

THE PROPOSED 2004 REVISIONS TO THE YORK ANTWERP RULES
SOME INSURANCE ISSUES

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If you have any opinion about the current proposals, you should draw these to the attention of you national maritime law association, whose delegates will be your representatives at Vancouver.

INTRODUCTION

Shortly after the adoption of the York Antwerp Rules 1994 in Sydney, IUMI (the International Union of Marine Insurance, the underwriters' trade body, whose primary objective is "to represent, safeguard and develop insurers' interests in marine and transport insurance" started pushing hard for further change and the customary twenty to twenty-five year cycle – 1877, 1890, 1924, 1950, 1974, 1994 – has been accelerated. The CMI will be asked to consider further revisions to the YAR during its 38th Conference to be held in Vancouver, BC, in early June 2004.

The proposed changes give rise to some fairly troubling potential gaps in coverage, extensive grey areas and inequities and it is the purpose of this paper to highlight these in an accessible way so that those affected by General Average – shippers, carriers and insurers of marine cargo – appreciate the potential effect of implementing these changes. Average adjusters have been painted during the course of this debate as biased and opposed to change. It is more a case of being opposed to change for change's sake and to removing one regime for absorbing certain types of loss without first putting another in its place. If various categories of expenditure are to be removed from General Average, it would seem preferable to first provide coverage for them elsewhere.

Any documents referenced in this paper can be downloaded at www.theGApage.com. The source document for the changes currently under review is the December 19th, 2003 "Report by the CMI International Sub Committee on General Average" – hereinafter, the "ISC Report", which contains a comprehensive and balanced review of both sides of the debate.

A WORD ON MATTHEW MARSHALL'S STATISTICS

A lot of the IUMI argument relies on a series of statistics prepared by Matthew Marshall, formerly of the Institute of London Underwriters. These statistics are cited at length in various IUMI papers and in the ISC Report. The writer visited Mr. Marshall at the ILU when he made available his initial study and was invited to review the methodology behind it. It seemed to be exhaustive and thorough. However, it is submitted that the statistics can no longer be relied upon to the extent that IUMI would wish because:

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- they have not been thoroughly updated
- they do not reflect the widespread adoption of GA absorption clauses in hull & machinery policies
- they do not reflect the impact of the York Antwerp Rules 1994 whose Rule Paramount bears substantively on the type of abusive GA's that IUMI targets

RADICAL CHANGE – COMMON SAFETY / COMMON BENEFIT

The widest-reaching proposal was to eliminate from General Average all allowances of expenditure made for the common benefit of the adventure following the General Average act. The most accessible review of how common benefit came to be part of General Average can be found in the paper entitled "Let's be Realistic" that English average adjuster Geoffrey Hudson prepared for the CMI's Singapore conference in 2000. For the time being IUMI has retrenched somewhat from its position that all common benefit expenses should be abolished from the scope of General Average, and the ISC Reports includes draft rules designed (a) to eliminate wages and maintenance of (b) to eliminate wages, maintenance, fuel and stores and port charges from General Average – see Section 14 of the Report. However, it is not impossible that draft wording could be introduced at Vancouver to eliminate cargo handling and it is likely that IUMI will launch a further initiative to eliminate this in the near future; the pitfalls of this cannot be overemphasized.

In the mind of most practitioners *Field v. Burr*¹ is the governing authority when it comes to how to adjust the cost of discharging cargo in order to effect repairs to the ship. It was held in that case that the cost of discharging cargo to effect repairs to the ship is not part of the reasonable cost of those repairs. Under these circumstances it cannot be claimed from the Hull & Machinery underwriters.

IUMI has stated that the decision in the case of the "MEDINA PRINCESS"² is clear authority for the costs of discharge being treated as part of the reasonable cost of repairs and therefore falling on the Shipowners and their insurers. The situation is not necessarily so clear-cut. In the case of the "MEDINA PRINCESS", the ship was extensively damaged and the voyage was abandoned at an intermediate port. The cargo was removed by the cargo interests at their own expense; the judge specifically acknowledged that he did not have to decide whether the discharge expenses were part of the reasonable cost of repairs because they had already been born by the cargo interests. He did indicate that had he been called upon to decide the point he might have treated the expenditure as part of the reasonable cost of repairs, saying:

For my part I do not regard *Field Steamship Company Ltd. v. Burr* as authority for the proposition that in no case where discharge of cargo is necessary in order to repair the ship (as for example where the adventure is to continue) can the cost of discharging that cargo be recoverable as part of the cost of repairs to the ship.

¹ [1899] 1 Q.B. 579; 68 L.J.Q.B. 426

² *Helmville Ltd. v. Yorkshire Insurance Co.* [1965] 1 Lloyd's Rep. 361

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It is unlikely that an American average adjuster would feel comfortable about allowing himself to be swayed by what an English judge in a forty-year old case said he might have done if the facts of the case he had been hearing had been different. Indeed, in the US, the Court hearing the appeal of the arbitration in “The Alchemist” stated:

Every merchant ship requires repair work at some time or other and often cargo must be discharged to do that work. Once a voyage is completed, hull underwriters are not concerned with the cost of cargo discharged, no matter what its form. This view on the coverage of blue water hull policies has been prevalent in marine insurance law for 85 years. We think it must be well understood by now.³

Well, it is clearly not well understood in all markets and it would appear to be unwise to remove the discharge of cargo from General Average until there is an insurance solution.

A further area of debate surrounds the possibility that more voyages will be abandoned at ports of refuge if large chunks of port-of-refuge expenses that otherwise are currently uninsured are removed from GA. The law surrounding when a voyage can be abandoned is not universally clear although IUMI points to *Kulukundis v. Norwich Union*⁴, where it was held that when the cost of temporary repairs, including salvage charges, sufficient to enable the vessel to continue the voyage, would exceed the value of the ship when repaired, the vessel was rendered commercially incapable of completing the contracted voyage.

However, this was not even a case under a contract of affreightment but rather involved an insurance on freight. There is in reality very little legal precedent surrounding abandonment of voyage.

One must also balance what the law says and what is actually doable. Certain Shipowners faced with substantial, unrecoverable expenditure would not be in a financial position to incur that expenditure and will be tempted to abandon a voyage, regardless of whether or not the law sanctions it. IUMI points out that insurance solutions are available and, in particular, they cite Loss of Hire insurance; however, in recent years, Loss of Hire insurance has not been readily available, where it has been available it has been expensive with a minimum deductible of 14 days and often 30 days and it is not available to the sort of Shipowner for whom an unanticipated expenditure during a voyage is likely to be financially ruinous.

(Part of the IUMI agenda is to eliminate marginal Shipowners. However, it seems unrealistic to expect that the insurance industry will achieve what the regulatory authorities have failed to achieve and one cannot underestimate the determination of even quite reputable shippers of cargo to continue to attempt to pare freight rates to the bone.)

³ *Antilles Steamship Co. v. American Hull Insurance Syndicate*, 1982 AMC 1100, 2444

⁴ [1937] 1 K.B. 1; 105 L.J.K.B. 703; (1936) 55 L.L. Rep. 55

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Abandonment of the voyage is of concern to cargo Underwriters, particularly in the US, because it is a well founded principle that under a cargo policy not only are the goods insured but so is the voyage itself. Current London Institute cargo clauses exclude ‘loss damage or expense arising from insolvency or financial default of the owners managers charterers or operators of the vessel’; where the Shipowner is financially incapable of completing the voyage the cargo Underwriters can walk away from the claim, though this is likely to be of little comfort to the insured cargo owner. Under American cargo clauses, however, absent a specific provision analogous to the English one, Underwriters likely would be expected to pay the costs of reforwarding cargo and under this scenario they would be paying it in full, rather than a ratable proportion as in General Average.

ELIMINATION OF SUBSTITUTED EXPENSES

It is quite often possible, and most Shipowners actively seek, to avoid a long delay at a port of refuge by the device of substituted expenses, which permit the allowance in General Average of expenditure that is not in and of itself General Average, in substitution for expenditure that otherwise would have been incurred and allowed as General Average. Common examples are reforwarding cargo to destination from a port of distress, or towing the ship from a port of refuge to destination. This is done by allowing the costs of reforwarding, which might be a second freight or the charter of an alternative ship, for General Average expenditure such as the necessary storage of cargo ashore while the ship is undergoing repairs necessary for the safe prosecution of the voyage and the wages and maintenance of the crew, fuel and stores to be consumed and port charges to be incurred during a detention for such repairs.

If most classes of port of refuge expense are eliminated from General Average then the financial mechanism that permits reforwarding to be allowed as General Average will disappear, giving rise to substantially greater delays in the delivery of cargo and commensurately greater exposure to the cargo insurer during the longer period of transit.

REDISTRIBUTION OF SALVAGE CHARGES

The arguments for and against the exclusion of salvage from General Average are laid out in Section 6 of the ISC Report. One of IUMI’s arguments in favor of exclusion is that it would avoid the collection of two sets of security – one for salvage and one for General Average. This is not necessarily the case because many casualties involving salvage also involve some element of General Average sacrifice or expenditure for which security would still be collected.

IUMI also argues that including salvage in General Average prolongs the whole operation, sometimes for years. In practice, excluding salvage will prolong General Average. General Average is adjusted on the value of the property at the termination of the adventure and it is not possible to quantify that value until the charges, other than General Average charges, that are incurred in respect of that property subsequent to the General Average are known. In other words, you cannot calculate the contributory value of the property until the salvage has been settled.

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(IUMI also argues that the costs of readjustment can be high. This might be so in some cases, but perhaps avoidably. No contributing party should pay adjusting fees that cannot be adequately demonstrated by the average adjuster to be justified by the work involved.)

A further IUMI argument is that the expense of including salvage in GA is enhanced by the allowance of General Average interest. It needs to be borne in mind that that interest is credited to the party that has incurred the expenditure, more often than not the cargo Underwriter himself.

It can be argued that the elimination of salvage from General Average would give rise to inequities, particularly where one commercial interest can strike a bargain with salvors at the expense of another commercial interest. It is submitted that in most instances there is more likely to be a strong relationship between the salvor and the shipowner than between the cargo owner than the shipowner, so that there would be an incentive for a shipowner and his insurers to make a quick and advantageous settlement with a salvor leaving the salvor to recover the lion's share of his remuneration from cargo.

Furthermore, there is a potential for hidden inequity, which IUMI truly seems to have not grasped, in cases where there is sacrifice of one or more parts of the property involved in the adventure, since the cost of making good that sacrifice is disregarded when settling salvage but it is added back when adjusting General Average. In the case, for example, of a fire where a portion of cargo is destroyed by the salvors in the course of the fire fighting efforts, that cargo will contribute nothing to the salvage but the sacrifice of the property will be made good in General Average. When the salvage is included in the General Average, the amount made good as sacrifice contributes to the salvage. Where salvage is left out of General Average, the owner and insurer of the sacrificed property is made entirely whole by contributions from the saved property, which has also contributed to the salvage. The sacrificed property would receive the benefit of the salvage without having to pay for it.

Further distortion arises in the formerly equitable distribution of the overall expenditure when one interest pays a lower percentage of salvage than another, because a proportionally smaller deduction from sound value will be made in order to arrive its contributory value. Indeed, where the General Average is bigger in monetary terms than the salvage, an interest that reaches an apparently more favorable salvage settlement than other parties to the adventure could pay more in the aggregate than it would have done had the salvage settlement been dealt with in General Average.

It seems to the writer that this aspect of the debate could be compromised, and any perceived imbalance redressed to some extent, by eliminating allowances in General Average for interest and commission where salvage is settled by each individual interests (as opposed to being paid in full in the first instance by a single interest on behalf of the other interests.)

TIME BAR

There is a proposal to introduce a Time Bar in the York Antwerp Rules, something that has not previously existed. Readers are invited to review the relevant Section 7 of the ISC Report and to draw their own conclusions.

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INTEREST and COMMISSION

The York Antwerp Rules provide for a fixed rate of interest of 7% per annum on General Average sacrifices and most forms of expenditure. The objection is that a fixed rate of interest is not desirable for the life of a particular set of the Rules – sometimes it might be inadequate and sometimes it might represent a windfall to the party that has incurred the sacrifice or expenditure.

The draft for consideration at Vancouver provides for the CMI Assembly to decide the rate of interest each year. There is some reservation about leaving this in the hands of the CMI since the organization might at certain times act with less energy than at others, thus leaving the question of interest in limbo, not to mention uncertainty about its competence for this task.

On the other hand, the principle of a variable rate of interest reflecting market forces is compelling; the Association of Average Adjusters of the United States addressed this question and in 2002 adopted the following Rule of Practice, which seems to address the issue quite satisfactorily:

II. Interest on allowances in General Average

When allowance, sacrifices or expenditures are charged or made good in general average, interest shall be allowed thereon at the prime rate prevailing on the last day of discharge, plus 2 %, and continue until three months after the issue date of the general average statement.

There is some suggestion of eliminating the current allowance of a 2% advancing commission on General Average expenditure. Actual bank and wire transfer charges, where incurred, would still be allowed. It should be remembered that commission is not only allowed on the Shipowners' expenditure but also to the concerned-in-cargo where they have, for example, incurred salvage expenditure or paid for repairs to, or reconditioning of, cargo damaged by General Average measures. This proposal seems largely unobjectionable.

TIDYING UP THE TEXT

The ISC Report includes an Annex ('C') containing various proposals for tidying up the text of the Rules in the interests of uniformity and consistency. The writer cannot see any pitfalls in these and would be interested in learning of any observations to the contrary.

In conclusion, in order for the York Antwerp Rules to remain viable, they must meet with the acceptance and agreement of as wide a possible cross section of the maritime and insurance community. Various changes are in prospect, the full reach and burden of which might not have been fully appreciated by all those likely to be affected by them. The more debate that takes place in the brief time remaining before CMI 2004, the better.

Jonathan S. Spencer
91 Park Terrace West
New York NY 10034