GENERAL AVERAGE
A POSITION PAPER BY THE INTERNATIONAL CHAMBER OF SHIPPING

INTRODUCTION

The purpose of this paper is to draw attention to the impending review and possible reform of the York-Antwerp Rules at the CMI conference in June, 2004. This reform movement has been headed by UK cargo insurers within IUMI who are keen to restrict the scope of General Average in a way that may threaten the working effectiveness of General Average and be to the disadvantage of shipowners by reducing amounts recoverable in general average and affect claims on hull insurers.

This paper reviews what general average is, its role in modern maritime commerce, the proposed changes, why these changes may not be welcomed and action to be taken to express views on this issue.

1. WHAT IS GENERAL AVERAGE

General average is a method of allocating and spreading the costs of dealing with a maritime casualty among those parties who benefit by ship and cargo being saved.

The principle is said to be as old as the oldest commercial sea voyages. The modern system of determining the basis, apportionment and allowances in general average is set out in the York-Antwerp Rules (YAR), now under the custodianship of the Comit Maritime International (CMI). YAR were developed towards the end of the 19th century and have been revised at regular intervals (every 20 —25 years on average) since then, most recently in 1994.

Claims in General Average fall into two categories:

i) Losses and sacrifices for the common safety of ship, cargo and other property involved in the common maritime adventure; for example extinguishing damage to ship and cargo in a fire or salvage.

ii) Expenses incurred for the common benefit to safely complete the voyage including those at ports of refuge such as cargo handling expenses, port dues, wages and maintenance and substituted expenses, but excluding the cost of repairing the accidental damage to the ship.

Since the early 19th century, English law and practice largely recognised only the common safety allowances as general average. European countries and the USA favoured the inclusion of claims for the common benefit.

There was a general concerted international effort to ensure a uniform approach which culminated in the York-Antwerp Rules 1890 that were used in contracts of

affreightment. These accepted in full the concept of the common benefit allowances in General Average.

General Average sacrifices and expenditure are borne by the different interests involved in the common maritime adventure *pro rata* to the value of the property saved.

2. WHY SHOULD GENERAL AVERAGE BE PRESERVED?

A long history is not itself sufficient reason. It is, nevertheless, testimony to the evolution of a system and its ability to develop to meet changing needs and reflect contemporary requirements.

General average is a very practical solution for sorting out distribution of losses following major maritime casualties. It is a system that is understood internationally and there is no point doing away with all or part of it. The recent lack of English case law on abandonment of the voyage is in no small part due to the way general average works in practice.

General average means that:

- action - often urgent in the circumstances - is not delayed, with the likelihood of even greater losses being incurred, by the need to start negotiations between different interests since the respective parties rights and obligations are already set out in clearly laid down rules;

- thus, in the event of danger, the Master does not have to make an arbitrary choice between preserving the interests of the ship or some or all of the cargo;

- the Master can therefore concentrate on the safe navigation and safety of the vessel, taking whatever decisions are necessary in the interests of all engaged in the maritime adventure; and

- the Master s independence of action does not prejudice the interests of any one party since all contribute *pro rata* to their degree of loss.

The system therefore represents an equitable means of rateable sharing.

3. PROPOSALS FOR REVISION

The extent of general average allowances is a matter of fierce debate. Some underwriters claim that the definition should be given a narrow interpretation. This, they argue, will rein back the progressive extension in the scope of general average which has taken place over at least the last 100 years . On this view, expenses and sacrifices would be admissible only where made or incurred while ship and cargo are in the grip of peril .

The opposing view holds that this never has been the position and that these underwriters wish to revert back to an English law position which Lloyd s underwriters failed to persuade others of, most particularly in North America and continental Europe, when the York-Antwerp Rules were formulated in 1890. Furthermore they reject the idea that there has been any expansion in the scope of general average during this period.

The proponents of change seem to have recently indicated they are seeking more limited changes in particular:

- Removal of allowances for crew wages and maintenance at a port of refuge, as well as fuel and stores
- Alter the basis of temporary repair claims
- Exclude salvage
- Introduce a time limit for claims
- Abolish or alter the rate of interest
- Abolish commission on disbursements.

It is, however, unclear as to what level of change or amendment to the York-Antwerp Rules 1994 will actually be sought at the CMI conference in Vancouver in June, 2004.

Whether the conference entertains more radical reform or that of a more limited nature, it is difficult to foresee, but neither will be in the interests of shipowners.

Please see the CMI website www.comitemaritime.org for both sides of the debate encapsulated in the CMI working group s report on the subject.

4. PRACTICAL ISSUES

Application of the narrow view would exclude many of the current allowances, particularly port or place of refuge expenses. There would be much greater argument on the extent of peril which would present the following problems:

- English law long ago decided that although the peril must be real it is not necessary that the ship should be actually in the grip, or even nearly in the grip, of the disaster that may arise from a danger . Are the proponents of the narrow view suggesting that only those acts undertaken during the actual peril - which might not be continuous - be allowable? How will this be assessed? If it is to be decided after the event, the Master will again be put in the position of having to take decisions which might later be viewed as partisan by one of the interests to the adventure; and

- How will peril itself be defined? It has been suggested that it should continue only until ship and cargo are in a condition of reasonable safety. How would such reasonable safety be assessed? A subjective test

would undoubtedly be open to later challenge, thus undermining the precision of existing YAR provisions.

Restriction to the actual grip of peril would significantly curtail allowable recoveries. This might have a superficial attraction to cargo underwriters who have argued that the system is abused and sometimes used by less responsible operators as a low cost maintenance scheme. However, it would destroy the effectiveness of general average as a casualty management system understood by all parties in time of crisis. The following points need to be taken into consideration:

- elimination of port or place of refuge expenses might exclude cargo interests from having their goods forwarded to destination through the system of substituted expenses. The owner of a vessel putting into port for repairs after a peril (however that is defined) is unlikely to be under any obligation to forward cargo and, depending on its position in the stow, could be expected to be reluctant, or even unable, to discharge the vessel in whole or in part. Goods would have to remain onboard pending repairs. Cargo would be unlikely to have any recourse under the contract of carriage;

- if expenses such as cargo handling are no longer dealt with as general average, many of them will fall on the shipowner and, in some instances, on the hull insurers. Such costs falling on the owner can be added to repair costs. The ratio between repair costs and the sound value of vessels would be likely to increase the number of abandoned voyages. Cargo would have to deal as best it could with forwarding goods, and would probably be responsible for the resulting costs;

- additional procedural changes introduce complications with a new set of Rules. The 1994 Rules have by no means supplanted the 1974 Rules. No one needs an additional set of Rules in 2004 to further complicate issues.

- removal of the port of refuge expenses such as crew wages, fuel, etc reduces the working effectiveness of General Average as a casualty management system. Moreover if not general average, then these are unlikely to recoverable from hull insurers.

- cargo underwriters argue that they pay the larger proportion of a general average settlement since the total value of the cargo invariably exceeds the value of the ship. However:

    - shippers have benefited from the economies of scale of increasingly sophisticated vessels able to carry more and higher value cargo; and

    - larger cargo total loss payments have been avoided by general average sacrifices and expenditure

Insurers cannot turn the arguments round to suit themselves.

General average is not a panacea for protecting poor quality operators:

- cargo interests have a defence to any claim for general average contribution where the incident has been caused by breach of the carriage contract, particularly a vessel s unseaworthiness;

- questions of seaworthiness are currently under the microscope through discussions at UNCITRAL which is debating the possibility of a new convention on transport law. Proposals being discussed, which will impose ever higher standards on shipowners, include the possibility of introducing a continuing obligation of due diligence throughout the voyage and repeal of the nautical error defence; and

- the ISM Code, with its requirements for shipowners to be fully aware of all operational and safety issues connected with their vessels and take early remedial action when problems come to light, represents a further means of encouraging ever higher standards.

5. WHAT WOULD HAPPEN IF THE PROPOSALS FOR RADICAL CHANGE WERE ACCEPTED?

In the first instance, there would be fewer general average settlements. This, however, masks the fact that there would still be costs to be met. The main difference would be where the costs lie. It seems likely that some of the new costs would fall to hull and machinery underwriters in terms of a transfer of risk from one sector of the insurance industry to another.

However, it would not be as simple as that. Shipowners would have to continue to protect their interests and could be expected to develop contractual clauses seeking to achieve the same ends as traditional general average.

At the same time, there would be considerable uncertainty about the new provisions. There would be three sets of Rules 1974, 1994 and 2004 rules. This would undoubtedly be resolved slowly, and at great expense, through the legal systems of leading maritime countries. Thus, there would be no immediate benefit to cargo (or to shipowners) since both parties could be expected to have to bear the costs of litigation and be prepared to pay up to whatever they were seeking to challenge. As a result, parties insurance costs would not fall but, perversely, they could rise.

6. WHAT ARE THE ALTERNATIVES TO GENERAL AVERAGE?

The principle of general average is sound. Nevertheless, the advantages can be outweighed in relation to smaller claims or adjustments involving large numbers of individual cargo interests where the collection of security represents

a significant proportion of the costs. A satisfactory market-based solution has therefore been developed through general average absorption clauses where hull and machinery insurers will meet the costs of a general average claim in full up to an agreed figure. Such clauses were often favoured by container operators but are now used, in our estimate, by 65% of operators.

7. WHAT WOULD HAPPEN IF MORE LIMITED CHANGE WAS INTRODUCED?

- A reduction in the cohesiveness of the binding elements that have held the institution of General Average together well, over a very significant period. As a result, as a casualty management solution, it becomes less effective.

- Confusion would exist as a set of 2004 rules would need to be introduced into contracts of affreightment to replace not just one but two other sets of rules.

8. CONCLUSION

The number of general averages where cargo is asked to contribute has radically fallen since 1994 due both to the widespread use of general average absorption clauses, better management practices in shipping and containerisation.

The industry is opposed to any change to the present arrangements. YAR 1994 have been applicable for less than 10 years and, in practice, for a rather shorter period since they have been introduced only gradually into contracts of carriage. There is, therefore, insufficient experience to determine whether change is warranted or, in view of the increasing obligations being placed on shipowners, needed.

There are very limited changes that shipowners might countenance, such as on the rate of interest but these are not sufficiently important to warrant introducing another set of Rules.

Pressure for change is coming from a limited quarter. There is no indication whether that view is shared by non-cargo underwriters who could be expected to meet some or all of the costs which would be shifted from cargo underwriters.

There has been no opportunity for constituent Maritime Law Association members, and the many other maritime organisations interested in the work of CMI, to properly debate the findings set out in a CMI Working Group report published at the end of last year. Until that debate has taken place, the outcome properly assessed and the views of hull and machinery underwriters put forward, there can be no basis for proposing change.

In order to put across shipowners views effectively at the conference in Vancouver in June 2004, shipowners must write now to their national Maritime Law Association to ensure that they understand and represent shipowner views.

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