

ASSOCIATION INTERNATIONALE DE DISPACHEURS EUROPEENS

*INTERNATIONALER VEREIN
EUROPÄISCHER DISPACHEURE*



*INTERNATIONAL ASSOCIATION
OF EUROPEAN ADJUSTERS*

15th November 2003.

**Mr. Bent Nielsen,
Chairman,
International Sub-Committee,
Comité Maritime International.**

Dear Mr. Nielsen,

The A.I.D.E. has set up a Working Group to examine the matter of the eventual revision of the York–Antwerp Rules 1994. This has resulted in the following considerations:

(1) Common benefit (abolition, incremental changes)

A common maritime adventure is no more, and no less, than the carrying of goods to their destination. Therefore, in practical terms, the purpose of general average is indeed to achieve *common safety* in time of peril, but also, in so doing, to enable the *common adventure* to be completed so that it would be

unrealistic to dissociate these two aspects which affect all involved parties.

In today's global economy merchants and sea carriers are more than ever pressed to join efforts in order to meet the growing requirements for more efficient service implying tighter schedules which increasingly lead to "just in time" deliveries. Thus any measures which may draw the parties away from co-operation, i.e. from the concept of *common benefit*, and take them to divorce their otherwise *common efforts*, would go against their best *common interest*. This is a fact of real life which no one can disregard.

General average and the YAR are unique and valuable instruments to assist the parties in achieving a fair resolution of most questions which arise at the time of a casualty requiring measures for the *common good*. Carriage by sea ignores barriers and the YAR are the most successful of all attempts to unify maritime law. They are accepted virtually everywhere and, having been written and agreed by the whole maritime community, are imbedded in most sea carriage contracts, their interpretation meeting with wide consensus.

More than ever, and contrary to the opinion voiced by some, general average and the YAR can meet the challenges of today's sea trade provided the management of general averages is thoroughly modernized and costs are thereby reduced. Whilst the YAR can be improved, the basic principles and allowances should not be substantially modified.

The complaints about general average being abusively used by unscrupulous Owners operating sub-standard vessels certainly warrant attention, but general average will not be a useful

scapegoat to Hull Underwriters who accept to insure sub-standard vessels and to Cargo Underwriters who accept to cover goods carried by them. Neither will too low premium rates be compensated by narrowing the scope of the YAR. Underwriters who know their business should know how much premium they ought to charge for the risks they accept to cover.

Here are some aspects which merit special attention when considering whether the principle of *common benefit* should be eliminated from the YAR:

- (1.1) In view of Ship Owners strong resistance to any major changes, transport contracts may either maintain the YAR 1994 or introduce special wordings such as *“general average to be adjusted in accordance with YAR 2004 but including Rules X and XI of the YAR 1994”*. Indeed there is the distinct prospect of moving from uniformity to legal chaos as a result of a wide variety of new bill of lading and charter party clauses being introduced, thus creating a lawyer’s paradise.
- (1.2) Recent research has shown that wages and maintenance do not weigh heavily on general average. In nine out of thirteen cases that were examined, wages and maintenance represented from 0.04% to 0.9% of the contributory values of cargo and in the other heavier casualties from 1.85% to 3.8%.
- (1.3) The more port of refuge expenditure is removed from general average the less expenditure will qualify by way of substitution under Rule F to forward the cargo to destination under non-separation agreements. Without

the incentive of the *common benefit*, frustration of the voyage is likely to occur more frequently when repairs result in a long detention period, leaving Cargo Owners and Underwriters to bear alone substantial additional costs. Such situations are also likely to engender legal disputes when the parties differ on frustration.

- (1.4) The abolition of *common benefit* will lead Ship Owners to seek protection of this financial exposure through other avenues. They may seek insurance protection and we know that Hull Underwriters have always been receptive to extending the cover they offer, as evidenced for instance by the absorption clauses. Owners may also pass some or all of the costs on to cargo interests, particularly such as discharging, storing and reloading expenses.
- (1.5) Rule XIV dealing with *temporary repairs* offers room for improvement to eliminate any undue advantage to vessel interests such as permanent repairs subsequently effected at a much cheaper port. However, any revision of this Rule should ensure that it does not delay the final adjustment nor renders it unduly complicated.
- (1.6) By way of conclusion on the subject of *common benefit* it can be said with reasonable certainty, and with no other objective than assisting the parties engaged in sea trade, that those who expect to benefit from the suggested changes may be surprised by the end result which may prove to be the reverse of what they hoped for. At the end of the day it is all a matter of money and if it does not show up where expected it might be useful to think twice before opening the box of Pandora of any major YAR changes.

(2) Redistribution of salvage charges

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 Ship Owner is liable for the payment of the whole of the salvage charges.
- (c) Not infrequently, and independently from any legal obligation, the Ship Owner provides security on behalf of all parties.
- (d) Some cargo interests have a stronger bargaining position than others leading to an unfair result if the salvage charges are not reapportioned. Many cargo interests may simply go unrepresented for having a somewhat low a value or for failing to fully understand what is at stake.
- (e) Where there is a single cargo interest, reapportionment would admittedly not be required.

Under the particular circumstances, a rule drastically excluding salvage charges from redistribution could easily in many a case achieve the undesired result of being unfair to many cargo interests. Accordingly, since different situations arise, the matter should be left to be dealt with as may reasonably be required whilst remembering that the exclusion of salvage charges from general average would neither hasten nor simplify the adjustment as salvage charges together with interest and legal costs would need to be considered in the calculation of contributory values.

(3) Time bar

This would not be a vital addition as there is no denying that with the use of modern technology, particularly of means of instant communication, general average adjustments are seldom unduly delayed, indeed the vast majority is speedily issued. Furthermore, national laws already provide for a time limit.

(4) Interest

Admittedly the question of interest does have to be addressed to be more in line with prevailing rates. Some simple rule should be devised to avoid complicating adjustments. Should, as appears to be the case, a variable rate be favoured, then this could perhaps be left to the CMI to be suitably dealt with.

(5) Commission

The 2% commission rule has the merit of being simple to apply. The proposed changes rather than simplifying matters are liable to lead to complications and result in increased adjustment costs.

(6) Modernising the handling of general averages

Much is already being done and can further be improved.

- (6.1) As the size of the ships has grown and the number of ports of destination has increased, sometimes reaching a worldwide service, collection of “Average Bonds” has become a time consuming formality. Without abolishing it, as it may still serve a useful purpose, the possibility of dispensing with this document should be seriously considered. This may raise a difficulty under certain legislations which can probably be resolved by inserting in “Average Guarantees” a clause whereby, notwithstanding any national legal provisions, the Cargo Underwriter agrees to put the carrier in the same position as if an “Average Bond” had been signed.
- (6.2) Marine Underwriters could, no doubt, organize themselves in their national associations to promptly provide security upon being shown proof that the goods are insured with them.
- (6.3) In the case of container ships, representative cargo values could be agreed.
- (6.4) The use of specific GA sites and of e-mail communications should be further developed to speed up the handling of all GA aspects.

Outside any law system and before insurance came into being, sea trade has from the very beginning generated a sense of community of interest between the merchant and the sea carrier, which has led them to agree to share the burden of certain measures taken to escape from the grips of peril and to successfully complete the common adventure. This has progressively led them to elaborate principles and rules which, through negotiation, have had the merit of uniting the world's

sea trading community in approaching certain difficult situations with remarkable consensus.

Thus, at a difficult time, with a certain tendency to depart from negotiation and launch into litigation, the valuable heritage of consensus should be preserved, which means that any change to the YAR should bring the parties to closer co-operation rather than risking to drive them apart. The real source of financial losses, which cause so much concern, should be thoroughly examined to reach the real root of the ills to be cured.

Yours faithfully,

Stefano Cavallo
President