the set of rules commonly incorporated in the contracts remains being the York-Antwerp Rules 1994.

The Association of Average Adjusters founded in 1869

The first known professional average adjusters practiced in the City of London from about

1800, though there is record that Lord Justice Mansfield, in his celebrated judgment in the case of *Lewis v. Rucker* in 1761, refers to the fact that:

“I thought a good deal of the points, and endeavoured to get what assistance I could by conversing with some gentlemen of experience in adjustment.”

The first formal association of the individual average adjusters took place in London in 1869 at the prompting of the underwriting members of Lloyd’s and the Liverpool Underwriters Association. The Association of Average Adjusters is the association to which all qualified average adjusters in Great Britain belong. Some of its fellows practice in various parts of the world. On the record, there have been five Chinese qualified fellows, namely, Raymond T C Wong (1980), Christopher Y C Tang (1982), Edward S O Lau (1985), Benson K K Chiu (1992) and Yibing Xu (2008).

The aims of the Association are as follows:

- To promote professional standards and correct principles in the adjustment of marine claims by ensuring, through examination or otherwise, that those entering into membership possess a high level of expertise.
- To achieve uniformity of practice among average adjusters by providing a forum for discussion and by establishing rules of practice where necessary.
- To ensure the independence and impartiality of its members by imposing a strict code of professional conduct.
- To provide service to the maritime community by establishing procedure by which advice on all aspects of marine claims may be obtained so as to facilitate their settlement.

The Association is a regulatory body, being charged with promoting and ensuring both skills and objectivity of the average adjusters. Fellows of the Association are practicing average adjusters who, being expert in the law and practice of general average and marine insurance, and having qualified by examination of the Association, apply their expertise for the benefit of the maritime and marine insurance communities.

The functions of the average adjuster are principally the following:

- The adjustment of general average.
- The adjustment of claims on policies of insurance on any interest directly or indirectly exposed to maritime perils.
- The preparation of statements of claim against third parties.
- The division of recoveries from third parties, or of proceeds of sale.
- The arbitration of disputes arising in relation to the above or associated matters.

The adjuster may be appointed by any member of the maritime or marine insurance

communities having an interest in the matter concerned and, irrespective of the identity of the party appointing him, he must always act impartially and independently. He may advise any party seeking his opinion on any matter within the area of his expertise, and assist in the collection of general average, salvage, or other security, and in effecting settlements under average adjustments, or otherwise as required.

Following a Maritime Casualty

The average adjuster is nowadays usually consulted as soon as a casualty occurs, and asked to formulate an opinion, with the little information then available, as to where the various liabilities will fall and who will pay under the bills of lading, charter party, insurance policies, salvage agreement, and any other contract which may be in existence. Assume that:

A vessel laden with cargo in containers shipped under multi-bill of lading providing for general average in accordance with York/Antwerp Rules 1994, is involved in a serious collision sustaining damage to her stem and forward shell plating, with serious leakage in the forepeak and nos.1 and 2 holds. To avoid any chance of sinking, the master decides to strand the vessel on a generally sandy and sheltered beach. It is considered necessary to discharge part cargo into barges, fit patches and then pump out and refloat with tug assistance. Various salvors offer to refloat the vessel on the basis of Lloyd's Open Form of salvage contract but, in the interest of economy, the necessary barges, stevedores and tugs are engaged on a daily rate basis. Fire breaks out during refloating operation which is extinguished with fire hoses from the attending tugs with LOF being signed retrospectively. Vessel is towed to port of refuge for necessary repairs, where cargo is forcibly discharged and subsequently transshipped....

Parties to the adventure, the shipowner in particular, are now faced with various problems. The questions in the shipowner's mind usually include:

1. What needs to be done at this stage (*upon hearing of the collision and voluntary grounding*)?
2. Whom do we need to inform/instruct?
3. Shall we opt for the Lloyd's Open Form, or shall we engage assistance on a daily hire basis?
4. What are pros and cons of these different types of services?
5. Who provides security for any salvage services, and how are the various expenses to be funded?
6. Do insurances on average disbursements, SOL (shipowner's liability), or any other interest need taking out? And who will pay?
7. Do we need to appoint a cargo surveyor in the general interest?
8. What general average security shall we take from cargo?
9. Do we need an admiralty solicitor?

10. What about security for the collision and jurisdiction?
11. What about pollution liability from either vessel?
12. How should we react to time charterer who asks us not to declare general average?
13. What is the significance of the fact that the freight is prepaid?
14. What is the significance of the remarks about the intentional grounding?
15. Will there be 2 deductibles on the hull & machinery policy claim?
16. Are the attending tugs engaged on daily hire entitled to claim salvage following their successful efforts made to extinguish the fire?
17. What will happen, and what should we do?
18. Will this fire mean an extra policy deductible?
19. Do we need another set of general average security forms?
20. Who will provide security to colliding vessel and what will it cost?
21. Who will provide security to salvors and what will it cost?
22. Who will provide security to Harbour Authority at port of refuge for possible pollution?
23. Who will pay the cost of forwarding the cargo to destinations? Can we abandon the voyage and ask the cargo to take delivery where it lies at its own expense?
24. Will the salvors permit the cargo to be forwarded before its security for salvage has been provided? If not, who is to provide such security?
25. Do we need to place any insurance on the cargo?
26. If so, why? On what conditions? For how much? And who is the assured?
27. Suppose the forwarding vessel were to be totally lost on the voyage when carrying the cargo ex our vessel, do we lose any general average contribution they would have paid?
28. If so, how can this be avoided?
29. Who will draw up specification for damage repairs and take tenders for the repairs?
30. Who will know/decide which yards should be asked to tender?
31. Who will provide money to pay repair yard their required advance payment?
32. Who provides the funds for progress repair payments?
33. Do we have a constructive total loss on H&M policy? [*There is a CTL when the cost of recovery and repairing the vessel exceeds the insured value.*]
 - (a) What is the estimated cost of repairing the vessel and what may be included in the computation of that figure?
 - (b) Can the cost of salvage be included?
 - (c) Do we have to give credit for any general average contributions received from cargo towards those repairs?
 - (d) Do we have to credit the scrap value of the vessel?
 - (e) What is notice of abandonment?

These questions, and many more like them (and those to follow during the salvage and

collision proceedings respectively), which may cause a severe headache to the average shipowner, are dealt with daily by professional average adjusters as they coordinate the involvement of salvors, superintendents, repairers, underwriters' surveyors, P&I representatives, lawyers etc.

The salvage and general average security collection operation can be a major exercise involving contact being made with several hundred different cargo interests concerned – receivers, shippers and insurers (also average agents and/or lawyers acting for them), and it is essential to have the full co-operation of the ship's agents at ports of loading and discharge. Once the cargo has been delivered, the average adjuster will then circularize the cargo interests to obtain details of any damage sustained by the cargo which could form a deduction to assess the contributory value and/or a claim in general average. The average adjuster will advise the claimants in general average as to what documents/information are required to substantiate their claims. In the meantime, when the salvage award is published by arbitrator or agreed between the salvors and the property interests, the average adjuster is often engaged by the salvors in multi-bill cases to assist in collecting the payments due from the parties concerned. Then there follows the main part of the average adjuster's task which is the preparation of the actual general average adjustment.

Concurrently with preparation of the general average adjustment, the average adjuster is processing the particular average claim on the hull and machinery policy. The first step is to establish whether there is a valid claim under the policy, hence the examination of the terms and conditions of the policy. Is the cause of damage a peril insured against? In a case like the one assumed herein, where a collision recorded in the log book on a specific date the cause is clear. However, in many other cases the cause may not be readily apparent at the time of survey and will require considerable investigation by the average adjuster with assistance of his technical consultant. Once it has been established that there is a prima facie claim under the policy, the average adjuster then ascertains whether a payment on account is warranted. In this connection, generally, in recognition of the cash flow difficulties a major loss can cause, underwriters are willing to arrange a payment on account if certified by the average adjuster. What happens in practice is that the average adjuster will arrange for the cost of repairs (and other major items of expenditure) or in appropriate cases estimates thereof, to be approved by the attending underwriters' surveyor and he will then prepare a payment on account certificate which sets out the basic facts and figures and recommends a figure which underwriters can safely settle on account of the final claim.

The average adjuster will similarly advise the assured what documents and information will be needed to substantiate his claim.

The final adjustment of general and particular average will be a self contained document with all relevant evidence being immediately available with a view to providing:

- (a) Background details that enable the parties concerned to understand the circumstances leading up to the casualty, as well as the casualty itself;
- (b) Key details relating to the policy coverage and relevant provisions concerning general average in the contracts of affreightment;
- (c) A concise summary of the liability position – apportionment of general average and application of general and particular average claims on the H&M policy of insurance.

The adjustment format of the world leading average adjusting firm breaks the adjustment into several “free-standing” sections, starting from a brief cover-view and then moving into progressively greater level of details; like a layer cake – the light icing of key facts is on top and the heavy details are at the bottom. The layers are made up as follows:

- i) The Front Page – The first page is a summary of everything that is in the adjustment. The headings will be similar in every case but there can be variations as circumstances require – Vessel, Voyage, Casualty, Insurances, Casualty Summary, Adjustment Summary, Recovery, Additional Information, and Claim Summary. The purpose is to give a single A4 snapshot of the case – what is usually called an “Executive Summary”.
- ii) The Adjustment of Claim – This section is the core document which must be self-contained with a summary of facts together with explanatory notes making the parties concerned to feel confident that all potentially difficult or controversial areas have been drawn to their attention and the adjuster’s treatment explained. If something is critical to a claim it should be summarized or quoted in full.
It includes a summary of the disbursements including the adjuster’s charges which form part of the claim/loss (which are classified by the adjuster between general and particular average and so forth), followed by the apportionment of general average and the application of the claims to the policy – again this is to make it possible for somebody to get a full picture.
- iii) Appendices – These usually consist of:
 - (a) Report and correspondence and
 - (b) Disbursement details where accounts covering the damage repairs and other expenses are shown in abbreviated form with each item allocated either as claimable or being disallowed.
 - (c) Accounts (for repairs and major expenditure)
 - (d) Additional appendices, for example including the apportionment of general average over individual cargo interest can be shown as necessary.
 - (e) Financial balance

A further major exercise will be for the average adjuster to collect debit balances due from cargo interests world-wide and take care of the sums due to the creditors under the adjustment.

In the meantime, the average adjuster will draw up a statement of claim against the colliding vessel. In this connection, it will be interested to note that in the case of *The Normanstar 1929* the adjuster's fees for preparing the ship and cargo claims for the purpose of the reference to the Registrar of the Admiralty Court were allowed as part of the costs of the reference, it being held by Mr. Justice Hill that the course adopted had saved legal expenses which would have been allowed as costs.

Following the conclusion of collision settlement, the average adjuster will draw up a further adjustment dealing with:

- i) Claim under the Collision Liability Clause (in terms of the H&M policy and P&I cover) in respect of the damage done to the colliding vessel which the assured is legally liable;
- ii) Division of the Recovery and interest thereon from the colliding vessel between various parties concerned;
- iii) Apportionment of costs in the collision proceedings.

Again, in the case discussed above, the average adjuster will be engaged in distributing the net recovery funds attaching to the cargo interests who have paid their contributions under the previous adjustment of general average.

Conclusion

Whilst the foregoing does not tell the secret how to "add one here, subtract one there", it will be seen that at all stages there is a need for properly trained experts who can bring order out of chaos, light out of darkness, cheer out of despondency, who can smooth the way and produce a solution which is satisfactory, fair and acceptable to all parties. Those highly qualified Average Adjusters aim at this high ideal.
