

**REPORT OF THE CHAIRMAN OF THE JOINT INTERNATIONAL  
WORKING GROUP ON ISSUES IN  
GENERAL AVERAGE TO THE EXECUTIVE COUNCIL**

1. At its post-Assembly meeting in Singapore on 17th February 2001, the Executive Council appointed the undersigned to organize and chair an international group of concerned maritime industry organizations for the purpose of discussing a wide range of issues and proposals related to general average, with the objective of determining which of these should – from the perspective of industry – be considered by the CMI Working Group on General Average appointed by the Executive Council under the Chairmanship of Bent Nielsen, which is to begin its work in 2002.

2. At the invitation of the Comité Maritime International, the Joint International Working Group met on two occasions at Ince & Co., Knollys House, 11 Byward Street, London. The First Session on 8th May commenced at 10:00 o'clock a.m. and concluded at 3:50 p.m.; the Second Session on 5th December commenced at 10:30 a.m. and concluded at 2:55 p.m. On both occasions the meeting included a brief interval for a “working” sandwich lunch. Participating were:

*- for the CMI*

Dr. F. L. Wiswall, Vice-President and Chairman of the Group;  
Patrick J. S. Griggs, Esq., President;  
Bent Nielsen, Esq., Titulary Member and designated Chairman of the International Sub-Committee on General Average; and  
Richard A. A. Shaw, Esq., Titulary Member and designated Rapporteur of the International Sub-Committee on General Average.

*- for the Average Adjusters*

Richard Cornah, AAA;  
N. Geoffrey Hudson, AAA;\*\*  
Jean Knudsen, Chairman, AAAUS;\*  
John Macdonald, Chairman, AIDE;  
Howard McCormack, Esq., Chairman, AAAUS;\*\*  
Tim J. W. Madge, Chairman, AAA;  
Howard Myerson, AAAUS;  
Rucemah Pereira, BAAA;\* and  
John Wilson, AAA.

*- for the Hull and Cargo Insurers*

Ben Browne, Esq., Shaw and Croft, for IUMI;  
Nicholas Gooding, IUMI;\*  
Eamonn Magee, IUMI;\*  
Matthew Marshall, IUMI; and  
Fred Robertie, AHIS.\*\*

*- for the P&I Insurers*

Hugh Hurst, Esq., IGP&I;\*\* and  
Charles Mawdsley, Esq., IGP&I

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*- for the Shipowners*

Donald Chard, UKCS;

Linda Howlett, Legal Adviser, ICS;\* and

Grant Hunter, BIMCO.\*\*

*- for the Shippers*

Neil Johnson, FTA / ESC\*

(\* = attended First Session only; \*\* = attended Second Session only)

Invitations were also issued to FIATA, IAPH and IICL, but their representatives were unable to attend.

3. Prior to substantive discussion at the Second Session, the Chair distributed a guidance sheet entitled “Considerations for Application to Proposals”; a copy is attached to this Report. All of the issues discussed at the First Session were re-visited at the Second Session.

4. At the outset of the First Session, Matthew Marshall of IUMI made a statistical presentation of insurance liabilities based upon some 2,000 general average adjustments over the previous decade, approximately 200 being post-1995. The figures involved were generally acceptable to the representatives of average adjusters.

5. The conclusion drawn by cargo interests from that statistical presentation is that cargo’s share of GA expenses is unfairly burdensome – on the order of 60% to 65% of losses – and has been so for many years. It is contended by some that the problem is partly a consequence of sub-standard ship operations. The expenses and sacrifices incurred on behalf of the ship by sub-standard operators are in many instances relatively greater than those incurred on behalf of cargo, though this is also dependent upon the circumstances of the case and the relative values of ship and cargo at the conclusion of the venture. The value of ships employed in sub-standard operations will usually depreciate more rapidly. Shippers and cargo underwriters are united in their determination to resolve the problem of imbalance, especially as this may relate to sub-standard ship operations.

6. It was at first suggested from the average adjusters that, rather than amend the York-Antwerp Rules, the better solution might be for the cargo underwriters to re-write their policies re cargo cover, assuming that hull underwriters also agreed that the problem was serious. On behalf of the underwriters it was stated that IUMI did not seek to resolve the problem of sub-standard ship owners and operators, but confined its interest to the reduction of GA costs to the insurers. IUMI did not seek the abolition of GA, but to reform it.

7. It was stated on behalf of the average adjusters that GAs were actually declining at present – a diminishing target. The real problem as seen by IUMI appeared to lie in expenses that were of common benefit to ship and cargo, and generally this problem could best be dealt with by GA adjustment.

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8. On behalf of both IUMI and the average adjusters it was stated that a major problem was the failure of hull underwriters to insist upon the use of the 1994 York-Antwerp Rules; at present the 1994 Rules were employed in only 50% of adjustments – the other half were done in accordance with the 1974 or older versions.

9. It was suggested from the underwriters that “port of refuge” expenses were another aspect of their problem; such expenses were being allowed even though the vessel was no longer in a state of peril. It was pointed out by the average adjusters that if in respect of all sacrifices in GA the liability were allowed to lie where it fell, one result would be that cargo underwriters would pick up the costs of transshipment from a port of refuge. For IUMI, the underlying issue at present was whether claims in GA should be based on “Common Benefit” or “Common Safety”. For example, should any expenses be allowed once the vessel was no longer in imminent peril? Transshipment costs should be disallowed, as should the costs of temporary unloading and reloading. The test of The Makis should be applied. Many such expenses would obviously move over to the hull underwriters, or move under a new extension of hull cover. From the average adjusters it was suggested that the means of dealing with the range of port of refuge expenses needed to be established before any changes were made to the York-Antwerp Rules.

10. To IGP&I the IUMI proposal gave the appearance of an attempt to shift liability. For IUMI that was not the objective and was incidental to the reduction of GA costs to the cargo underwriters. From CMI it was observed that the elimination of the nautical fault defence in a new transport convention would have an obvious impact.

11. For IUMI the proposal was, in essence, to make the change from GA to a series of Particular Averages on port of refuge claims. To the FTA / ESC there were analogies to be drawn from air transport, where GA does not exist. From CMI it was asked what recourse the container lessors would have in such case, as they do not declare a GA.

12. It was pointed out that if port of refuge claims were not adjusted, the actual expenses would continue to be incurred and disputed. For the average adjusters, it was not always easy to determine the point at which a voyage became frustrated; likewise, the adjustment of post-peril expenses would pose considerable difficulties. It was recognized, however, that while certain port of refuge expenses such as fuel might properly be allowed, others such as wages should be excluded as expenses in GA. There was a consensus that issues in respect of certain port of refuge expenses should be considered by the GA Working Group.

13. On behalf of ICS and BIMCO it was noted that the latter was now in the process of drafting “absorption” clauses in the context of bills of lading and charterparties. The suggestion was made that sacrifices in GA should be excluded from such clauses. There was a consensus that the CMI WG on GA should further examine absorption clauses when BIMCO had concluded its current work, even though this might not have implications for amendment of the York-Antwerp Rules.

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14. It was stated on behalf of IUMI that in salvage cases there had already been an apportioned award, so the GA adjustment was in actuality an unnecessary re-apportionment. IUMI proposed that salvage claims be excluded from GA, and it was suggested that this would substantially reduce costs; likewise the exclusion of differentials in salvage settlements and lawyers' fees and security costs. It was noted that at the CMI Singapore Conference a majority of those indicating an opinion concerning GA adjustments in salvage cases viewed the issues arising in this regard as deserving of consideration in the context of the York-Antwerp Rules.

15. For IUMI it was proposed to eliminate commission and interest expenses in order to reduce GA costs. From the average adjusters it was pointed out these were inducements to 'finance' a GA. It was generally agreed that one aspect deserving particular consideration was the fixed rate of interest stated in the York-Antwerp Rules.

16. IUMI wondered why "ballast GAs" were allowed; it was pointed out by the average adjusters that this was actually a hull insurance contract issue, unrelated to GA. There was no other support for an examination of this issue by the GA Working Group.

17. The problem of "temporary repairs" to remove a vessel from a position of peril was raised by IUMI. On behalf of average adjusters it was suggested that while the problem in and of itself did not warrant amendment of the York-Antwerp Rules, if they were otherwise to be amended, then the matter should be considered; temporary repairs should not be allowed as an expense in GA, but should be treated as a "substituted expense". On behalf of the CMI it was observed that even if temporary repairs were first dealt with by changes in the insurance contract, a solution to the GA problem could only be achieved by eventual amendment of the Rules.

18. The issue of time bar was raised by IUMI, who suggested that in order to strive for uniformity and to speed up the handling of claims, including adjustments in GA, appropriate time-bar periods should be inserted into the York-Antwerp Rules. It was pointed out from the CMI that such contractual time bars could only be effective if the applicable national law gave effect to them, or if they fell within the period of any statutory time bars applicable under national law. It would require a questionnaire addressed to the Member Associations in order to make a catalogue of such time bars – a daunting task. Nonetheless it was the feeling of IUMI that if the Rules contained time bars the commercially-minded States would eventually bring their national law into line with the Rules. IUMI has proposed a model time-bar clause.

19. The matter of "deductibles" was raised from the average adjusters. The most common application would be in the case of engine repairs, where in the absence of a deductible clause costs of repair in the course of a voyage were presently being allowed as expenses in GA and gave rise to the adjustment of relatively small claims. It was pointed out that it would be very difficult to apply such a clause to actual circumstances, and in the course of discussion a consensus emerged that the difficulties probably outweighed the benefits.

20. It was suggested by IUMI that damage consequential upon error in management of the ship, such as breaches of the ISM or STCW Codes, or Classification Society Rules, should be

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excluded from GA. From CMI it was pointed out that the draft Convention on International Transport Law that would shortly be presented by CMI to UNCITRAL abandons entirely the defence of error in management, and that it would be inconsistent for CMI to propose abolition of the concept in one context while assuming its long-term retention in another.

21. From the average adjusters the issue was raised whether, at least in cases of sacrifice of property in GA (which might include, e.g., damage to cargo during discharge in a port of refuge), the liabilities should not properly lie where they fall. It was proposed that this should be studied by the CMI Working Group on GA, and this appeared to be the consensus.

22. It was suggested that the Rule 11(d) exclusion in respect of pollution damage added to the York-Antwerp Rules in 1994 ought to be deleted; that this amendment of the Rules had been an unprincipled compromise. Discussion established the general view that the time was not yet ripe for a return to this issue.

23. From IUMI it was proposed that adjusters' fees be excluded from GA. From CMI it was observed that, realistically, this proposal had little to no chance of success.

24. The allowance of "substituted expenses" in mitigation of damage was raised on behalf of IUMI. It was proposed that these expenses be disallowed if the concept of "Common Safety" were accepted as a basis for revising the York-Antwerp Rules.

25. With the exception of nos. 20 and 23 above, all of the foregoing proposals and points were discussed as fully as desired by any of the participants, and no other proposals were made or points raised for discussion. Based upon the discussions taking place at both Sessions of the JIWG, I conclude that:

The following issues **should** be taken up by the CMI Working Group on General Average, though not in each case directly related to possible amendment of the York-Antwerp Rules:

- **Port-of-refuge expenses** – to consider whether certain expenses currently allowed (such as wages) should be excluded, and whether such an incremental approach is preferable to a blanket exclusion of all such expenses;
- **Absorption Clauses** – (exclusion of sacrifices in GA) to be considered when BIMCO completes its current work;
- **Salvage claims** – to consider as set out in § 14 above;
- **Interest expense** – to consider the rate of interest stated in the YAR, and how this might be governed by a formula rather than a set figure;
- **Temporary repairs**;
- **To let liability lie where it falls in sacrifices of property**;
- **Time bar** – with a low priority for consideration, in view of the amount of research required in order to fashion any truly useful solution; and
- **"Substituted expenses"** – as one part of the consideration of the "Common Safety" vs. "Common Benefit" approach; this would be a fundamental change in the philosophy of GA, and should not be taken up until all the specific issues and proposals have been decided upon.

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The following issues should not be taken up by the Working Group, either because they are not yet ripe for consideration, were withdrawn from consideration, or would be a complete waste of the Group's time:

- **Commission expenses;**
- **“Ballast GA”;**
- **Deductible clauses;**
- **“Error in management” exclusions;**
- **Reversal of the 1994 Rule 11 (d) compromise; and**
- **Exclusion of adjusters' fees.**

Respectfully submitted,

Frank L. Wiswall

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**ATTACHMENT TO THE REPORT**

**CONSIDERATION FOR APPLICATION TO PROPOSALS**

**1. Best Means of Accomplishment**

Is the best means of accomplishing the objective

- (a) by changes in the York-Antwerp Rules?
- (b) by changes in the contract(s) of insurance?
- (c) by both means?
- (d) Why?

**2. Effects upon Cost**

- (a) What cost burdens will be shifted by the proposal?
- (b) What costs may be increased by the proposal?
- (c) What costs may be decreased by the proposal?

**3. Collateral Effects**

- (a) What positive collateral effects, if any, will this proposal have?
- (b) What negative collateral effects, if any, will this proposal have apart from increases in cost for one or more of the parties?

**4. Other Considerations Unique to this Proposal**

Are there any?