

**Remarks of David W Taylor on  
General Average Session  
at IUMI Conference, Oslo  
15 September 1996**

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Mr Chairman, distinguished delegates:

I am greatly honoured to be invited to participate in your discussions today. I am not an Average Adjuster. I am a Maritime Lawyer, and an insurance practitioner to be specific. I have, however, been concerned with General Average over the years. I have to declare an interest in the strict sense, since I am the Honorary Secretary of the Average Adjusters Association. I was not one of the authors of the Association's Briefing Notes which were circulated before this meeting, but I applaud their preparation in the interests of achieving a more informed discussion.

I am described in the Programme as expressing the views of the Average Adjusters Association. That is not really my brief. I am here to speak as "an informed neutral".

My relevance to your discussions was perhaps established at Sydney in 1994 when I was Chairman of the International Sub-Committee of CMI which was responsible for recommending amendments to the York-Antwerp Rules 1974. At Sydney there was a week long debate followed by a Report and Recommendations to the Plenary of CMI where 35 nations voted unanimously for the adoption of the recommendations of that international sub-committee to the plenary session. My wife subsequently remarked that I was "no fun in Sydney" - a rebuke I accepted because of the implication that I was fun on other occasions. It was an arduous week for all. A feature of the week was the very active participation in the debate by representatives of ILU, Michael Hill, IUMI, Matthew Marshall and Lloyds, Nicholas Gooding.

The work in Sydney was the culmination of 4 years work involving the participation by the Maritime Law Associations of 54 countries as well as UNCTAD, the United Nations Committee on Trade and Development, IUMI and AIDE (Association Internationale de Dispatcheurs Européens).

I am not today the representative of CMI having completed my work at Sydney in 1994. I have, of course, informed CMI of our discussions today and my participation in them not least because I wanted to seek to ensure that if as a result of your discussions you felt that further examination was

needed that appropriate machinery could be put in place by CMI - I was delighted to hear your President announce this morning that IUMI has become a consultative member of CMI.

The IUMI Report prepared by Matthew Marshall in 1994 was before the Conference in Sydney but it must be said it came very late in the day. I mean no criticism by this remark. The issues however raised in that Report were enthusiastically raised in debate by the insurance representatives present. To my relief and their everlasting credit, I, as a referee, never had to use a Red Card and was only momentarily tempted to use the Yellow Card.

Even though Michael Hill in his Report to IUMI in Tokyo in 1995 entitled "General Average Reform" covered the role of CMI and General Average, I do believe it is worth my developing that subject a little more. There are I perceive still ghosts which rattle their chains crying "self interest" and "conspiracy" and I want to banish these ghosts for ever.

**1. What is CMI?**

CMI, the Comité maritime Internationale is the Association of National Maritime Law Associations. This means that its constituent members are individual maritime law associations of individual countries throughout the world. The current membership comprises the National Maritime Law Associations of 53 countries. The CMI meets every 4 years. The last meeting took place in Sydney in October 1994. As if to prove the rule the next meeting is 3 years after the Sydney meeting, in Antwerp from 8 - 13 June 1997. This is because 1997 is the centenary year of the CMI. The CMI has a distinguished record of responsibility for such international maritime conventions as the Brussels Collision Convention 1910, the Hague Rules and Hague Visby Rules, the Liens and Mortgages Convention, the various Limitation Conventions, Civil Liability Convention etc. Latterly the responsibility for developing the creating international conventions has devolved more upon IMO as governments have, more and more, assumed responsibility for international maritime affairs.

**2. What is the link between CMI and the York-Antwerp Rules?**

The first set of rules emerged following in May 1860 a meeting of the national Association for the Promotion of Social Science - who, you may well ask. This meeting was followed by a meeting in York in 1864 and a further meeting in Antwerp in 1877. The York meeting produced 11 Rules known as the York Rules and the Antwerp meeting added a 12th Rule; those Rules then became known as the "York-Antwerp Rules". All this activity, if that is what one can call it, began with a letter written in May 1860 by the national Association for the Promotion of Social Science to the maritime countries of Europe. It was signed by Lord Brougham, the Chairman of Lloyd's, the Chairman of the London general Shipowners

Society, various Chambers of Commerce and others. The letter contained the significant sentence "The system of General Average is one which, to prevent confusion and injustice, pre-eminently requires that the same principles should be acknowledged amongst the chief maritime nations". The cry for uniformity and consistency has been continued over all the intervening years - in the words of your President the issue is a "global polyprismatic" one.

This is all very interesting but what has it really got to do with current reality? The connection is this; throughout their history the Rules have been regularly reviewed in 1890, 1924 and 1950. It was the 1950 revision which was delegated to the CMI by the International Law Association. Thereafter the CMI has been the custodian or trustee of the York-Antwerp Rules. Accordingly, CMI has been responsible for the revisions in 1950, 1974, the small but important amendment to Rule VI in 1990 and the October 1994 revisions which we are discussing today. So that is how CMI becomes involved in the York-Antwerp Rules.

Turning now to today I admit to being impressed by Nick Gooding's research for his presentation. Since I know that he was preparing his paper on holiday, I suspect that Mrs Gooding may have thought he too "wasn't much fun" for that duration.

The extent of his research puts a burden on me to demonstrate the same diligence. It is certainly remarkable that General Average provokes such strong feelings and that the cry for abolition has been so consistent over so many years. I hope that it will delight Nicholas Gooding if I mention that my research shows that at the time of the 1877 revision of the York-Antwerp Rules, the representatives of Lloyd's said they didn't wish to participate in any discussions since they considered the whole idea of General Average should be abolished.

It is, I say, a curious feature of the topic of General Average that it has the potential to inspire great depth of feeling, most especially when the intent is to provide an international agreement, a uniform and equitable system for apportionment of loss based on fairness and good sense. These principles should inspire calm feelings.

It has been said in England that if you wish to induce intellectual spasm in the mind of an English High Court Judge, this is easily accomplished by the mention of two words "General Average". It is also said of General Average that if you're an Average Adjuster no definition is necessary and if you are not an Average Adjuster, no definition is possible. I can see that the difficulty in understanding the Rules and the operation of the system is on the face of it a handicap. The questionnaire which I issued as Chairman of the CMI International Sub-Committee, the questionnaire being the first step in the work of the International Sub-Committee invited comments and suggestions for changing the language to aid understanding and clarity. Interestingly there was no significant support for change. Such countries with established insurance markets as Canada, Australia, New

Zealand, Germany, United States, Switzerland, Sweden, the Netherlands etc all preferred the existing format of numbered and lettered Rules and existing wording, saying that the Rules had stood the test of time, providing uniformity and that the Rules had the benefit of interpretation both in practice and by courts.

It may seem strange that the subject of General Average should be the subject of correspondence, as Nick Gooding points out, even on Christmas Eve. To put that in context can I mention that I have seen a letter written by a maritime lawyer dated 25 December, Christmas Day, in which the writer "apologises for the manuscript letter caused by the absence of his secretary". It is perhaps the general world of marine insurance not merely the particular world of General Average, if I do not muddle my words too much, which thrives on such eccentricity.

It is clear to me however that notwithstanding all the work that has been carried out, particularly over the last 4 to 5 years, there are still important misunderstandings.

#### **What is the work and what are the misunderstandings?**

Over the 4 years prior to 1994, CMI consulted with 54 member countries. This was a continuous process of consultation, not merely a one-off questionnaire. UNCTAD, the United Nations Committee on Trade and Development, issued its report in March 1994, some months before the CMI meetings in Sydney in September entitled "The Place of General Average and Marine Insurance today" UNCTAD carried out its own inter-governmental consultations and produced its own statistics with a reference to IUMI statistics. There is a strong call in that Report for the abolition of small General Averages. No-one dissents from that. As an Average Adjuster himself commented "not even Average Adjusters most dedicated to their craft like small General Averages usually involving only a few days detention at a Port of Refuge. If these can be removed from the scope of General Average, it is my opinion "that a lot of the opposition to General Average can be removed".<sup>1</sup>

There are some who thought that UNCTAD started its examination of General Average from the proposition that General Average was a conspiracy by developed countries to derive benefit at the expense of Third World countries whose nationals were predominantly cargo interests. To emphasise how wide misconceptions can be, although you may find it incredible, I overheard a conversation on my commuter train to London between 4 men one of whom had received a letter from an Average Adjuster calling for a General Average contribution in respect of a package of household goods which was shipped on board a vessel which had caught fire. Would that I had been able to record that conversation. One of the 4 said that he knew a bit about General Average and offered an explanation.

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<sup>1</sup> C S Hebditch, Chairman of the Association of Average Adjusters address to the General Meeting 10 May 1990

In the event, the debate was brought to an end by the question "Was the ship a British ship?" The complaining cargo owner said "no it wasn't, it was foreign". This produced the reply "I thought as much!". So much for comprehension.

UNCTAD produced a further report in February 1995 following the Sydney Conference entitled "Reform of the GA System". In addition there is the report of Michael Hill following the Sydney Conference, this Report being made to you in Tokyo in 1995 entitled "General Average Reform".

In addition to all this effort of course must be added the work of Nick Gooding and Matthew Marshall leading up to the meeting today.

This all represents a prodigious amount of effort, a prodigious amount of man hours, a prodigious cost, access to a prodigious reservoir of knowledge and experience yet, despite all this, consensus among the users of General Average is still elusive.

May I introduce some statistics of my own? To the statistician all is clarity - if you are not a statistician all can be obscurity. Of your 51 member associations, 33 replied to your questionnaire. Of those 33 countries, 19 voted in favour of the York-Antwerp Rules 1994 in Sydney.

There were 39 nations at Sydney who voted unanimously for the 1994 Rules including such key mercantile nations as China, Greece, Hong Kong, Korea, the Russian Federation, Norway, Malaysia, Singapore, South Africa, Brazil, Chile, Peru and Venezuela.

It appears that no replies to the IUMI questionnaire were received from China, Greece, Korea, the Russian Federation, Norway, Malaysia, Singapore, South Africa, Brazil, Chile, Peru or Venezuela.

This demonstrates very clearly that there are imperfections in the process of consultation.

#### **What are the misunderstandings?**

- (a) Do artificial General Averages still survive - that is to say the ability to claim General Average when there is no peril under Rules X(b) and XI. Professor Tetley (in Fairplay of 5 September) says they do. Average Adjusters, however, are confident that since 1974 "artificial General Averages have not been adjusted". Who is right?
- (b) Is it agreed by all that the York-Antwerp Rules have moved from the concept of "peril" to that of "safe prosecution of the voyage" to the disadvantage of all, including insurers? Or is this the same point?

- (c) Is the principle enshrined in Rule D that General Average is adjusted without reference to fault a serious defect? My own view is that it's appropriate to exclude from the General Average process the examination of fault. To include the examination of fault would, to my mind, simply be an enlargement and a further complication and an added expense. A recent correspondent<sup>2</sup> complains that negligence of the crew member in the navigation of management of a vessel entitles a ship owner to claim General Average contribution from an innocent cargo to an expense which was induced by that negligence. At first sight this is a very telling point. Further thought, however, produces the realisation that before being able to rely on any such defence or contractual terms, a ship owner must exercise due diligence to make his vessel seaworthy at the beginning of the voyage. A ship owner is not permitted to avoid the obligation of providing adequate and competent crew at the beginning of the voyage. The intention of these defences is to make provision for the sort of misjudgment of which even the best of us are guilty, as the correspondent points out<sup>3</sup>.

Without taking sides on that issue, is it not another illustration of divergence of opinion which really should be resolved by further discussion.

- (d) The complaint that the shipowner who operates badly maintained and incompetently crewed vessels can benefit under General Average and the York-Antwerp Rules is to my mind not a criticism of the General Average system, but a criticism of the fact that such shipowners are tolerated and even insured. The question of ship maintenance and manning is being strenuously and properly addressed by both Hull and P & I Insurers, as well as Port State Control. Would not the problem be dealt with by policy wording denying cover, for example, for engine breakdown where the cause of the breakdown was wilful and persistent neglect of maintenance. Has not ITC 1.11.95 addressed this problem already in the due diligence provisions?
- (e) There is still concern about re-apportionment of Salvage Awards which was mentioned in Sydney. The current cost of salvage is a separate concern.
- (f) Costs - the cost of GA is clearly an issue - as far as fees are concerned there is an initiative in the London market to ensure clear understandings of fee notes and to give transparency where perhaps there was obscurity before.

I don't pretend that this is a complete list, but these examples illustrate graphically to me, the extent of misunderstanding which surely can be reduced by further discussion.

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<sup>2</sup> 26 June 1996 letter in Lloyd's List from Ben Brown Clyde & Co

<sup>3</sup> Lloyd's List 5 July, letter from Paul Hinton, A Bilbrough & Co Ltd

It is evident that there has been imperfect communication. In our own commercial lives we all have communication technology. It is a cruel paradox that though we have the technology of communication, real, actual, communication is quite rare.

So far as General Average and the York-Antwerp Rules are concerned, I am convinced that the mechanisms provided by CMI have all the necessary elements to be effective. It is evident, however, that these mechanisms have not been properly used by insurers, particularly over the last few years and perhaps maritime law associations could have been more active in ensuring wide participation in their debate. CMI can move quickly as it demonstrated well in 1990. when Rule VI was amended very promptly to ensure consistency between the York-Antwerp Rules and the principles of Articles 13 and 14 of the Salvage Convention 1989.

It does seem to me that insurers have not taken their places at the table of discussion within each maritime law association. I don't know why. Marine insurers, be they Hull or P & I are key contributors to the debate. Maritime law associations are not, in my somewhat extensive experience, dominated by adjusters, nor indeed was the debate in Sydney dominated by adjusters.

I do not subscribe to any vested interest or conspiracy theory. My own bibliography, to match that of Nick Gooding, will show that some of the best reasoned arguments and proposals for reform have come from adjusters themselves. An adjuster, John Crump, who "crossed the floor", to use an English parliamentary analogy, to join the insurance market, remarked that "even were I to accept that adjusters generally were sufficiently lacking in integrity to strive for the preservation of a costly anachronism which they knew benefitted no-one but themselves, even if I were to accept, further, that the commercial interests concerned were foolish enough to tolerate such explanation, I would still believe that it is not in the interests of adjusters themselves to resist efforts to simplify General Average. It is my opinion that in this, as in other fields, the adjusters' task is to assist, as to achieve what it requires". He concludes that the objective is "the simplest method of settlement consistent with an "equitable result"<sup>4</sup> This is surely a sentiment which everyone can endorse.

Although there was an interval of 20 years between the 1974 revision of the York-Antwerp Rules and the 1994 revision, it is nowhere prescribed that 20 years is the only interval. Indeed it is surely the case that in the fast changing world in which we live, a 20 year period is too long.

I found in considering these issues and the present situation that I came back to the remarks I made at the opening session of the CMI Conference in Sydney "The York-Antwerp Rules are within the trusteeship of CMI - CMI has the authority and mechanism to alter and amend the Rules. While the

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<sup>4</sup> John Crump - speech to Association of Average Adjusters' Annual Meeting 1969 "The simplification of General Average.

Rules do not have the status of an international convention, they have perhaps an even more impressive status since they depend entirely for their existence upon their voluntary acceptance. They must satisfy the needs of their users, ship owners, cargo owners, and insurers. The York-Antwerp Rules must therefore not merely stay in touch with reality, they must themselves reflect current commercial reality. If they do not do so, they will have no value and will find their way sooner rather than later into Jurassic Park. Amendments must have as the prime objective the maintenance or establishment of a greater uniformity, because the Rules are given their effect voluntarily and that is their strength. Any amendments must command respect and as wide an acceptance as possible among commercial interests. The systematic re-examination of the Rules is crucial so that account can be taken of current changes, current attitudes, current case law, current legislation and, indeed, insurance current attitudes and policy forms." Even since 1994, the marine insurance world has gone through an upheaval. New policy forms proliferate, new attitudes proliferate, and the rapid development of the world marine insurance market itself brings tensions. A situation which makes international uniformity even more desirable.

Behind all the rhetoric, and I include my own, there is I am, sure a sincere desire to learn from all the work that has been done. The superb research which Matthew Marshall has carried out, has and will, contribute massively to the task of helping to put General Average into its proper commercial context. The discussions today and the informal discussions which have already taken place in preparation for this meeting have already substantially, I believe, improved awareness and created a much better climate for identifying and solving outstanding issues than has ever existed before. Never before surely has so much material information been available - it must not be squandered.

My own exhortation would be:

- (a) for steps to be taken by I.U.M.I. to establish a realistic dialogue with CMI putting forward the views which will be expressed in any report you produce. York-Antwerp Rules are a living creation and the rate of change in our world makes a wider debate healthy and appropriate.
- (b) I would urge against seeking to write a new set of Rules. You would, I assure you, be throwing out not only the baby and the bath water, but the bath as well. Even Professor Knut Selmer, quoted by Nick Gooding, expressed the view "It may safely be said that General Average is the field of maritime law where the international unification effort has succeeded to the greatest degree". Interestingly he made this remark in his Paper "The Survival of General Average" which was delivered in Oslo in 1958.
- (c) For all concerned in the consideration of General Average to be sure that the views of ship owners and cargo owners are fully canvassed. Do ship owners value General Average? ;

- (d) I have some sympathy with the cynics who say that it is questionable whether General Average is an influence on the minds of those in charge of a ship in a crisis having regard to modern communications. For my part, I believe, notwithstanding the communications, the dilemma remains but it is now the ship owner in his office who is making the decisions, perhaps rather than the previously incommunicado Master on the bridge. The dilemma remains and I for one would not be quick wholly to dismiss this, the "safety" aspect.
- (e) Significantly to improve the liaison between IUMI and CMI and IUMI and AIDE to establish much improved dialogue. P & I Clubs are involved in the consultation process and no Club circular which I have seen comes out against the 1994 Rules.
- (f) As Michael Hill exalted you in the past, take your places at the tables of national Maritime Law Associations and make your influence felt. You are, after all, significant paymasters. I was delighted to hear your President this morning refer to the encouragement and support to be given to your liaison officers further to increase their efforts.
- (g) I believe that significant improvements were made in Sydney in 1994, not least those aimed at improving the speed of the preparation of General Average adjustments. The reply to question 22 of your recent questionnaire seems to indicate that 13 of your members had "noticed a tendency for adjustments to be prepared more quickly in recent years". So far as the "pollution compromise" is concerned, I support the commentator who said that it would be wiser to withhold judgment to see how the compromise works in practice.

There is no professional in the market today who is not concerned to reduce costs to his customer or client and to try to produce the best value for money. If I speak of missed opportunities, I do not believe for one moment that those opportunities are gone for ever. It is evident that there are defects in the consultation process which lead to misconceptions and misunderstandings. It is alarming to note that 19 of your member associations, more than a third of the total, are not represented on national maritime law associations<sup>5</sup>

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<sup>5</sup> Source: IUMI synthesis of replies to questionnaire September 1996 question 2.