

# Settlement of Disputed Marine Insurance Claims

Svante O. Johansson

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## 1 Introduction

Disputed marine insurance claims are handled all over the world. The procedures that are followed in settling a disputed claim may vary between continents and countries. This can be explained by historical reasons as well as tradition at the market in question. It is therefore hard to compare different markets on the topic settlement of disputed marine insurance claims.

In later years, with mergers and cooperation between different insurance companies, Scandinavia increasingly has appeared as one marine insurance market. It is therefore natural to consider the process of settling disputed insurance claims as similar in the different Nordic countries. However, some national peculiarities are still left. One such is the concept of the Average Adjuster. The Average Adjuster is in many cases handling the settlement of a marine insurance claim when the insurance company does not want to handle it or when it is disputed. In this paper I would like to elaborate on the procedural framework when a dispute – no matter how friendly or hostile it might be – has occurred between the insurer and the insured and all efforts to reach an amicable settlement are exhausted.

The activities of the Average Adjusters are – with some minor variations – of a rather similar nature everywhere in the world. However, the activity of the Swedish and Finnish Average Adjusters differs from the normal patterns in this field.<sup>1</sup> In order to illuminate the questions connected with the settlement of a disputed insurance claim I would like to concentrate on the specific features of the Swedish Average Adjuster. Most of what I am about to say counts also from a Finnish point of view<sup>2</sup> but I refer to the Swedish rules.

## 2 Disputed Claims

Before I turn my attention to the Average Adjuster I would like to make some remarks about disputed claims handling in the Scandinavian market.<sup>3</sup> The first thing that strikes one is that disputes are so rare. It might be discussed whether this follows from a specific feature in the Scandinavian market or maybe because of the marine insurance market as such. But regardless of the outcome of that discussion it can be noted that there are many elements in the Scandinavian market that results in dispute avoidance. Let me point out some of them.

First, the insurance conditions in Scandinavia has since long been covering all risks. As a starting point the assured is covered under such conditions. If the

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<sup>1</sup> It has been said that the procedural rules regarding disputed marine insurance claims are a deterrent example of systematic in law as they are given in the Maritime Code in a chapter regarding general average, see Hellner, Jan, *Lagstiftning inom förmögenhetsrätten* (1990) p. 197.

<sup>2</sup> Riska, Olof *Dispaschörsprocessen i Finland*, in JFT (1943) 4.

<sup>3</sup> I would in this context like to thank my friends *Kitty Kendal*, Claims Director of North Edge Risk Services, Bergen, and *dispatchør Bjørn Slatten*, Oslo, for their kind permission to use parts of their presentation at the Association Internationale de Dispatcheurs Européens' forum in Seville 2001 on Settlement of Disputed Insurance Claims.

exclusions are formulated in straightforward manners, as they are in Scandinavia, the text of the conditions in many cases gives clear answers. The assured therefore has a pretty good knowledge of the cover he or she have under the insurance.

Second, in the Scandinavian market almost all insurers are trying to get a close relationship with the insured. Compared to other markets this seems to be quite unique. The insured has direct access to the insurers' claims staff. The dialogue thereby can be based on understanding of the situations which helps the parties to reach an amicable solution.

Last, it seems to be a tendency rather to approve a claim than to reject it. This is very hard to substantiate empirically. However, the wording of the approval of a claim might give us some ground to stand on. For example the wording "for underwriters' consideration" means that we probably are outside the cover of the insurance. The claim is nevertheless covered, at least by the leading insurer. Another such wording that can be seen is "without prejudice". This connotes that the insurers approve this claim but if a similar claim is put forward once again they might decline. A clear indication on the tendency to approve rather than reject claims is the well known "ex gratia" approval.

However, despite of what is said above about facilities for avoiding disputes embedded in the Scandinavian market they occasionally occur. There are of course many different casualties that can trigger a conflict which leads to a disputed claim. But whether the disagreement is about allocation of claims to underwriting year, unseaworthiness, technical questions or causation, the parties have to find a way to settle their dispute. It is here where the claim might be presented before the Average Adjuster.

### **3 Sources of Law**

The history of the Average Adjuster of Sweden can be traced all the way back to 1750. In that year an act entered into force concerning the settlement of disputed insurance claims. This was the so called Marine Insurance and Casualty Act 1750.<sup>4</sup> By that act the statutory basis for the Average Adjuster was established. The act contained provision that pointed out a person that should be handling disputed marine insurance claims. That person was called Average Adjuster.<sup>5</sup> The qualifications of the Average Adjuster were that he should be familiar with commercial and insurance matters. The statements regarding disputed marine insurance claims could be appealed to some sort of Insurance Court.

Even if the sources of law related to the Average Adjuster can be traced back to the act of 1750, law regarding settlement of disputed insurance claims can today be found in various statutes in the legislation. First, there are some rules laid down in the Swedish Maritime Code (SMC).<sup>6</sup> These rules, which establish the institute of the Average Adjuster, can be found in chapter 17 of the Code. In

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<sup>4</sup> 1750 års försäkrings- och haveristadga.

<sup>5</sup> In Swedish 'dispaschör', this is also – with minor differences in spelling – the normal name on the European continent.

<sup>6</sup> Sjölagen (1994:1009).

adherence to this, some instructions have been given<sup>7</sup> as to the appointment of the adjuster, the place of office, opening hours of the office, rules of disqualification etc. Although I will not elaborate the rules here it can be said that the Average Adjuster of Sweden is appointed by the Swedish Government in the same manner as a judge in the Courts of Law is appointed. The Average Adjuster is appointed for six years in a row, a time that is automatically prolonged if the adjuster does not want to resign.

Apart from these rules there are other rules that are of great importance, but only in a more indirect manner. I am thinking of the rules found in the Code of Judicial Procedure. Great inspiration from these rules can be seen in the proceedings before the Average Adjuster. Some of the rules also have direct impact on the proceedings such as the question of jurisdiction.

One also has to take into account the European Community Law. Lately, the Community Law has shown to have some impact on the question of jurisdiction. Community Law, through its regulations on jurisdiction and enforcement of judgement in civil and commercial matters, is here essential. These rules are often referred to as the Brussels system.<sup>8</sup>

#### 4 The Average Adjuster's Tasks

By stipulations in the Swedish Maritime Code the Average Adjuster has four tasks. First, the Average Adjuster is, unless otherwise agreed, empowered to issue statements of general average (sec. 17:2 SMC). Second, disputes concerning distance freight may be submitted to investigation and resolution by the Average Adjuster (sec. 14:21 and 13:15 SMC). Third, the parties may, if no limitation fund has been constituted, submit the question of the amount of the limitation of shipowner's liability to examination and decision of the Average Adjuster (sec. 9:9 SMC). Forth, the question that shall be dealt with here, the Average Adjuster is to decide a disputed insurance claim (sec. 17:9 SMC).

It can be noted that the latter of the above mentioned tasks was the only task for the Average Adjuster according to the Marine Insurance and Casualty Act of

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<sup>7</sup> See förordning (1975:932) med dispaschörsinstruktion.

<sup>8</sup> Even though I refer to the Brussels system, references are given mainly to Council Regulation (EC) No. 44/2001 of December 22, 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* L 12, 16.01.2001, p. 1 (CELEX: 301R0044). However, reference will also be made to its precursor, the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, ratified in Brussels on September 27, 1968 (Brussels Convention), *OJ* L 299, 31.12.1972 p. 32 (CELEX: 468A0927/01/) as amended by the Convention of October 9, 1978, by the Convention of October 25, 1982 and by the Convention of May 26, 1989, published as amended in *OJ* C 27, 26.1.1998, p. 1, and parallel conventions for EFTA counties and Poland, and the Convention 88/592/EEC, on jurisdiction and the enforcement of judgments in civil and commercial matters ratified in Lugano on 16 September 1988 (Lugano Convention), *OJ* L 319, 25.11.1988 p. 9 (CELEX: 488A0592). In most substantive questions the different sets of rules will lead to the same result.

1750.<sup>9</sup> Later on the Average Adjusters in practise exercised other tasks and law now confirms this practise.

## 5 Jurisdiction

Jurisdiction has always been a question of great importance when it comes to litigation, especially in maritime cases with its international features. In later years this question has taken a different angel. Since Sweden became a member state of the European Community new and different rules concerning jurisdiction have been enacted. What I am referring to is the above mentioned Brussels system on jurisdiction and enforcement of judgement in civil and commercial matters.

As a point of departure most national legislations on jurisdiction, including the Swedish, hold the Courts in the country where the defendant is domiciled to be competent in the case. Furthermore, the rule is relevant also in marine insurance matters. This is clear from Swedish case law in the field.<sup>10</sup>

In the case *Axel Johnsson* NJA 1923 p. 202 a Swedish shipowner had taken out an insurance on the hull from an Norwegian insurance company. A Swedish agent for the underwriter negotiated the contract. The agent had not yet been registered in the Company register and was thus not domiciled in Sweden. Further, the policy had been issued in Norway by the insurance company and had been sent by mail directly to the shipowner. On the grounds that the insurance company was not domiciled in Sweden, and when no other arguments could support the opposite, the Supreme Court found that there was no jurisdiction in Sweden.

European Community law has changed the situation. There are rules that specifically address jurisdiction in insurance cases, including marine insurance. According to these rules an insurer domiciled in a member state may be sued, not only in the Courts where he is domiciled, but the policyholder, the insured or a beneficiary may also sue the insurer in another Member State. Namely, the insurer can be sued in the state where the plaintiff is domiciled.<sup>11</sup> The market in Sweden has in later years paid some attention to these changes. A couple of years ago the Supreme Court had to decide a case based on those rules.<sup>12</sup>

In *Barbro* NJA 2000 p. 3, ND 2000 p. 1 (SSC) a shipowner, domiciled in Stockholm, Sweden, had signed a Loss of Hire-insurance in a company underwriter domiciled in Bergen, Norway, for the motor vessel "BARBRO". Under a time charter for crude oil she was damaged to the rudder and needed to be repaired. The owners claimed compensation under the insurance for loss of hire during the reparation. The question was if that could be done in Sweden. In

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<sup>9</sup> Lundh, Torsten *Det svenska dispaschörsväsendet*, in *Nordisk försäkringstidskrift* (1987) p. 135.

<sup>10</sup> See *Axel Johnsson* NJA 1923 p. 202.

<sup>11</sup> See article 8.2 in Brussels and Lugano Conventions and article 9.1 (b) in Brussels I-regulation.

<sup>12</sup> *Barbro* NJA 2000 p. 3, cf ND 2000 p. 1.

the decision the Supreme Court stated that article 8, first paragraph, 2 of the Lugano Convention gave the owners a right to seek the insurers in the courts for the place where the policyholder was domiciled. The Court also said that the convention gives this benefit to the policyholder, as he normally is the weaker party. Article 8 in conjunction with article 31 in the Convention was meant to give the claimant a judgement that later could be enforced in another Contracting State. The Swedish national rules regarding settlement of disputed marine insurance claims, which refers to average adjuster did not secure this. The Supreme Court thus held that the Lugano Convention was applicable in priority of national Swedish law. The Stockholm City Court therefore had jurisdiction concerning the owners claim.

On the background of this case it is quite clear that the insurance market has to watch out. In solving a dispute they might find themselves playing on away fields. This might be inconvenient and considerations have to be made as to the question of jurisdiction. Further, the case has some impact on the Swedish rules on average adjusting which I will revert to below.

## 6 The Competence of the Average Adjuster Excludes Courts of Law

As already noted above, disputes on the liability of an insurer, on the account of marine insurance, shall be referred to investigation and decision by adjustment (Particular Average Adjustment). This follows from section 17:9 SMC. As can be seen this section deals only with “marine insurance”. How is that to be defined? The phrase “marine insurance” is also used in the Insurance Contract Act of 1927<sup>13</sup> and guidance can be derived from section 59 in that act. For the purpose of that act marine insurance means insurance against perils to which the insured interest is exposed during carriage at sea. Where the insurance covers both marine and other risks connected with the transport the insurance in its entirety shall be deemed to be marine insurance. It follows from the wording of the act that marine insurance in the Swedish context involve not only hull and machinery insurance or cargo insurance but also P&I-insurance as well as other insurance as loss of hire and freight interest.<sup>14</sup> Also reinsurance of a marine insurance is assumed to be a marine insurance.

The rules on marine insurance apply only and so far as the claim are *disputed*. If there is no dispute the Average Adjuster have no competence derived from the law. This has led to the fact that the Average Adjuster does not adjust much in ordinary insurance claims. If he does so he might be disqualified if the claim becomes disputed. The argument that can be put forward in advance for this is that his handling with the claim before it is disputed is likely to undermine confidence in his impartiality in the case if it later becomes disputed. Occasionally the claim might be referred to the Average Adjuster by the parties in order to hear his opinion. This is often done jointly by the parties to the

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<sup>13</sup> Lag (1927:77) om försäkringsavtal.

<sup>14</sup> A curiosity is that also a boat insurance are regarded to be marine insurance, *see further Johansson, Svante O. Båtassuradören hos dispasschören eller tingsrätten?*, in Festschrift till Jan Sandström (1997) p. 263 *et seq.*

contract and they take upon themselves to follow the opinion. Under such circumstances it is no risk for the Average Adjuster to become impartial.

It shall also be noted that only the question on liability of the insurer shall be referred to the Average Adjuster. In other claims, e.g. on insurance premium, the Average Adjuster is not competent.

The most important part of section 17:9 SMC in deciding competence is the word *shall*. The word is not may or can, but shall. This formulation indicates that the only competent body to try the case is the Average Adjuster. This interpretation is also since long confirmed by steady case law in Sweden.<sup>15</sup>

A corresponding rule is laid down in the procedural laws of Sweden. The Courts are according to section 10:17:1[1] Code of Judicial Procedure not competent to entertain disputes that shall be entertained by authorities other than the Courts of Law. The provisions in the Maritime Code regarding settlement of disputed marine insurance claim thus exclude the Courts of Law and confer the power on the Average Adjuster to decide cases regarding marine insurance dispute in the first instance.

If a summons application regarding a claim under a marine insurance is filed to a Court of Law this Court is obliged to decide its own competence *ex officio*. The parties are thus not autonomous in this regard and can not agree on whether or not the Court is competent. Even if no party has made a timely objection to the competence of the Court the Court can not deem itself to be competent.

To summarise; according to steady case law the competence to try disputed insurance claims rests with the Average Adjuster. As I will show later the competence of the Average Adjuster does not mean that the statement can not be appealed. The Average Adjuster can in this respect be regarded as a Court of first instance.

## 7 The Legal Status of the Average Adjuster

Before I continue with the survey into the proceedings before the Average Adjuster I would like to make a few remarks on the legal status of the Swedish Average Adjuster. I think that it is not only proper but also necessary in order to understand the patterns of settlement of disputed marine insurance claims in Sweden. It is also regarding this question that Community Law has had some impact during the last years.

### 7.1 In National Law

In Swedish legislation the Average Adjuster is some sort of a chameleon. Sometimes he is considered to be a Court or tribunal, sometimes he is considered to be a public authority and sometimes he is nothing but an independent contractor.

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<sup>15</sup> The first case reported is *Thorsten* NJA 1899 p. 86, see also the thorough reasoning in *The paper bags* NJA 1954 p. 423 regarding double insurance.

In Swedish constitutional law an entity is considered to be a Court of Law if the Parliament has said so. That has not been the case and the Average Adjuster is therefore not the same as a Court.

Even though the Average Adjuster is not a Court in constitutional law there are cases when the Average Adjuster has assumed to be a Court according to procedural law. The Supreme Court of Sweden thus applied the extraordinary remedies on an statement of particular average and granted relief for a material defect when new evidence was invoked that probably would have led to a different outcome of the case.<sup>16</sup> Such a relief can, according to the wording of the Code of Judicial Procedure that was applied in the case, only be granted after a judgement of a Court of Law.<sup>17</sup>

On the other hand the Average Adjuster is assumed not to be a Court under the Code of Judicial Procedure in some cases. As a matter of fact the Court of Appeal in Stockholm – in the same decision – managed to uphold both the view that the Average Adjuster was and that the Average Adjuster was not a Court of Law under the Code of Judicial Procedure.<sup>18</sup>

Also under the Enforcement Code the Average Adjuster is treated in a twofolded way. On the one hand side the Average Adjuster has been regarded as a Court of Law when parties involved have been directed to apply for investigation and decision at the Average Adjuster. According to the wording of the Enforcement Code a party can only be directed to a Court of Law. On the other hand the Average Adjuster's statement is not a title of enforcement. Normally only judgements and decisions by Courts can trigger such enforcement.

However, it is possible to regard the Average Adjuster as a public authority. An entity is a public authority if the entity is organised in a certain way. If this requirement is not fulfilled the entity can not be a public authority even if it exercise authority on individuals in accordance with the law. There is no doubt that the Average Adjuster is exercising its legal authority in issuing statement of particular average.<sup>19</sup> In my opinion the Average Adjuster is also organised in a way that public authorities are. As I have already mentioned the Government appoints the Average Adjuster. He is obliged to have an office and secretariat in Göteborg, Sweden and that office is supposed to be open every weekday except Christmas and Midsummer Eve. In my opinion there is no doubt that the Average Adjuster is a public authority according to Swedish constitutional law.<sup>20</sup> From this conclusion follows a host of consequences. One important is that the

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<sup>16</sup> NJA 1985 p. 543.

<sup>17</sup> After a change in the Maritime Code it is clearly outspoken that the rules on extraordinary remedies and granted relief for a substantive defect can be used also on statements of particular average, *see* 21:14 SMC.

<sup>18</sup> ND 1997 p. 52; *cf* RH 1997:103.

<sup>19</sup> Government bill 1972:5 p. 232 *et seq.*

<sup>20</sup> One can note an evolution in this field. From the beginning utterances in the preparatory works can be seen that indicates that the Average Adjuster is not a public authority, *i.e.* Government bill 1979/80:2 part A p. 125 and 127. Later on there has been a change and it is clearly outspoken that the Average Adjuster is such an authority, *see* SOU 1983:61 p. 178 and Government bill 1990/91:178.



Swedish principles of access to official records are to apply on the documents filed with the Average Adjuster.

When it comes to pay taxes the Average Adjuster is not an employee. He runs his own business and pay tax as such.

To summarise: no wonder that the Average Adjuster feels a bit schizophrenic about its status under Swedish law.

## 7.2 *In Community Law*

In European Community Law there is, of course, no legislation that directly involves the Average Adjuster. I have however touched upon one issue that raises some doubts about the status of the Average Adjuster in Sweden. In Community law, it is settled case law that in order to determine whether a body is a Court or tribunal for the purposes of article 234 of the EC Treaty, which is a question governed by Community law alone, the European Court of Justice takes into account of a number of factors. These factors are such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent.<sup>21</sup>

In my view it can be assumed that the Court will follow the definition of the concept of “court or tribunal” that has developed in the case law regarding article 234 of the EC treaty also in other areas such as Brussels system. What will then the outcome be if that concept is applied in connection with the Brussels system. There is no doubt that the Swedish Average Adjuster fulfils all five of the said requirements. Does law establish the Average Adjuster? Yes, it undoubtedly does. This follows from the Swedish Maritime Code. Is the Average Adjuster permanent? Yes, he undoubtedly is. He is not like a *de facto* tribunal in arbitral proceedings but has been established since 1750. Is the Average Adjuster’s jurisdiction compulsory? Yes, it is and it follows from what I have already pointed out earlier concerning the competence of the Average Adjuster. Are the proceedings *inter partes*? Yes, as we shall see below they undoubtedly are; the insurer and the insured. Is the Average Adjuster applying rules of law? Yes, at least he tries to apply insurance contract law. Is the Average Adjuster independent? Yes, he undoubtedly is. He applies the same rules of disqualification as judges in the Court of Law. The conclusion of the said is that the Average Adjuster must be considered to be a court or tribunal according to European Community law.

However, this conclusion was not considered by the Supreme Court of Sweden in the above named case *Barbro*.<sup>22</sup> Instead the Court concluded that the insured had a right to sue the insurer before the court of his domicile in Sweden

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<sup>21</sup> See e.g. Case 61/65 Vaassen (née Göbbels) [1966] ECR 261; Case C-111/94 Job Centre [1995] ECR I-3361, paragraph 9; Case C-54/96 Dorsch Consult [1997] ECR I-4961, paragraph 23; and Joined Cases C-110/98 to C-147/98 Gabalfrisa and Others [2000] ECR I-1577, paragraph 33, Case C-195-98 Österreichischer Gewerkschaftsbund v. Österreich [2000] ECR I-10497.

<sup>22</sup> NJA 2000 p. 3, cf ND 2000 p. 1 (SSC).

despite the Swedish rules on the competence of the Average Adjuster. That ruling has, on this point, been criticised in the literature.<sup>23</sup>

## 8 Proceedings Before the Average Adjuster

The proceedings before the Average Adjuster are highly unregulated. That has its background in the fact that the adjuster tasks differ so much. You can not find one way to proceed when dealing with so different tasks as statements of general and particular average. Here I am just discussing particular average and can conclude that no uniform proceeding has been established. The different tasks of the Average Adjuster are also the reason why the proceedings before the Adjuster do not follow the principles in ordinary Court proceedings. In such proceedings the principles of orality, immediacy and concentration are of great importance. That is not the case in the proceedings before the Average Adjuster.

The proceedings before the Swedish Average Adjuster are based on a couple of principles. They are i) freedom in arranging the procedure, ii) *audi alteram partem* and iii) impartiality, speedy, practical and flexible procedure.

There are not many provisions concerning the proceedings in a dispute before the Average Adjuster. Formally, the rules in the Public Administration Act of 1986<sup>24</sup> are determining for the proceedings as the Average Adjuster is a public authority.<sup>25</sup> However, the Public Administration Act does not contain many rules on proceedings. The proceedings before the Average Adjuster can therefore be “tailored” to fit the dispute at stake.

The most important principle, which also is recognised in proceedings in all western countries, is the principle of *audi alteram partem*. This principle states that each party must be given a sufficient opportunity to present his or her case. This is fulfilled in the proceedings before the Average Adjuster by different rules. In particular average cases it is fulfilled by an analogy to the Code of Judicial Proceedings. The rules on contradiction in that Code are very well elaborated and are followed very closely also in the proceedings before the Adjuster.<sup>26</sup>

The Average Adjuster is to deal with the claim in a speedy, practical and flexible manner. Sometimes this is hard to obtain in the Courts of Law and the insurance market has felt more comfort in the way disputes are settled by the Average Adjuster.

There can be problems in connection with the evidence in disputes. Although the proceedings normally are in writing, oral hearings can be and has been

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<sup>23</sup> See Pålsson, Lennart, in *Svensk Juristtidning* 2001 p. 583 *et seq.* and Johansson, Svante O. in *Svensk Juristtidning* 2002 p. 939 *et seq.*

<sup>24</sup> Förvaltningslagen (1986:223).

<sup>25</sup> See Johansson, Svante O. *Båtassuradören hos dispaschören eller tingsrätten*, in *Festskrift till Jan Sandström* (1997) p. 272 and 276 and Johansson, Svante O. *Skiljeförfarande enligt nya kasko- och varuförsäkringsvillkor*, in *Juridisk Tidskrift* (2000/01) p. 499.

<sup>26</sup> Sandström, Jan *Dispaschören och dispaschprocessen*, in *Festskrift till Kurt Grönfors* (1991) p. 396.

arranged.<sup>27</sup> A dispute involving technical issues, e.g. the cause of an engine breakdown, involves mostly written statement like survey reports and technical reports. In such cases there is almost never need for oral hearings. An independent engineer or technician can assist the Average Adjuster in such a case.

## 9 The Character of the Statement of Particular Average Adjustment

From what has been said above it can be concluded that the Average Adjuster of Sweden (and Finland) can be characterised as something in between a Court of Law and an Arbitration Tribunal. This also leaves patterns on the statements that are issued by the Average Adjuster.

As far as an insurance claim is concerned, the Average Adjuster's statement in such a dispute, to some extent, has the same character as a judgement by a Court of Law. This comes from a whole host of sections in the Swedish Maritime Code and the Code of Judicial Procedure. Here can only the main features be outlined.

It must be noted that a statement of particular average that has not been duly appealed is binding and valid pursuant to section 21:10 second para. SMC. To say that a statement of particular average adjuster is binding and valid shall be compared with the legal force of a judgement by a Court of Law. The statement determines the matter at issue in respect of which the action was instituted. A question thus determined may not be adjudicated once again. This follows from section 17:11 of the Code of Judicial Procedure. The only way that a binding and valid statement of particular average can be challenged is by extraordinary remedies, i.e. relief for material defects and for grave procedural errors.<sup>28</sup> This means that the statement have the same legal force as a judgement by the Courts of Law.

The statement of particular average is however, as compared with a judgement by the Courts of Law, not a title of execution. Execution according to the Swedish Enforcement Code can thus not be based on a statement of particular average, not even if it has been decided after appeal.<sup>29</sup> It was from the beginning however submitted that the insurers would pay if they were found to be liable under a policy. Thus, no rule on execution was needed.

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<sup>27</sup> Johansson, Svante O. *Båtassuradören hos dispaschören eller tingsrätten*, in Festskrift till Jan Sandström (1997) p. 277. One example of when oral hearings must be arranged is cases where the truth of one's story is at stake.

<sup>28</sup> See *Mistral* NJA 1985 p. 543 where the rules in the Code of Judicial Procedure were applied by analogy. See now also section 21:14 SMC.

<sup>29</sup> A discussion on this can be seen in Sandström, Jan, *Dispaschören och dispaschprocessen*, in Festskrift till Kurt Grönfors (1991) p. 396 and Pineus, Kaj *Svensk dispasch, några processuella synpunkter*, in *Nordiske Domme i Sjøfartsanliggender* (1943) p. 82.

## 10 Appeal

A statement of particular average adjustment may be appealed. The appellant shall submit his petition to the City Court where the statement has been issued, i.e. the City Court of Göteborg. The petition must be lodged with the Court within four weeks from the day of the statement. These rules can be found in section 21:12 SMC.

The appeal is treated in a special way in the City Court. Besides the three legally qualified judges, that the Court normally consists of, the Court shall in each marine insurance case appoint three special members. These shall be experienced in commerce and shipping and be suitable for serving as special members in marine insurance matters. Thus the Court is really strengthened in trying a statement from the Average Adjuster.

A party may also appeal against the final decision of the City Court. This follows from the normal rules on appeal in section 52:1 of the Code of Judicial Procedure. However, leave to appeal is required for the Supreme Court to review a statement in a particular average matter. Such leave to appeal may be granted only under special circumstances. This can be if it is of importance for guidance of the application of law or there are extraordinary reasons for such as substantive defect or grave procedural errors. Such a leave can be seen every now and then or at least once a decade.

## 11 The Future and the Settlement of Disputed Insurance Claims

Recently there has been a change in the patterns of settlement of disputed marine insurance claims in Sweden. In the year 2000 new conditions for both hull and cargo were introduced on the market. In these conditions there were inserted new clauses regarding dispute resolution. The new clause reads as follows.

If a dispute arises concerning the indemnity obligation of the Insurer as a result of this contract, the dispute shall be determined according to Swedish Law by arbitration with the Swedish Average Adjuster as sole arbitrator.

The procedure shall correspond with the procedure laid down by law for the Average Adjuster.

Necessary documents and information shall be handed over as soon as possible to the Average Adjuster.

Expenses of average adjustment shall be indemnified by the Insurer, unless the Insured's claim for the indemnity is manifestly unfounded.

The parties are entitled to institute proceedings or appeal against the arbitral award in the same way and in the same period that an average adjustment according to law may be appealed against.

The new dispute resolution clause in the conditions changes the old regime. In fact a new arbitration clause was introduced. As can be seen from the wording of the clause proceeding as is prescribed by law shall be applied also in the arbitral proceedings. Why then, is the clause introduced into the market?

The background to the introduction to the clause is that the market felt little enthusiasm about the Community law concerning jurisdiction where an insurer

could be sued in the land where e.g. the policyholder or the insured is domiciled.<sup>30</sup> Those regulations and conventions that are included in the Brussels system shall however not apply to arbitration. By introducing an arbitration clause the market is thus trying to avoid jurisdiction other than in the state where the insurer is domiciled.<sup>31</sup> It remains to be seen if the clause will be upheld by the Courts.

If it is upheld it will change the traditional way to settle disputed marine insurance claims in Sweden. Even if the wording of the clause tries to bring in the proceedings before the Average Adjuster prescribed by law, some differences and some unclear points will occur.<sup>32</sup>

The arbitration clause is a bar to court proceedings. This goes also for the proceedings before the Average Adjuster prescribed by law. However, if a party files a writ with the City Court without observing the arbitration clause the court shall not dismiss the case *ex officio*. Only after the other party has moved for it the court can dismiss the case. If the proceedings before the Average Adjuster prescribed by law are to apply, the Court shall observe that the claim concerns a marine insurance and dismiss the case *ex officio*.

The place for the proceedings is not regulated in the clause. Normally this is done in arbitration agreement. However, as it is stated in the law that the Average Adjuster shall have office in Göteborg the appointment of the Average Adjuster must lead to the conclusion that the place for the arbitration is Göteborg.

In the traditional proceedings before the Average Adjuster prescribed by law the statement of average adjuster can be appealed. That is not possible according to the new clause. Instead the statement has to be challenged in other ways. According to the clause a party may institute proceedings against the statement. What is meant by that? Well, to my opinion the only way to challenge a statement pursuant the new clause is to file a writ with the City Court as in every ordinary proceedings regarding any claim.

Also the character of the statement made by the Average Adjuster will be affected. As mentioned above the statement issued pursuant to proceedings before the Average Adjuster prescribed by law has legal force but will not be a title of execution. As the statement according to the new clause is an arbitration award it will have both legal force and be a title of execution.

As can be seen from the above mentioned some differences will come from the new clauses. It is too early to evaluate all the effects of it at this stage. However, it seems to be proper to say that it has some merits and have been met with not only scepticism in other markets.

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<sup>30</sup> See above under the headline Jurisdiction.

<sup>31</sup> As prorogation is possible only in a limited way in land transport this was not considered proper, see Johansson, Svante O. *Skiljeförfarande enligt nya kasko- och varuförsäkringsvillkor*, in *Juridisk Tidskrift* (2000/01) p. 443.

<sup>32</sup> Some differences are discussed in Johansson, Svante O. *Skiljeförfarande enligt nya kasko- och varuförsäkringsvillkor*, in *Juridisk Tidskrift* (2000/01) p. 439 et seq.