ASSOCIATION INTERNATIONALE DE DISPACHEURS EUROPEENS

INTERNATIONALER VEREIN EUROPÂISCHER DISPACHEURE

INTERNATIONAL ASSOCIATION OF EUROPEAN ADJUSTERS

Position of A.I.D.E. on the eventual revision of the York-Antwerp Rules 1994

INTRODUCTION

The Association Internationale de Dispacheurs Européens (AIDE) brings together practicing members of the average adjusting profession, not only in Europe, but world-wide. In 1991, in anticipation of major proposals for the revision of the York-Antwerp Rules (subsequently adopted in 1994), AIDE passed a resolution defining its role as follows: -

> *"It was agreed that, as representing the profession of average adjusters, AIDE should continue to place its expertise at the disposal of those who will make the decisions as to what amendments, if any, should be adopted in the review of the York-Antwerp Rules and in other areas affecting the adjustment of general average. Any recommendations made by AIDE in this respect should have as their objective the maintenance of the principles of general average, the avoidance of ambiguity and the limitation of the areas of potential dispute."*

This role was taken up by an International Sub-Committee appointed by AIDE which thereafter, with CMI's full approval, shadowed the proposals made by various national Maritime Law Associations and also initiated a number of proposals of its own, all of which were debated at the Sydney Conference.

As in 1991, so in 2003, a programme was set up whereby:

1. the IUMI proposals were fully debated by the AIDE General Assembly in the light of the known views of shipowners (represented by ICS), charterers (represented by BIMCO), and other interests;

2. members were invited to express their own opinions without limitation on the future of General Average;

AIDE Secretariat c/o Fedorowicz & Partners S.A.

Tel (32-2) 633 41 14
Fax (32-2) 633 55 58

Address :
Rue d'Anogrune 170
1380 Lasne Belgium

E-mail: fedo@skynet.be
website:
http://www.aideadjusters.org

Bankers :
Fortis Bank
a/c 220-0031818-38

3. a committee was established to review the Report of the CMI International Sub Committee on General Average dated 19th December 2003 (the ISC Report), taking the whole of the foregoing into consideration

Comments on individual issues raised in the ISC Report are presented below. However, AIDE would stress that any changes which may be made in the substantive provisions in the YAR should carry the broad agreement of all parties; shipowners, cargo owners, charterers and their insurers. It should at all times be remembered that the success of the YAR depends upon their reflecting the will of the international maritime community, not the wishes of any one sectional interest, however dominant. Failure to maintain this consensus could be disastrous.

According to readily available Lloyd's Register and Norwegian sources, there were in 2003 just over 43,400 cargo vessels involved in world trade. Of these, approximately 49% were bulk carriers, tankers of all types, reefers etc., which generally carry cargoes involving a fairly limited number of interests, indeed very often a single one. However, only approximately 7% (2,956) of the world cargo fleet consisted of container vessels where the handling of general average procedures presents a particular difficulty, which is now largely overcome by the inclusion in hull insurances of general average absorption clauses.

Obviously these 40,000 or so vessels concern a very large number of Owners who may decide to ignore any amended York Antwerp Rules and use a wide variety of Bill of Lading provisions. As already mentioned, the maritime community would then be moving away from a large measure of uniformity and move towards chaotic diversity. It appears to be in the interest of all concerned that this be avoided.

THE COMMON SAFETY / COMMON BENEFIT ARGUMENT

At an early stage of this argument, IUMI contended that at some unspecified time in the past, allowances in General Average were deemed to terminate when ship and cargo had arrived in a position of common safety, the corollary being that it was only by virtue of YAR that allowances could be made for, e.g. wages and maintenance of crew whilst ship and cargo were in a port of refuge. Research by AIDE, among others, soon showed this argument to be totally flawed: in fact the Law Maritime, as interpreted in all countries other than the United Kingdom, recognised that the object of General Average was not merely the attainment of common safety wherever ship and cargo happened to be after an accident, but the completion in safety of the common maritime adventure.

WAGES AND MAINTENANCE OF CREW, ETC. AT A PORT OF REFUGE

AIDE welcomes the amelioration of the position of IUMI on this issue but remains concerned regarding the proposals to amend Rule XI by excluding certain categories of costs, in particular the wages and maintenance of the vessel's crew, incurred during detention at a port of refuge. In this respect AIDE believes that the following factors deserve the careful consideration of Delegates:

- Although a shipowner may be compelled to continue to pay the crew during a general average detention, the value of the crew's services, in terms of contributing to the earnings of the vessel, is lost to him. The cost of paying the crew during a period of general average detention therefore represents a real cost to a shipowner and is distinguishable from a claim for loss of earnings, in any disguise, on that account.

- The wages and maintenance of the vessel's crew incurred putting into a port of refuge and during a period of detention there, has always been admitted as general average under the laws of all Civil Law countries and the U.S.A. The notable exception is, of course, the United Kingdom, for the reasons examined in the preceding paragraph regarding the furtherance of the common maritime adventure.

AIDE has no comment to make at this time with regard to the draft amendments to Rule XI as set out in Annex B to the ISC Report, but will comment if this issue proceeds.

TEMPORARY REPAIRS

The ISC Report on this subject is admirably clear.

AIDE has for many years participated in the search for a simple and equitable solution to the problem of whether and, if so, to what extent to allow in general average the cost of temporary repairs of accidental damage. For example:

1. There is a great deal to be said for allowing the cost of temporary repairs of accidental damage only when such repairs are essential to the continuance of the voyage, and there exists no possibility of effecting a permanent repair in the locality, i.e. when the only alternative would be the enforced (and therefore legal) abandonment of the voyage. This practice, pre-dating the York-Antwerp Rules, is an example of the "common safety" approach.

2. The present second paragraph of Rule XIV, based on the principle of "substituted expense", has its critics, but since the English law case of *The "Bijela"* there is no doubt that its application in practice is no longer limited to those cases where permanent repairs could have been effected at the port of refuge, as had previously been contended.

3. On the other hand, there are many practitioners who would be prepared to advocate the abolition of any allowance in general average for the cost of temporary repairs of accidental damage, provided that hull insurance markets could demonstrate uniformity in accepting the cost of such temporary repairs reasonably incurred, as forming a part of the measure of indemnity.

AIDE recognises two sets of circumstances in which allowance of the cost of temporary repairs can be considered to be objectionable. Firstly, where permanent repairs are never carried out, and secondly, where the deferment of permanent repairs to a cheaper repair port is undertaken with the object of achieving a saving to the shipowner or his underwriters. In order to meet potential objections on these grounds, the ISC has set out a draft amendment in Annexe B to its report, based on the so-called "Baily Clause". At this stage AIDE is by no means convinced of the desirability of this amendment, but if after further debate it should appear that delegates wish it to be considered further, AIDE would respectfully suggest the following simplified wording for discussion:

> *"For the purposes of the second paragraph of this rule only, the cost of temporary repairs falling for consideration thereunder, shall be limited to the extent that the cost of temporary repairs effected at the port of loading, call or refuge together with the cost of permanent repairs eventually effected exceeds the cost of permanent repairs had they been effected at the port of loading, call or refuge."*

SUBSTITUTED EXPENSES

When a ship with cargo has sustained a serious casualty which could involve a long delay on the voyage before the ship is repaired, it frequently happens that the most satisfactory solution to the problem, for all interests, is to complete the voyage by some other means, e.g. towing the ship with its cargo to destination, or transhipping the cargo and forwarding it in another bottom. Although these operations almost invariably result in considerable savings in expense to all parties, their cost is not allowable directly in general average; it can only be admitted *via* Rule F, the substituted expense route.

Under the present YAR substantial benefits accrue to all parties (proportionately to their values) by reason of substituting the cheaper and more expeditious cost for the more expensive course of action. Furthermore, the benefits are not only financial in the sense of affecting the amounts chargeable to the general average, they also include (for cargo interests) the safer and speedier delivery of their cargo.

In the opinion of AIDE, therefore, the proposal of IUMI to abolish substituted expense allowances under Rule F would have the most dire consequences, particularly for cargo owners and their insurers by closing off a useful and well-recognised means for the saving of both time and expense.

REDISTRIBUTION OF SALVAGE CHARGES

In this respect the following points should be borne in mind:

(a) Salvage is the archetype of a general average expense.

(b) In some countries, for example the Netherlands and Germany, the Shipowner is liable for the payment of the whole of the salvage charges.

(c) Not infrequently, and independently from any legal obligation, the Shipowner provides security on behalf of all parties.

(d) When some interests are in a stronger bargaining position than others, this may lead to inequity in the settlements made with salvors. Redistribution in General Average automatically corrects the inequity, and also acts as a disincentive to separate interests attempting to obtain this kind of unfair advantage.

(e) Where there is a single cargo interest, and no other item of general average is involved, reapportionment of the salvage awards, *per se,* would admittedly not be required.

However it has to be borne in mind that when other items of sacrifice or expenditure are present, the mere exclusion of salvage charges from the general average would neither hasten nor simplify the adjustment, as salvage charges (together with interest and legal costs) would need to be taken into account in the calculation of contributory values.

Consequently, following the admirable practice that each case should be treated on its own merits, rather than by a "rule of thumb", AIDE suggests that should there be a strong call from delegations favouring the exclusion of salvage settlements from general average, then a practical solution should be found in preference to a theoretical one.

In such a practical solution AIDE envisages that where the parties to the common maritime adventure have all agreed in writing that settlements made with the salvors should not be disturbed, then the present rule as to the admission of such charges in general average should be reversed, otherwise no change. The following wording is submitted as an addition to the first paragraph of Rule VI (a):

> *"Notwithstanding the foregoing, where the parties have so specifically agreed in writing the cost of settlements made with the salvor(s) shall be excluded from general average."*

Of course it may be said that the parties are always at liberty, as between themselves, to vary the application of the YAR by special agreement, AIDE believes that

recognition of this liberty within the text of Rule VI will encourage the parties to enter into such an agreement in appropriate cases.

TIME BAR

In the view of AIDE this is not a subject which fits happily within a set of contractual rules. Nevertheless, it is recognised that it may be convenient to have such a rule available when the applicable national law is non-mandatory or silent. However, AIDE is not happy with the drafting of the proposed new Rule XXIII, set out in Annexe B to the ISC Report, and submits the following:

"Rule XXIII. Prescription of Contributions in General Average.

(a) All rights to claim the balances due in general average shall be extinguished unless an action is brought by the claimant within one year after the date of the general average adjustment [or within six years from the date of termination of the adventure, whichever shall first occur].

(b) The foregoing shall apply in all cases save where governing national law provides specifically to the contrary"

INTEREST

The ISC Report correctly identifies two problems relating to the allowance for interest on general average allowances:

1. the variation of bank and other prime rates of interest over periods of time (the time factor),
2. the variation between the rates applicable in different countries and currencies (the currency factor),

and has proposed a partial solution to the first of them, namely to provide for an annual review of the rate of interest fixed by Rule XXI of YAR.

Unfortunately this leaves the second problem unresolved. Although the predominance of the United States dollar as an international commercial currency has led to its acceptance as the currency most frequently adopted for general average adjustment, there are instances when general average settlements have to be made in other currencies which are subject to severe inflation and widely varying rates of interest, as can be observed, for example, in certain South American countries from time to time.

AIDE has kept this subject under study for many years. It has recognised the inter-relationship of the problems relating to the currency of adjustment, the rate of interest

and the currency of settlement, and in its reports prior to the CMI Sydney Conference of 1994 it recommended:

A. the SDR solution, or, failing that,

B. the preparation of general average adjustments either in a currency selected by the parties, or where that was not possible *"in such currency or currencies as may be equitable in the interests of the parties, having regard to the currencies in which the major claimants in general average have sustained financial loss"*.

Recommendation A (the SDR solution) was adopted by the British MLA and although it received a considerable degree of support at the Sydney Conference, it failed to achieve the required majority.

Recommendation B, although not successful at Sydney, has become accepted adjusting practice.

AIDE does not understand why the suggestion that a formula be devised for a variable rate of interest linked to the LIBOR has been rejected as being “too complicated”. On the contrary, the LIBOR rate, which is based on not one, but a "basket" of stable currencies, is successfully used in a number of commercial contracts and in the Norwegian Insurance Market. By comparison with this proposal, AIDE considers the suggestion to refer the question of the rate of interest in general average adjustments annually to the Assembly of the CMI to be totally inappropriate, and the proposed guide lines for the determination of an annual rate to be unnecessarily cumbersome.

COMMISSION

AIDE can confirm that the original motive for the allowance of commission was to encourage shipowners (and other parties) to make prompt payment of accounts due. In the USA, the practice (other than when YAR apply) is to allow commission on paid accounts at 2.5%.

It is also correct, as reported, that it is the practice to allow administrative charges, such as travel, communication expenses, and the cost of collecting general average security either on the evidence of actual vouchers or, where the examination of vouchers would involve an inordinate amount of time, on the basis of a considered estimate by the average adjuster.

In the opinion of AIDE, it is quite unnecessary to create a new provision in YAR to confirm a long-standing practice of this kind.

TIDYING UP THE TEXT OF THE YAR

At this juncture AIDE has no comment to make on the changes proposed on this account.

However, AIDE would like to express its willingness to participate in the work allocated to any drafting committee that may be appointed at the Vancouver Conference.

Respectfully submitted,

Stefano Cavallo, President
Janusz Fedorowicz, Vice-President
Jean-François Chevreau
Michael D. Harvey
N. Geoffrey Hudson

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