



ASSOCIATION OF
Average Adjusters

PRESS RELEASE NOVEMBER 2023

Navigating claims recoveries: Association of Average Adjusters specialist offers crucial guidance

Securing an equitable share-out of the proceeds – often millions of dollars – of third-party recoveries following marine casualties demands exceptional care, practitioners were reminded at a market briefing in London.

"Recoveries – are you missing out?" was the challenge in the title of a presentation by the speaker, John Thompson, Fellow of the Association of Average Adjusters, at the seminar, organised on November 1, 2023, by the Association in co-operation with the International Underwriting Association.

Mr Thompson highlighted the complexities around the right to proceeds, including interest and costs, and how recoveries can be shared between the concerned parties.

He focused on common marine policy provisions and relevant case law on who should receive credit when a recovery is obtained from a third party.

The event attracted a strong audience of marine specialists in-person and online, and several attendees were quick to congratulate Mr Thompson on what one called his "terrific presentation" spanning so many aspects of recoveries.

In English law, the doctrine of subrogation applies when the insurer has paid a claim (section 79 of the Marine Insurance Act 1906). Mr Thompson noted that while insurers tend to take an active role in assisting the insured in seeking a recovery, it is only when the principle of indemnity has operated that an insurer gains the right to be credited with some part of the recovery.

Mr Thompson, who is associate director in the Liverpool office of Richards Hogg Lindley, further underlined that insurers are generally entitled to recover only up to the amounts paid, plus interest and costs. This follows the approach taken in the case of *Yorkshire Insurance v Nisbet Shipping* (1961) where insurers, following a collision, paid a total loss claim for the vessel's insured value which was slightly less than its actual value. Due to a revaluation of exchange rates, the recovery gained from the other vessel was significantly greater than the value of the vessel and claim paid, and the Court held that the insurer was not entitled to receive more than they had actually paid.

When a recovery is not for the full amount of the claim, from an English law standpoint, reference can be made to section 81 of the Marine Insurance Act 1906 which deems that where the assured is insured for an amount less than the insurable value, the assured is viewed as an insurer in respect of the uninsured balance. This is illustrated in the case of *The Commonwealth* (1907) where it was found recovery of an amount for less than the amount of the loss should be apportioned in the ratio the insured value bears to the insurable or agreed value of the subject matter insured.

Care must however be given to the policy conditions. Different policy regimes have different approaches, with for example Clause 12.3 of the Institute Time Clauses – Hulls (1/10/83), giving priority, or "first bite" to the insurer in respect of the principal proceeds of the recovery – essentially

the insurers get first bite at any recovery up to the amount paid, with the assured then only receiving credit for anything left.

This position changes in other policies, such as the Nordic Plan where Clause 5-13 specifies that recoveries are to be apportioned between the insurers and assured in proportion to the loss that each has carried, whether a full recovery of claim is made from a third party or not. Commonly this means that where a claim has been paid by insurers after application of deductible, the assured will participate in the recovery from the third party in the proportion that the amount of the deductible bears to the amount of the compensation paid by the insurer.

A similar position is reflected in clause 49 of the International Hull Clauses 2003 where recoveries are to be apportioned between insurers and the assured in the same proportion that insured and uninsured losses bear to the total insured and uninsured losses.

The American Institute Hull Clauses are silent on how recoveries should be apportioned and follow the position at law. For English law, this means an approach is taken like that in the Nordic Plan and Institute Hull Clauses 2003.

Interest can be a key component of any recovery, Mr Thompson emphasised. Clause 12.4 of the Institute Time Clauses – Hulls (1/10/83) provides insurers can recover more than they have paid out. Interest is generally apportioned between the assured and the insurers, considering the original amounts paid and dates when they were paid. Care does need to be taken when a recovery is for General Average (GA) including GA interest as it is then necessary to ensure proper credit is given to the insurer from the point GA interest starts to accrue.

On the question of collision recoveries, Mr Thompson noted this was probably a topic for another seminar but commented that from a vessel-to-vessel point of view, single liability settlements work perfectly fine; but without the inclusion of a cross liabilities clause, the way the claim is placed on policies, and any recoveries are allocated, can be seen as unfair. The cross liabilities clauses found in most policies open up the calculations to allow losses and recoveries to be correctly attributed to concerned parties.

Mr Thompson noted that recoveries might also sometimes be required as between different kinds of policy. A common example of this is where allowances for operating costs for removals to repair yards and in GA situations are made and claimed on a Hull & Machinery (H&M) policy, when similar operating costs are also deemed to have been included in a Loss of Hire (LOH) claim. If proper credit is not given to the LOH insurance, then a double indemnity situation can occur. While provision for this can be found in Clause 16-16 of the Nordic Plan the position is not 100% clear in English law or ABS LOH conditions, but the view commonly taken is that hire is divisible, and that wages and operating costs etc are part of the rate of hire, so there is a need for them to be credited back to LOH insurers to avoid a double indemnity.

As for the matter of costs, Mr Thompson advised that generally each party should bear the costs relating to their own recovery of claim and that this appears to be a fair approach. He noted that although the ITC 83 clauses are silent on how costs of making a recovery should be dealt with, the Nordic Plan and International Hull Clauses 2003, have provisions to that effect. He added that a specific way of dealing with collision costs, some of which have to be charged to the recoveries made and some as an actual claim on policy, can be found in the Association of Average Adjusters' rule of practice A8.

Mr Thompson concluded by considering where average adjusters fit in; noting that adjusters can carry out the essential task of independently preparing, calculating, and stating the division of recoveries between different heads of claim, including GA, particular average, collisions, loss of hire, and an assured's uninsured losses.

During questions and comments, a member of the audience urged care to check whether any elements in a claim might be time barred.

Burkhard Fischer, chairman of the Association of Average Adjusters, who presided at the meeting, said the question of recoveries could become very complex in relation to container and other cargo fires. In many cases the 'bad' container can be identified quickly, suggesting that the party to blame for the outbreak of the fire could be a cargo interest. A scenario could be that other cargo interests affected by the fire or by firefighting efforts would go against the shipowner or immediately against the shipper of the suspect cargo. In reality, there were more complicated procedures involved as for instance cargo owners who suffered sacrifice losses, or their subrogated insurers, had a right to recover losses in GA.

"As the average adjuster," said Mr Fischer, "you are in the position that somehow you have to finish the GA adjustment bearing in mind there could be an ongoing action against the third party to recover loss. You have a whole level of redistribution of losses within the GA regime which has to be considered within the recovery action, and that makes it very complicated."

Note to editors: The Association of Average Adjusters promotes professional principles in the adjustment of marine claims, uniformity of adjusting practice, and the maintenance of high standards of professional conduct. Irrespective of the identity of the instructing party, the average adjuster is bound to act in an impartial and independent manner. The Association plays an important part in London insurance market committees and has strong relationships with international associations and insurance markets.

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