

**GENERAL AVERAGE - THE PROGRESS OF THE
IUMI PROPOSALS FOR THE REFORM OF
THE YORK-ANTWERP RULES**

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by

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1. **Introduction**

I have been asked to provide an update on the progress of the reforms to the York-Antwerp Rules for which IUMI has been pressing for many years.

Marine property underwriters have been concerned about the growing scope of the York-Antwerp Rules for well over 130 years. In the early 1990's, during the run-up to the CMI Conference in Sydney which adopted the York-Antwerp Rules 1994, a resurgence of this unease occurred. Shortly after the York-Antwerp Rules 1994 were adopted Matthew Marshall produced research into about 1700 General Average Adjustments (which has since been updated to 1999) which provided a statistical basis for this concern. Mr. Marshall first presented his findings to IUMI in 1994. Amongst other things his research has shown:

GA is too expensive

- The annual cost of General Average claims to insurers is about US\$300 million.
- 10% or US\$30 million is made up of Adjusters fees and a further 10% is interest and commission.

GA takes too long

- The adjustment of claims is a time consuming and lengthy process. In seven years we can only expect 95% of Adjustments to be completed. 2/3rds of the Adjustments are produced in the first two years but unfortunately that accounts for only 1/3rd of the money moved.

GA is inequitable

- 80% of cases are acknowledged as being caused or likely to have been caused by the shipowner's fault. Nevertheless 60 to 65% of the total cost of G.A. claims is borne by innocent cargo interests.

In short G.A. is an inefficient system of casualty management. Moreover it is becoming clearer to insurers that the G.A. system is unpopular with shipowners in the liner and container trades and even more so with the shippers and consignees of cargo. So IUMI felt there was a need to change the system of General Average.

2. **The IUMI Proposals**

The IUMI proposals for reform involved a change in the idea underpinning General Average. At present the York-Antwerp Rules allow losses, sacrifices and expenses suffered or incurred for the preservation of the common maritime adventure. Thus, it is argued, masters and shipowners will not feel constrained in incurring expenses to avoid or mitigate losses or damage to ship and cargo in time of peril for the common benefit of hull and cargo interests. Originally G.A. broadly speaking, permitted the recovery of expenses and the making good of sacrifices incurred or suffered while ship and cargo were in the grip of a

peril. This principle is enshrined in Section 66 of the Marine Insurance Act 1906. However this principle was being undermined even before that Act came into being by the York-Antwerp Rules which allow expenses suffered or incurred for the preservation of the common maritime adventure. Thus shipowners can recover expenses quite unrelated to the actual act of saving ship and cargo from peril. For example expenses incurred while at a port of refuge are often recoverable in G.A. from hull and cargo insurers. IUMI took the view that in fairness these expenses should be borne by the owner as a maintenance item or by hull insurers as P.A.

What IUMI proposed was that only Sacrifices/expenses incurred/suffered while ship and cargo are in the grip of a peril should be recovered in G.A. Effectively what IUMI asked for was a return to the wording of Section 66 Marine Insurance Act 1906 (although slightly amended). They also sought to replace Rule VI York-Antwerp Rules by which salvage is included in G.A. so that salvage payments lie where they fall and are not brought into G.A. unless one party has paid another's portion. Amongst the numerous other proposals for the reform of G.A. it was suggested that interest and commission should not be recoverable in G.A. and there should be a uniform time limit for G.A. claims of 6 years from the date of the G.A. incident.

G.A. would still cover (where reasonable):

- Jettison of cargo,
- Salvage (where paid on behalf of another party),
- Damage intentionally and reasonably caused to ship's engines by working them when aground in a reasonable attempt to refloat and lightening.

The following types of expenditure however would come out of General Average under the original IUMI proposals:

- Ordinary crew wages (except crew overtime while the vessel is in the grip of a peril),
- Environmental expenses of any kind (save only Article 13 salvage enhancements for environmental threats and Rule 11 (d) expenses if for the common safety).
- Costs of Transhipment to destination.
- Ship's expenses at a port of refuge.
- Temporary repair costs.
- The cost of discharging, storing and reloading cargo while the vessel repairs at a port of refuge.
- Consumption of extra fuel and stores once the immediate peril has ceased to exist.

The effect of these reforms if implemented in full would be that the amounts readjusted in General Average each year would fall at least 60%. Even if the proposals to exclude interest and commission were not adopted the amount readjusted each year would still fall by at least 50%. In any event there would be fewer GA's with a consequent saving in Adjusters' fees, interest and commission.

To be fair some of the gains would be off-set by increased expenses (particularly for hull underwriters in port of refuge expenses for example) but the net overall gain even to hull underwriters would be considerable. There

may be a requirement for new insurance products to pay for some of the expenses which would fall outside G.A. particularly at ports of refuge.

3 **The Road to Singapore**

In 1994 Nick Gooding, Matthew Marshall, Eamonn Magee and I started working together to put together a platform for reform which, while preserving the equitable basis of General Average would enable it to be quicker, cheaper, less open to abuse and less frequently invoked. We consulted a number of people in the industry including Average Adjusters. A paper emerged and after some amendments and consideration by a IUMI sub-committee they were adopted as IUMI policy in 1998.

Once the IUMI policy was formulated it was submitted to the CMI with a request that it be considered at the next CMI meeting in Singapore in 2001. The CMI circulated a questionnaire to the Maritime Law Associations affiliated to it asking for their opinion on some aspects of the IUMI reforms. The responses were mixed: while some were in support and some opposed many were divided. Against this background the issue was placed on the agenda for the CMI's meeting in Singapore last February 2001.

Nick Gooding and I attended for IUMI. The session was surprisingly well attended by over 140 delegates. Outright opposition was encountered from delegations from the United States, the International Group of P&I Clubs and The International Chamber of Shipping. The opponents argued that the York-Antwerp Rules had only just been changed in Sydney in 1994 and that it was

too early to consider another change. More groups however supported some but not all of the changes proposed (e.g. Italy and Denmark). For example Japan supported the idea of reforming Rule VI regarding salvage in the way proposed by IUMI and changing the position with regard to substituted expenses and crew wages/maintenance at ports of refuge. Many delegations were split between their marine property underwriter representatives, who broadly supported the IUMI reforms, and their shipowner/average adjuster members who opposed them (e.g. U.K., Germany and China). Some delegations felt able to give broad support to the IUMI reforms (e.g. Canada, Israel, Ireland and Spain). However over the course of the debate in Singapore a general consensus emerged that a sub-committee should be established to give further consideration to the reform of the York-Antwerp Rules. An indicative vote taken by the Chairman, Dr. Thomas Reme showed only five hands raised against this.

So it was resolved to establish an International Sub-Committee (ISC) under the chairmanship of Bent Neilsen (Kromann Reumert, Copenhagen). Other members of the ISC were Hans Levy (formerly with Skuld and now of Advokatefirm Hans Levy), Richard Cornah (Richards Hogg Lindley, Liverpool), Pierre Latron (subsequently replaced by Gilles Heligon of Axa), Richard Shaw (formerly founding partner of Shaw and Croft, London Solicitors), Jens Middelboe (the Danish adjuster), Howard McCormack (Healy and Baillie, New York) and me.

4. **The Joint International Working Group**

A few weeks after the CMI met in Singapore the Vice-President of the CMI, Dr. Frank Wiswall, reported that the Executive Council of the CMI had decided that

a Joint International Working Group (JIWG) should be established and should to meet in London in May and December 2001. A wide range of involved interests were invited to send representatives to attend the meeting, including representatives from FIATA, IAPH and UNCITRAL.

The objective of the JIWG was to focus the efforts of the ISC onto proposals which would have the broadest support. In other words its objective was to select those of the IUMI proposals which would go forward and discard those which would not. The conclusion of the JIWG was that the following issues should be taken up by the ISC, though not in every case directly related to possible amendment of the York-Antwerp Rules:

- Port of refuge expenses
- Absorption Clauses
- Salvage claims
- Interest and commission
- Temporary repairs
- To let liability lie where it falls in sacrifices of property
- Time bar
- Substituted expenses

The following issues however were not to be taken up by the ISC:

- Ballast GA's
- Deductible Clauses
- Error in management exclusions
- Exclusion of Adjuster's fees

- Reversal of the 1994 Rule 11(d) compromise on environmental liabilities falling in GA.

The list of issues considered by the CMI working group on GA contained most of the important issues raised by IUMI. Of the five issues which were not to be taken up by the ISC three were raised by IUMI but none were felt by the IUMI GA Sub-Committee to be central to the IUMI proposals. The 3 issues were ballast GA's, error in management exclusions and the exclusion of adjuster's fees. The other two excluded issues (deductible clauses and the reversal of the 11(d) pollution compromise) were raised by others.

5. **The ISC's Report**

The ISC met in London on 18th and 19th March 2002, in Copenhagen on the 3rd and 4th July 2002 and again in London on 28th November 2002. The Committee produced its report on 7th March 2003 and runs to 46 pages. The ISC's job was to draft a report to the CMI Executive Committee which was designed to give information upon which substantive decisions could be made concerning the proposed reforms to the York-Antwerp Rules. The ISC was not supposed to make any decisions or even recommendations itself; its job was solely to set out the information upon the basis of which the discussion in the Executive Committee could proceed.

6. **CMI, Bordeaux**

The Executive Committee of the CMI met in Bordeaux in June 2003 and IUMI was represented there by Nick Gooding, Gilles Heligon and me. The meeting was to decide what issues should go forward to the CMI meeting in Vancouver in June 2004 for reform. The meeting in Bordeaux was well attended. Indeed

there were people standing at the back. It went on all day. In the end it was decided that the CMI working group on General Average would produce a draft working paper for the Vancouver Conference by the end of December 2003 dealing with the potential reform of the following topics:

(i) **Port of Refuge Expenses - Rules X and XI York-Antwerp Rules**

There was broad support for the exclusion of crew wages and maintenance from GA and some support for the exclusion of fuel and stores used at a port of refuge as well. However, there was little support for the proposal that the expenses of discharging, storing and reloading cargo at a port of refuge should be taken out of GA. Accordingly, wordings are being prepared to exclude from GA any allowances for crew wages and maintenance and as an alternative crew wages, maintenance, fuel and stores.

(ii) **Temporary Repairs**

There is some support for wording which would limit any allowance for temporary repairs in General Average so as to avoid any undue advantages for shipowners, particularly in cases where a temporary repair makes it possible for a ship to make final repairs at a place where repairs can be made more cheaply than close to the port of refuge (this is sometimes called "the Bailey method"). The working group will include a draft clause to this effect.

(iii) **Salvage**

There was mixed support for the proposal to exclude salvage charges from GA (except where one party pays another's proportion) but it was agreed that this proposal should go through to Vancouver for a decision. A draft clause was

contained in the ISC's March report and so no further draft wording was required.

(iv) **Time Limit**

IUMI proposed that all parties should be discharged from liability to contribute in GA unless proceedings were instituted within one year after the Adjustment is published or six years after the GA Act (whichever is the earlier). Although all parties recognised that in some civil law countries this would not be enforceable as it would be contrary to public order, it was felt by many that time bar wording of some kind ought to go into the Rules, although not necessarily along the lines suggested by IUMI or the ISC in their March paper. Accordingly the ISC will prepare a new draft wording in consultation with the maritime law associations in civil law countries (particularly South America). Also the International Sub-Committee approved the working group's proposal that CMI should urge UNCITRAL to include a rule time barring general average contributions in the Convention on Issues of Transport Law now under consideration.

(v) **Interest**

At present interest is chargeable on GA at 7% per annum. It was widely felt that this was unsatisfactory. The working group proposed formally linking the rate to LIBOR but this was rejected as being too complicated. However, there was substantial support for a proposal whereby interest is varied in response to fluctuations in rates possibly by providing that the CMI should fix interest rates at suitable intervals, such as every year or every other year. The working group is to produce a draft clause in its December paper as well as draft guidelines for

the CMI Executive Council and Assembly for the fixing of the rate. unfortunately there was no support for the abolition of interest altogether

(vi) **Commission**

At present commission is charged on GA disbursements (except crew wages) at 2%. IUMI advocated that commission should be abolished because it duplicated interest. Some supported this position (e.g. Ireland) others (e.g. Brazil, the USA and the International Chamber of Shipping) supported its retention. Canada supported IUMI's position on commission but were prepared to see claims for the owner's administration costs included in GA. This was thought to be an interesting proposal and the ISC was instructed to produce a draft clause under which the actual costs of administering GA would be allowed without any commission. This issue will go forward to Vancouver for decision.

7, **Conclusion**

The ISC will be meeting in London on 17th November to consider a draft document which is currently in the course of preparation. Once the document is finalised it will go forward as one of the conference documents to the 38th International Conference of the CMI in Vancouver at the end of May 2004. It is then that the final decision on the IUMI proposals for reform of the York-Antwerp Rules will be taken.

In preparation for the Conference in Vancouver Matthew Marshall has kindly volunteered to update his G.A. statistics for IUMI. To do this he needs any G.A. Adjustments you feel able to let him have published since January 1998. Please send these to Matthew Marshall at The Cottage, Locks Lane, Leavenheath, Colchester CO6 4PE, United Kingdom.

Work on the reform of the York-Antwerp Rules was started nine and a half years ago. The purpose of the IUMI proposals is to streamline the handling of casualties, save underwriters money and rein back the progressive expansion of general average which has been going on for over one hundred and fifty years. It is worthwhile work and we need support from the maritime law associations worldwide to help us achieve the broadest adoption of IUMI's programme in Vancouver in 2004.

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