

**APPENDIX B****GENERAL AVERAGE REFORM - THE IUMI POSITION\***

EAMONN MAGEE

Ten years ago this year I began looking at the subject of General Average. For my sins I was the nominee from the Irish Maritime Law Association to the International subcommittee set up by the CMI and chaired by David Taylor – a subcommittee charged with bringing forward proposals for a review of the law of General Average and the York Antwerp Rules 1974 to the CMI's Sydney Conference in 1994.

It was on a crisp winter morning then, in Brussels, that I first worked with Geoffrey Hudson and at the end of that first subcommittee session I invited him to scribble on my copy of his work on General Average. Although it would not qualify as my selection for Desert Island Discs alongside the Bible and Shakespeare I do recognise it for the scholarly work that it is, as I equally recognise the formidable adversary that Geoffrey is in any discussions on General Average.

IUMI recognises that it was late in Marshalling its arguments in advance of the Sydney review by the CMI and realises that one view might exist within the CMI that to look at the system of General Average again so soon after 1994 may not prove popular. As against that, it could be argued that recent momentum in terms of the focus on General Average should not be lost and that the opportunity should be seized at the start of the new millennium to address the ongoing practice of General Average adjustment through the mechanism of the York Antwerp Rules.

IUMI is unashamedly interested in the operational aspects of General Average adjustment because as a market it is the principal if not sole payroler of the product. ( I don't know how many General Average adjustments are drawn up in situations where no insurance is in place in respect of the various property interests but I suspect they are few. (Perhaps Geoffrey can help us here.) The Marine Insurance industry is under threat in a changing Global marketplace and if it is not to be swallowed up by the very much bigger non marine market, where all embracing product covers are increasingly the order of the day, then of necessity there has to be a focus on those areas where the industry itself adjudges that there is an unnecessary duplicity of expense, an expense which at the end of the day is picked up by the industry and guess what

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\* Paper delivered at the Toledo Colloquium in September 2000.

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– passed back to the customer ultimately. Who are our customers ? – Ship and Cargo Interests for whom General Average cover is way down their shopping list at premium negotiations.

This should be of concern not only to Underwriters of course but to all those who work in the sector, to consumers of marine insurance services and to all service providers to the Industry. General Average adjustment is part only and I suspect a small part of an Average Adjusters portfolio. The balance of that portfolio must surely depend on the *health* of the Industry within which they work. IUMI's General Average concerns are aimed at contributing to that *health* overall.

The CMI will be aware of the recommendations of the IUMI General Average - Drafting Working Group ( which accompanies this paper in appendix 1.) and hopefully at this stage have received the views of National Law Associations in response to those recommendations.

It is not my intention to deal specifically with each of the recommendations in the IUMI paper. We would like to think that such an examination will be undertaken by the CMI working group going forward from this point and that IUMI would be invited to participate in the work of that group but it is incumbent on me on IUMI's behalf to re-iterate some of our long stated concerns as a preface to our recommendations.

The total spend on General Average disbursements is in the order of \$300 million annually ( for comparison purposes the annual cost of Hull total losses is in the order of \$600 million.) Of this figure ( \$300m ) some 67% is funded by the cargo interests or more accurately by the Underwriters of the Cargo interests. By far the smaller contributor to the cost of General Average is the Hull interest or more accurately the Underwriters of the Hull interest. The inequity of this situation has been referred to repeatedly, particularly in light of the causes of general average which tend to be almost exclusively related to issues involving the management of the vessel such as engine breakdown, mechanical and structural failure, grounding through negligent navigation and so on, and recognising that there is an argument for continuing General Average in certain limited classes of situation, IUMI recommendations are aimed at addressing these inequities.

Behind the proposals for reform is the desire to limit recoverability in General Average to expenses incurred only "in time of peril" so that for example when a port of refuge has been reached and the acting peril averted no further expenses would be allowed in General Average. We feel that the concept of "Common Maritime Adventure" currently forming the basis of the York Antwerp Rules" should be replaced by the concept of "Common Safety", consistent with the "acting peril" argument and these considerations are the basis for our proposed redefinition of General Average at paragraph 1 of the recommendations.

#### Proposed Re-definition

"There is a General Average act when and only when any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety in time of peril for the purposes of preserving from peril the property."

*General Average*

We address our concerns on the “ fault ” issue at paragraph 7 of the recommendations. The primary causes of General Average vis poor maintenance, particularly in the engine room, can be addressed with a recommendation that the revised rules contain a clause preventing recovery in General Average where there have been breaches of the ISM Code, the STCW Convention and/or any breaches of the rules of the Classification Society with which the vessel is entered. This recommendation promotes compliance with Safety Conventions and addresses the inequity of requiring Cargo interests to contribute to expenses incurred where there has been vessel non compliance with safety requirements – and so we have our Rule D recommendations.

It is proposed that substituted expenses, most often encountered in the area of transshipment of cargo from a port of refuge to final destination, be abolished. This is a logical sequitur from our position that only expenses incurred in the grip of a peril be allowed in General Average. Similarly we recommend that Rules X and XI (a) (b) and (c) expenses should be disallowed in General Average

One area of particular contention for Underwriters in any consideration of General Average is the unquestionable duplicity of effort and expense which sees Salvage expenditure redistributed in General Average. We quote Ian Stevens of LCO when he put it thus:

Ian Stevens

“What really aggravates me – no I do not get hysterical – are those situations where each party to the adventure provides it’s own security to Salvors and separately settles its proportion of the salvage remuneration. Why in the name of the York Antwerp Rules, is it necessary to go through a lengthy and costly process of re-apportioning the salvage settlements in General Average, often in situations where salvaged and contributory values are more or less identical? And why should one or more parties who have had the expertise and good business sense to settle with Salvors for a lesser remuneration than paid by other salvaged interests lose the benefit of their skill, because all payments are thrown into the melting pot of General Average?

All this nonsense only adds to the cost of General Average”

IUMI would like to see the replacement of Rule V1 with a clause along the following Lines;

- (a) salvage payments ( including legal fees associated with such payments) shall lie where they fall and not be brought into General Average save only that any amounts paid by one party to the General Average in respect of the proportion ( calculated on salvaged values and not GA contributory values) of another party or parties shall be apportioned between the parties to the General Average in accordance with these rules
- (b) in paragraph (a) of this section references to salvage payments and the like expressions shall be construed as excluding payments under Article 14 of the 1989 Salvage Convention and similar provisions (including Scopic).

The question of repairs is addressed in paragraphs 21 & 22 of the position paper. Some recommendations in respect of deductions new for old appear in paragraph 21. The question of recoverability of temporary repair costs under the

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existing Rule XIV is addressed in the broader position disallowing all expenditure incurred following arrival at a port of refuge. Temporary repairs could qualify where they were incurred in circumstances of actual operative peril.

IUMI is concerned also at the existing practices in relation to the payment of Commission on General Average expenditure and the payment of interest on Adjustments and our position here is clarified in paragraph 27 of the Drafting Group's paper.

CMI has as one of its principal objectives, the search for uniformity in matters of private international maritime law and IUMI can anticipate the argument that if a set of Rules ( regardless of their content ) has universal application as for example is largely the case with the York Antwerp Rules, then issues of uniformity do not require that the interests of a single lobby group such as IUMI be necessarily accommodated. Against this it must be argued that:

- CMI were sufficiently concerned at the operation of the system and the application of the Rules to make significant recommendations for change in 1994. Concerns continue to exist and CMI, having rightly taken up the challenge then can make a further meaningful contribution now by addressing the remaining concerns.
- Since 1994 there have been significant developments aimed at a safer maritime environment for all. One thinks of the ISM code, the STCW Convention, the work of the CMI's own committees on for example the liability of Classification Societies and the search for new liability regimes governing transport by sea. Here is an opportunity to focus further on those very issues and to send a message to sub standard operators that their losses will not be made good in General Average.
- Insurance is the life-blood of international trade. Whilst traditional products are changing, and with that change comes a threat to the specialised marine insurance industry, that very change is coming about because of poor results fuelled by duplicity of cost and expense. Here, in the area of General Average, is one small opportunity to do something about that in the interests of the Industry, the Customer, the Supplier and in the interests of a safer and cleaner marine environment .

The argument is often made and the question put:

“What incentive is there to a Shipowner to get Cargo to a place of safety where his expenses are not guaranteed in General Average and where his freight may be at risk?”

The answer has to lie in commercial realities. General Average should not be a mechanism to subsidise sub standard operators. These operators deserve no place in international trade.

### Conclusion

Where genuine instances of peril are encountered IUMI is supportive of a limited and equitable application of General Average addressing the release of Ship and Cargo from that peril. A revised version of the existing York Antwerp Rules can bring that reality nearer and address the concerns of all legitimate interests.

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