

International Chamber of Shipping

Report of the CMI Conference held in Vancouver from 31 May to 4 June 2004

1. GENERAL AVERAGE: REVISION OF YORK-ANTWERP RULES

Ever since the 1994 revision of the York-Antwerp Rules (YAR), cargo underwriters, through the International Union of Marine Insurance (IUMI), have been pressing their case for further reductions in the scope of allowable recoveries. A radical change restricting general average allowances to common safety and thereby excluding recovery in relation to common benefit was promoted. The shipping industry has opposed the suggested changes in principle and, also, because of insufficient practical experience of the latest rules which, in any event, have not been universally accepted with many contracts of affreightment still requiring settlement under the YAR 1974. An ICS position paper supported by BIMCO, Intertanko and Intercargo was submitted to CMI.

CMI is the custodian of the YAR and its endorsement is needed to effect change. It was therefore decided, despite shipowner opposition when first mooted at the CMI Conference in 2001 that, based on the discussions at that time, work should be undertaken "to consider what, if any, revision of the YAR should be made".

Discussions have unfolded over several years through the CMI mechanism and conclusions put forward by an International Sub-Committee charged with drawing-up recommendations. Underwriters' case throughout the discussions has been that general average is often used by sub-standard operators as a means of funding costs which should lie with the owner; and that the system is costly to administer and slow to progress.

The International Sub-Committee's eventual report set out a number of possible areas for change although, following CMI practice, it did not pronounce on the need for amendment but, rather, outlined the arguments for and against. In the lead up to Vancouver it emerged that IUMI was no longer actively pursuing radical change. No doubt, IUMI felt that this stood little chance of success or, more cynically, that the industry might be better disposed towards other changes if the more extreme option were seen to be removed.

Debate in Vancouver, therefore, focussed on a shopping list of so-called incremental changes to the YAR 1994. Recommendations in the International Sub-Committee's Report were debated - in an often highly charged (but always good humoured) atmosphere - over a period of 1½ days, with the proposals put to the final Plenary session for approval. Voting rights are restricted to CMI constituents, i.e. national maritime law associations. Consultative members (including IUMI, ICS, the UK Chamber of Shipping and the Association of Average Adjusters) have rights of audience but cannot vote.

Rule VI *Salvage Remuneration* was the most contentious issue. Under English law, salvage is not recoverable in general average although it is in civil law countries. In order to ensure uniformity of law, which is CMI's underlying objective, a rule was introduced in 1974 (and updated in 1994 to reflect provisions in the Salvage Convention) expressly providing for recovery in cases of salvage. Cargo underwriters supported removing the allowance arguing that salvage adjustments can result in an unnecessary, and expensive, duplication of apportionment and should be excluded. The case in favour of retention, put forward by the shipping industry and some delegations, is a fairer settlement, the avoidance of serious injustices if salvage is allowed to lie where it falls, the need to refine tentative assessments based on rough figures and addressing the balance where one party achieves a favourable settlement with salvors on behalf of other parties.

A vote in the International Sub-Committee on the first day was tied. Under CMI rules, this meant that the motion for change was defeated. However, following active lobbying by IUMI, some of those who had voted against the proposal in the International Sub-Committee changed their minds at the closing Plenary where an opening statement for change put forward by Australia and New Zealand, quickly gained support. A few delegations, and shipping industry and average adjuster observers, spoke against the motion. Greece put up a compromise proposal, which the industry could have supported, but this was rejected.

The vote in the Plenary produced 21 delegations in favour, nine against and one abstention. Accordingly, the motion to exclude salvage from allowable general average recoveries was carried. One side effect is that the change reverses the position for civil law countries where, when applying the YAR, salvage will now no longer be considered a general average expense.

The following other changes which, had they been agreed without the removal of salvage, might not have been unacceptable, were:

- Rule XI *Wages and Maintenance of Crew and Other Expenses Putting into a Port of Refuge etc*: the costs of wages and maintenance of the Master, officers and crew will no longer be allowed during the period a vessel is in a port or place of refuge undergoing repairs recoverable in general average. Fuel and stores consumed will continue to be allowable expenses;
- Rule XIV(b) *Temporary Repairs*: after considerable discussion, it was agreed to add a so-called "Bailey Clause" to restrict the advantage to the owner (in practice his hull insurer) where temporary repairs make it possible to effect permanent repairs at a place where such repairs can be made more cheaply than at or near the place of refuge;
- Rule XX :the payment of a commission of two percent on general average disbursements was abolished;

- Rule XXI: the set seven percent rate of interest was replaced with a requirement for the CMI Assembly to determine the rate every year in accordance with guideline criteria;
- Rule XXIII: despite reservations, and to the extent permitted by domestic law, a time-bar provision was inserted extinguishing rights to claim general average contributions one year after an adjustment has been issued or six years after the termination of the “common maritime adventure”;
- Tidying-up the Text: proposals for modernising and ensuring consistency in terminology, were agreed.

The proponents of change were keen to ensure that their efforts were duly recognised. Accordingly, they proposed that the revised provisions should be known as the *York-Antwerp Rules 2004*, with a recommendation that they be applied to the adjustment of claims in general average as soon as practicable after 31 December 2004.

However, the shipping industry remains unconvinced about the need for change and the changes produced will no doubt result to some extent in a transference of costs between insurers. There is also likely to be uncertainty, and resulting questions of interpretation, about the new provisions. Many operators today use absorption clauses, particularly in trades involving numerous cargo receivers and/or for smaller claims. This is a helpful means of keeping down administrative costs and has seen a reduction in the number of general average declarations.

The YAR 2004 are not mandatory and will only apply on a contractual basis. Owners continuing to incorporate general average arrangements into their contracts of affreightment will wish to review the new provisions, probably guided by whether existing more comprehensive cover can be maintained at no additional cost, before taking a decision as to whether or not to apply the new rules or stay with the YAR 1994, or even YAR 1974.

A copy of the new YAR, and explanatory notes, will be circulated when received.

2. CARRIAGE OF GOODS: UNCITRAL DRAFT INSTRUMENT

The two day session on the UNCITRAL text was somewhat constrained by the fact that CMI’s initiative with the draft instrument came to an end when it was passed to UNCITRAL for development as an international convention. However, the meeting decided to concentrate on six specific areas, as set out in the attached report.

The two most important issues were *Basis of Carriers Liability and Jurisdiction & Arbitration*. In relation to the former, it was agreed to try to improve, and set out more clearly, the principles, including the all-important “fault based” liability proposed by CMI and accepted by UNCITRAL. CMI’s proposal is

included as annex 1. As noted, some concern was expressed about the assumption that the provisions did not cover “co-operating causes of loss or damage” and that the position in such instances was unclear. Of the two options in paragraph 5 in the case of competing causes of loss or damage, the industry preference is more likely to be for alternative 2 since, unlike the first, the carrier is not required to undertake the almost impossible task of proving a negative; while there is also a fall-back provision for the equal division of liability in defined circumstances.

As to *Jurisdiction & Arbitration*, the industry has consistently argued that the present system of contractual freedom works. Accordingly, there is no need for prescriptive provisions along the Hamburg Rule lines which have been put forward and would give the (usually cargo) claimant considerable say over where a case was heard. Nevertheless, the almost unanimous view of the national maritime law delegations was that jurisdiction provisions should be included. This meant that there would also have to be an *Arbitration* provision. An industry intervention suggested that party freedom to choose and invoke pre-existing arbitration agreements, of the type often found in charterparties, could be maintained by a simple statement to the effect that nothing in the instrument would preclude parties’ rights to agree to arbitration. Significantly, it was agreed that arbitration need not be in a Convention country, although the general view was that arbitrators should be bound by the terms of the instrument when determining disputes.

It was agreed that the CMI Report would be passed to the appropriate intersessional working group within UNCITRAL for further development.

3. PLACES OF REFUGE

This one day session chaired by Stuart Hetherington (Australia) was well attended. Papers were presented by Eric van Hooydonk (Belgium), Richard Shaw (UK), Frank Wiswall (US), and Gregory Timagenis (Greece) and several written submissions were also circulated.

Discussion was based on a series of “questions for consideration” posed by the chairman and distributed in advance of the session. The question, “Should there be an international convention?” provoked the most debate with many delegations expressing the view that an international convention on places of refuge was necessary. However, several delegations and the Chairman of the IMO Legal Committee (Alfred Popp) reminded the session that CMI was expected to report to the IMO Legal Committee on liability and compensation issues arising out of the admission of distressed vessels into places of refuge and suggested that it should be left to IMO member states to determine whether there was a need for an international convention or not.

It was agreed that the International Sub-Committee on Places of Refuge should continue its work and report to the next session of the IMO Legal Committee.

4. MARINE INSURANCE

A study of marine insurance has been conducted by a CMI International Working Group over several years. This has concentrated on the duty of good faith, the duty of disclosure, alteration of risk and warranties. The central purpose was to identify areas of similarity in approach in national legal systems; areas of difference where a measure of uniformity would better serve the marine insurance industry; areas of difference where such differences provide sound reasons for a competitive edge and uniformity would be undesirable; and areas of profound difference where seeking uniformity would be unrealistic.

The session reviewed the work undertaken and heard from several speakers. However, some aspects have now been overtaken by events, particularly resulting from the London insurance markets' *International Hull Clauses* where in the event of breach of warranty, cover is now lost during the breach but restored when the breach is rectified.

It was agreed that the International Working Group should continue its activities. In particular, efforts should be made to produce CMI Guidelines for the formulation of Marine Insurance Laws dealing with the issues concerned, research undertaken into further aspects of marine insurance law and guidelines put forward.

Developments will be monitored by the industry which will offer to assist CMI as appropriate.

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