

GENERAL AVERAGE - TIME FOR A CHANGE

In "The Work Wealth and Happiness of Mankind" published in 1931 H.G. Wells stated "In England we have come to rely upon a comfortable time-lag of fifty years or a century intervening between the perception that something ought to be done and a serious attempt to do it".

My recent research leaves me to believe that H.G. Wells was right and he might well be considered a prophet by marine insurers if we look at his comments in relation to the call to "jettison" General Average".

Let us go back in time to the year 1873. Queen Victoria was on the throne and Gladstone was Prime Minister. In the English courts a controversial decision was made in the case of *Stewart v West India and Pacific Steam Navigation Company*, where it was held that damage arising out of the efforts made to extinguish fire was recoverable as a general average sacrifice. Mr. Douglas Owen, for many years Secretary, and afterwards Chairman of the British Association of Average Adjusters commented some time later, "Thereupon, the barriers were broken down and one kind of damage after another was allowed in General Average and any damage that can by hook or by crook be twisted into the shape of voluntary sacrifice is made the occasion for a voluminous and costly General Average adjustment".

In 1877 the Committee of Lloyd's was invited to attend a meeting for the Association for Reform and Codification of the Law of Nations at Antwerp. Representatives were appointed and carried with them a letter signed by the then chairman, Mr. Goschen, which opposed any extension of General Average and went even further by saying "There is a strong feeling in this Committee that the differences which exist in various countries upon this subject would be best met by abolishing General Average altogether".

On their return from Antwerp the Lloyd's delegates formed a sub-committee and a formal report was signed by the secretary of Lloyd's.

The report was very critical of the "vast and complicated system of General Average which by the consequent expense and delay had become almost intolerable".

The committee were of the opinion that the theory of General Average should be contracted as against the recent suggestions which were uniformly in the direction of extending it. They felt that every interest should bear its own particular peril and went as far as to state that General Average should be abandoned on the basis that most interests were insured. The committee warned if the area of General Average was increased it would lead to great abuse or even to fraud and at a minimum their representatives at the Antwerp were urged to advocate a return to the simple concept of the original law of 'sacrifice for safety'.

In the same year on the 11th December, there began an extraordinary exchange of correspondence in *The Times* newspaper. A correspondent signing off as J.L.W. opened with a letter to the editor which was critical of the paper's report of the Antwerp meeting. In particular he felt that the Lloyd's position had been dealt scant justice arising from the appearance of the Society as protesters! A position I myself experienced first hand at the 1994 C.M.I. conference debate on the York-Antwerp Rules in Sydney! But back to the letter, J.L.W. explained the conflict between the common law position and laws and customs of General Average. He pointed out that no charge was made to passengers on vessels which incurred General Average expense and that there was no similar sharing of loss or expense on the inland leg.

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He suggested that there were fraudulent claims, delays of months and that the multitude of parties claiming fees rendered General Average "an obnoxious thing".

He went on to state that it would be a great relief to trade (the customer!) if General Average was abandoned reasoning that the saving would be so great that it would be difficult to estimate. He warned that shipowners, being very powerful in some trades, might by power of monopoly arbitrarily insert the York-Antwerp rules without further discussion. He concluded that a return to a system of simplicity would not be easily attained, but if it were for the advantage of commerce a better system could prevail.

On the 17th December, a letter was published from Richard Lowndes, Chairman of the Liverpool Committee. He denied the correctness of much of J.L.W.'s letter and put forward the case for uniformity of approach among the several maritime countries, on the law of General Average. He put forward an agreed standard for reform, namely that General Average should be payable in accordance with York and Antwerp Rules, which had been approved by many of the ship owning and other mercantile associations. However he went on to say that this would not be introduced except after full and public discussion so as to satisfy all parties interested that the proposed change is a good one, and to give merchants time to get their policies adapted to the new terms.

J.L.W. replied to the points raised by Mr. Lowndes with a letter published on the 20th December and suggested that both their points of view acknowledged a grievance and both suggested a remedy. The recommendations of one tending towards extension and complexity, and those of the other to reduction and simplicity. Quoting directly from his letter J.L.W. stated "that the present system of General Average must be either abandoned or greatly extended; if the latter course be pursued and the York-Antwerp Rules accepted it will extend the area for that ingenuity of fraud which seems gradually reduced to a science".

"I agree that no-one could claim space in The Times to discuss the technicalities of this part of mercantile law, but there is no reason why its principles should not be stated there, it is the only satisfactory mode of bringing into light what has become almost an occult science, confined exclusively to experts. It would be well if merchants and all those who have large foreign trade could share in the study of this subject in which they are really interested".

On the 21st December a letter was published from Mr. Manley Hopkins, representative at the Antwerp Conference of the Average Adjusters' Association of England in which he strongly defended General Average. He stated "it is founded on the plain dictates of natural right. Twelve hundred years before the Christian era the Rhodians had enacted a law on the subject, and since then other maritime nations had successfully made regulations for its action. The proposal to abolish General Average is a proposition to sponge out an important page from the customs and codes of nations".

I was not alone having read Mr. Hopkin's letter believing that he had totally lost the plot. Mr. Joseph Hillman, one of the representatives of Lloyd's at the Antwerp Conference had his letter published on the 24th December. His letter began "I fear that the letter of Mr. Manley Hopkins will not greatly add to the enlightenment of your general readers of this important but somewhat technical subject". He went on to describe the system as a "nest of fraud and abuses, a lurking place for speculation and waste. It was in its origin a cumbrous form of partial insurance the necessity for its use is rendered obsolete by modern underwriting". He concluded by saying that the chief interest of the subject for the general public lies in the fact that the waste and

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unproductive outlay incidental to a system which violates the soundest principles of the economy are, in the long run, at the charge of the consumer.

The final word in this exchange of correspondence fell to a Mr. Henry J. Atkinson who as Chairman of the "General Ship Owners' Society" felt sufficiently moved by the topic to pen a letter to The Times on Christmas Day which was published on the 27th December. His letter added little to the debate but reiterated the invitation to meet with representatives from the Lloyd's market.

There was growing global concern on the General Average issue as evidenced by an article published in the Lloyd's List on Thursday, August 14, 1879, which reported support for the Lloyd's position on a governing international law, from Underwriters in Holland. They were not favorably disposed towards this movement because they did not see the necessity for such international law and if international rules were to be laid down they favored British General Average law. They wanted limitation not extension of General Average especially with regard to the expenses in a port of distress. Experience led them to believe that the more that was refunded through General Average the more the expenses increased.

The Dutch underwriters warned that the average adjusters were endeavoring to insert in Bills of Lading, policies, charter parties the words "according to the York and Antwerp" in order to make these rules applicable, without a modification of the law. They did not however believe that this would succeed. They were wrong!

Moving into this century Mr. Wellington Williams presiding at the centenary meeting at the Liverpool Underwriter's Association in 1902 said:

"It is admitted on all hands that owing to the increase in the size of vessels and the great diversity of their cargoes there are many abuses in connection with General Average, and the enormous charges which are connected with Statements are out of all proportion to the amount involved".

At the meeting of the same Association five years later in 1907, Mr. Williams stated:

"General Average is a remnant from a primitive age, and grew up in times altogether different from the present, and at the present time it seems to be entirely out of harmony with the conditions of modern commerce. Ships are much larger and carry larger cargoes and the expense, trouble and time wasted upon General Average statements is well known to you all. I have never publicly advocated the abolition of General Average, but I have been in sympathy with those who have, and I think that the time has come when it will have to be seriously considered. Average statements are increasing in volume, and the tendency is still to increase, and if not faced, our difficulties will increase to. I think the matter is well worth the consideration of Underwriters, shipowners and merchants, to see if some means cannot be adopted for dealing with General Average".

In 1913, Mr. H.K. Fowler, Chairman of the Association of Average Adjusters of the United States, addressed their annual meeting on the "Burden of General Average". It was a thoughtful and well presented paper. He put forward a view that marine insurance provided a ready and inexpensive way by which either shipowner or cargo-owner can be and is indemnified directly for that loss by his Underwriter without reference to the liability of the other parties to the adventure to contribute.

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He also referred to the 1877 debate and compared the conditions with those existing in 1913. "In 1877 our largest steamers did not exceed 5,000 tons. Today we have steamers of 45,000 tons and carriers of 20,000 tons of cargo. It is not an uncommon thing, especially in our coastwise trade for an adjuster to have to deal with 3,000 or more bills of lading in respect of a single cargo. The time, trouble, expense and delay involved are out of all proportion to the benefit achieved and a system, equitable in theory and in other times valuable in practice has become out of harmony with the spirit of the age". Today, in 1996, the largest container vessels can carry in excess of 6,000 TEU's many of which may be groupage loads, so the number of Bills issued would certainly be in excess of 6,000!!!

Mr. Fowler went on to state that "Three parties are concerned and would be affected by change - shippers, shipowners and underwriters. The shippers would be utterly indifferent; they collect their losses from underwriters and there is not the slightest reason why they should bother their heads as to whether their underwriters do or do not recover from third parties. It is difficult to see any advantage to shipowners by a continuance of the present system comparable to the gain to them by its abolition".

Moving onto 1915, Mr. M.C. Harrison from the United States of America presented a very hard-hitting paper entitled "The Abolishment of General Average". He suggested that "Commerce by sea has been fettered by this growing land barnacle for nearly three thousand years. It was useful prior to the introduction of marine underwriting, but has served its time, and should not be allowed to remain as a drag upon the interests of mankind". He was most certainly not sitting on the fence! In presenting his arguments and his plan he gave three reasons that demanded abolishment of the system completely.

First - the majority of the parties interested in the maritime venture at the present day do not understand the system of General Average, and it is so intricate and cumbersome that, in the nature of things, it is not possible for them to gain, in the ordinary channels of commerce, even a fair understanding of its workings.

Second - the amount of work required by various interested parties is getting too great.

Third - the expense is enormous.

The next paper of note was read before the Insurance Institute of Liverpool on the 11th February 1925. It was presented by its author C.H. Johnson A.C.I.I. of the Mersey Marine Insurance Company and was entitled General Average - Abolition Codification or Reform.

The paper was very well researched and raised many of the objections I have already mentioned. One new point and well made, was the development of the international cable and telegraph systems of communication which place the ship's master in almost continuous communication with his owners, so lessening the burden of responsibility which rested upon him. Mr. Johnson commented that "the customs of the era of the stagecoach surely need amendment in order to make them acceptable to an age in which wireless telegraphy enables the globe to be circled in a few minutes". I wonder what comment he would make today in an age of satellite communication and computer technology.

Mr. Johnson pointed out the absurdity regarding all parties contributing following the use of ship's machinery, coal, stores and materials in an emergency, for common safety, notwithstanding that they are actually put to the very use for which they were provided. He also

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quoted The Hon. Secretary to the Maritime Section of the Stockholm Conference (Sanford D. Cole), who whilst admitting that the logical method of reforming General Average was its abolition, suggested that the real obstacle to that course of action was "vested interests". I wonder to whom he was referring?

Moving onto 1937 Mr. E.W. Murray chairman of the American Association of Average Adjusters addressed the annual general meeting with a most amusing paper General Average - A spoof and a defense. I do not believe anyone here today has ever found anything remotely amusing about General Average so I shall give a flavor of this paper:

"Once there was an honest captain who took great pride in his ship. He used to make the crew scrub down the decks each day and would become very angry if ever the stokers allowed the fires to go out under the boilers or if the mess boy did not wash the dishes after each meal. But for all his harsh discipline, he was a kindly man and was generally well liked and almost respected by all the members of the crew, including the under-officers and the cabin boy.

One evening while the captain was sitting on the deck talking with the first mate about how well he ran the ship, he happened to think of something and he said to Mr. Briggs - for that was the first mate's name - "Mr. Briggs, we haven't had a General Average for fourteen months come next Sunday. Don't you think we have put it off rather long?" "Strike me pink", said Mr. Briggs - or at least he said a nautical equivalent to "strike me pink", "I'm sorry Captain, I hadn't noticed it before - I'll attend to it right away Sir. Why if we don't look out we will forget all the requirements and we won't know how to have a proper General Average. It's very technical - the General Average - and one can easily get out of practice". "Quite right Mr. Briggs", said the Captain, "but I didn't mean to criticize you and there is no need for undue hurry. Let's think it over. I may have a suggestion or two to make". "Mr. Briggs" the Captain said, "my idea of this proposed General Average is to time it for New Orleans. A little stranding - no real bottom damage you understand - a little machinery trouble - enough to sight the bottom and overhaul the machinery, you understand - about two days, and not later in New Orleans than next Wednesday. As you know from the radio advice received today my relative is going to be in New Orleans next Wednesday. She's my wife's cousin once removed and I haven't seen her for over a year, but she took a fancy to me years ago and I don't want to disappoint her".

"Oh" said Mr. Briggs enthusiastically, "I think I understand about the stranding - has she a sister? - I know a place where I can put her - the vessel I mean soft bottom - no danger - will have to work the engines a little to get her off, but will guarantee you will be in New Orleans next Wednesday. Has she a sister"?

To find out the answer you will have to buy the book or see the film. However you will only need one guess as to who picked up the bill for the expenses!

In 1946 I.U.M.I. appointed an international committee under the chairmanship of Swedish underwriter N.E. Kihlbom. The task of the committee was to be:

- a. Objective investigation of the criticism of the General Average system and of proposals for its abolition.
- b. To give the underwriters' point of view on the question whether any changes should be made or what measures should be taken in order to eliminate the shortcomings which have appeared in the application of General Average.

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The committee's report to the council was presented in 1948. In his book "The Survival of General Average", published in 1958, Mr. K.S. Selmer summarized the findings of the committee as being strongly against an abandonment of General Average on the grounds that the institution was necessary to protect the impartiality of the master and his freedom of action in dangerous situations.

Mr. Selmer's thorough and detailed study however came to a different conclusion. He favored a complete abolition of the General Average distribution. Any sacrifice, including the cost of seeking a port of refuge and staying there should be borne by the party who is hit by the loss or incurs the expense. Only when salvage money is incurred should a proportional distribution take place.

In the years that have followed there appears to have been less debate, but there were two important papers produced by UNCTAD in **1991** and 1994. However, I believe Mr. Marshall's paper and statistics presented to the I.U.M.I. conference in Toronto has motivated us to examine all aspects of General Average for the benefit of the industry's client base. Some shipowners have already reached their own conclusion on the commercial viability of General Average and have agreed with their customers not to seek contribution. Ultimately this is how General Average will be abolished but we have to assist in the process by making the declaring of G.A. a much less attractive and cost effective proposition to those shipowners who regularly take advantage of and abuse the system.

How do we do this?

Firstly, we must recognize that it would be difficult to abandon G.A. altogether. It might be replaced by claims at common law for restitution in the U.K. for example. Also if the loss lay where it fell there would have to be some mechanism for collection of expenses paid by the shipowner on behalf of cargo. We do need however to rein back the progressive extensions in the scope of General Average that have taken place over the last 100 years or so with a view to lessening the burden on property underwriters worldwide. It is not beyond our combined wit or wisdom to produce a readily understood set of rules paying only sacrifice or expense incurred whilst in the grip of a peril, until such time as common safety is reached. In other words do away with safe prosecution of the voyage and all the layers of extraneous expense that go with it. Preliminary work on this has already been undertaken and draft rules could be quickly drawn up.

Why have all clarion calls for change failed over the past 100 years or so? Probably because those with vested interest have had more influence in the custodianship of the rules and because the marine insurers have lacked the inspiration to drive the radical changes that are so clearly necessary to those who have studied Mr. Marshall's statistical data.

Mr. Marshall's statistical report was drawn up following an examination of 1,700 individual GA case studies. The report was first delivered in 1994 and was further updated in 1996. A smaller sample of cases were reviewed last year and the findings are unchanged from the earlier studies.

It was an indepth study that looked at the

- number, size and cost of GA's

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- why GA arises and to which type of ship
- how costs are allocated between hull and cargo
- how much the system costs to administer
- how long the process takes

and

- the potential impact of absorption clauses.

The headline numbers that alerted IUMI to the seriousness of the problem were:

ANNUAL COST of GA \$300,000,000

FEES of ADJUSTMENT 10%

INTEREST and COMMISSION 12%

SALVAGE RE-ADJUSTED THROUGH GA 40%

CREW WAGES 4%

Of the causes of GA a staggering 39.7% were caused by engine or other mechanical failure!
The next largest causation was grounding at 21.7%.

Following Mr. Marshall's and my presentation in 1996 the IUMI executive council set up a group under the Chairmanship of Mr. Jorgen Steffensen and it was open to all member associations to put forward a representative. The inaugural meeting was held in London in 1997 where 17 countries were represented, including the USA by the indomitable Walter Kramer. At the conclusion of this meeting a steering group of 8 people was set up, split between hull and cargo underwriters and claims adjusters and Walter Kramer. Neither Ben Browne nor I were involved.

The Group reported at the IUMI Berlin conference in 1998 and the report was adopted by the executive in 1999 with a view to being passed onto CMI as the basis for a review of the York Antwerp rules. The IUMI report was debated at the CMI conference held in Singapore in 2001. In a meeting of 140 people all but four voted to take the majority of the report forward. A CMI working group consisting of adjusters, insurers, P&I clubs, shipowner representatives and shippers met twice under the chairmanship of UXMAL and CMI council member Frank Wiswall to formulate the strategy and composition of the drafting team. Howard Myerson represented the US average adjusting community. The drafting team was set under Bent Neilsen and included Howard McCormack and Ben Browne. Their report forms the proposals to amend the York Antwerp Rules at the forthcoming CMI conference which will be held in Vancouver in May. Not all the IUMI proposals survived the long journey to Vancouver but those that remain are a sensible compromise that will benefit all but poor quality shipowners by a reduction in the cost and scope of GA.

It has been suggested that all of this is a cargo inspired plot to shift costs away from their account and it has no real level of support and has been driven forward by a gang of four based in the UK and Ireland. Well nothing could be further from the truth - IUMI, representing all the

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marine underwriting classes, would not have adopted a report on that basis and the CMI conference in Singapore and the colloquium in Bordeaux last year would not have carried the proposals forward if that were the case.

You will probably hear this morning lots of seemingly practical reasons why the new proposals will not work and it may be suggested to you that they will add to confusion and delay. These are type of arguments put forward by those with a vested interest in the past that has made reform so difficult.

If members of the AIMU want to assist customers of the industry by promoting a more sensible system of claims management whilst reducing the level of the cost of GA then you should encourage your MLA to vote in favor of change at Vancouver. You, as marine insurers, bankroll the system of General Average - not the average adjusters or lawyers - they are your servants - yet it is their voices that are being heard arguing strongly against proposals being put forward by your International Union. If these proposals don't go through you will continue to flush hard earned premium down the black hole that is General Average.

I leave you with one final thought and that is if we were inventing something called marine insurance today we would never have dreamt up a system of claim payment, for one type of loss, that is so complicated as General Average. We would, I suggest let the loss lie where it falls and pay our respective hull and cargo claims.

Nick Gooding
20th January 2004