POSITION PAPER BY ASSOCIAZIONE ITALIANA DI DIRITTO MARITTIMO
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1. Common safety v. common benefit

IUMI's proposal to reduce the scope of application of General Average (hereinafter "GA") giving relevance to the principle of "*common safety*" rather than to the principle of "*common benefit*" or, to use IUMI words, by means of the allowance in GA of expenditures or sacrifices incurred or suffered only when the properties involved in the adventure are "*in the grip of a peril*", under many aspects echoes a now long recurring criticism about GA.

IUMI's position, subsequently followed by others authors and among them by Prof. Tetley, had already been the subject for a long debate during CMI's Sidney conference in October 1994, and which brought to a compromise solution represented by the insertion of the Rule Paramount.

It should be remembered that, from a systematic point of view, the problem is still existing since there is an inconsistency of principle between Lettered Rule A, which provides that there is a GA when and only when an extraordinary sacrifice or expenditure is intentionally and reasonably incurred for the "*common safety for the purpose of preserving from peril the property involved in the common maritime adventure*" and those Numbered Rules (in particular Rules X, XI, XII and XIV) which instead only require, for the allowance of an expenditure in GA, the "*common benefit*".

On the other hand, the (itself disputed) Rule of Interpretation where at its second paragraph provides, in accordance with a general principle of law, that Numbered Rules (particular conditions) shall override Lettered Rules (general conditions) has allowed the existence of a general principle which is substantially contradicted by particular provisions.

The reasons for disputing the principle of "*common benefit*" which are reported in the Report of the Working Group (chapter 4.2) reflect those which had already been debated during the Conference of Sidney.

Also the reasons adopted to support the contrary theory (see Report, chapter 4.3) are the already known ones. A review of the opposing theories suggests the following short comments:

a) it is obvious that the exclusion altogether of the "*common benefit*" as the inspiring and basic principle of GA or, at least, the exclusion of given sacrifices or expenditures made in relation to the common maritime adventure would go beyond the reasons relied upon to support the amendment;

b) the opportunity to maintain the principle of "*common benefit*", although with the some mitigation, is also acknowledged by those who criticise it. In particular it should remembered the observation contained in Prof. K.S. Selmer's report, issued in 1958, that the principle of "*common benefit*" has the advantage to allow to come to practical

solutions regarding issues such as the continuation of voyage which, in the absence of such principle and of the particular provisions inspired to it, would hardly find a solution in consideration of disputes between the parties (the point is taken also at chapter 4.3. of the Working Group Report);

c) the introduction of the "principle of reasonableness" makes to a large extent unjustified the request to eliminate the "common benefit" since the principal reason which supports this theory is to avoid abuses which should be excluded by a strict application of the Rule Paramount;

d) it should in any case always be recalled that a restriction of GA achieved through the elimination of the principle of "*common benefit*" substantially re-distributes among property underwriters the burdens in which GA consists.

The consequent financial advantage is therefore extremely restricted since what is not distributed among cargo underwriters and hull underwriters shall be respectively borne by each of them and the overall exposure brought by the GA act (excluding the expenses and fees of adjustment) is not reduced.

In the light of the above, the solution which should be adopted in relation to this disputed issue is to maintain Rule F and to amend the Numbered Rules in order to reduce the scope of application of the principle of "*common benefit*", without excluding it.

2. Wages and Maintenance of the crew

The observations contained in the Working Group report should be approved since if, on one side, it is true that those expenditures do not correspond to the ordinary cost of Crew but only to costs caused by the prolongation of the detention of the Vessel at a port of refuge; on the other side, it is also true that the preference treatment reserved to the Shipowner, under this aspect, does not find consideration in an equivalent treatment reserved to the other parties of the adventure who could equally suffer economic losses in consequence of the said prolongation (lets take as an example the financial damage consequent to the impossibility to dispose of valuable goods) which are not allowed in GA.

This Rule could therefore be amended, although in IMLA's view this is not a major issue in the context of YAR potential revision.

It is worth mentioning – though – that this change will bring overall a very marginal effect on the economics of the G/A.

Having said that IMLA approves the proposed amendments to Rule XI and deletion of reference to Wages in Rule XVII (Section 2)[1]

[1] Reference to maintenance in Rule XVII does not seem correct for maintenance does not concur in the calculation of contributory values.

3. Fuel and Stores

IMLA does not share the proposal to exclude from G/A allowance for fuel and stores – which - unlike Wages and Maintenance of the crew, represent a burden which is not solely originated by the mere prolongation of the voyage.

The same reason applies to port charges which are originated by the act of G/A and do not represent mere running expenses.

4. Rule XIV – Temporary repairs

The more complex and debated issue is probably the allowance in AG of expenditures and costs for Temporary Repairs allowed by Rule XIV.

The dispute does not refer to the first paragraph, which allows these expenses having regard to the "*common safety*", but second paragraph which allows in GA the "*temporary repairs of accidentals damage*" effected in order that the adventure can be completed; an allowance which, though, is subject to the general principle contained in Rule F i.e. as substituted expense.

It should also be remembered that the limit of allowance as substituted expense, is indicated in the comparison between cost of temporary repairs and the expenditure which would have been incurred and allowed in GA had those repairs not been carried out, namely, in the most recurrent case, the costs of discharging, storing, reloading cargo, in order to lighten the Vessel and carry out permanent repairs.

But the Rule also adds that for the purpose of considering the allowance of costs of temporary repairs no regard must be had to the economic saving which by virtue of the principle of substitute expense, the cost of temporary repairs has allowed to other interests (including the Shipowner's).

A lengthy debate took place at Sidney 1994 about this Rule since in the opinion of those who rejected the principle of "*common benefit*" this Rule represented the hallmark of the abuse of the principle, since temporary repairs enable the Shipowner to charge on the other parties of the adventure a cost which at the end of the voyage, without cargo, allows the Shipowner to choose the place for permanent repairs on the basis of individual economic considerations, usually with large savings compared to costs which the Shipowner himself (and subsequently his Underwriters) could have met had, in the absence of Rule XIV, he been obliged to incur by carrying out permanent repairs in the Port of refuge.

During the Conference of Sidney the Maritime Law Associations of United States and Canada suggested the elimination of the rule, but the proposal was rejected since it was considered that the limit of allowance (in accordance with the criteria of Substitute Expenses) would have represented a sufficient protection from abuses of the rule.

In reality the reasons mentioned by the Working Group amount to substantially serious grounds to suggest a reconsideration of this rule.

What appears more relevant is the consideration made not by IUMI but by other Authors, according to which the economic advantage obtained by parties having interests on the Vessel (through the Temporary repairs Rule) in the overall balance of the GA in terms of savings of costs of permanent repairs is not considered within Rule XIV, since as it has been seen, the said rule contains a comparison between cost of Temporary Repairs and cost of Substituted expenses i.e. loading, discharging, storing and reloading cargo, but it does not call for a comparison with other possible savings. This is evidenced by the words "*without regard to the saving if any to other interests*".

In order to answer the criticisms and at the same time to keep Rule XIV and the advantages which it carries consideration could be given to the to elimination of the above words in order to be able to allow in GA the Substituted Expenses represented by costs of temporary repairs, only on *proviso* that such expenditure is in place not only of costs directly saved, but also of those other advantages which may be obtained by any other party of the adventure.

Such an amendment – however - would imply, on one hand, major practical problems, since the Adjuster would have to consider the saving obtained by the Shipowner as regards to costs of permanent repairs; on the other hand, it could cause complex calculations as it would be impossible – in practice - to establish the limit within which economic advantages (also the indirect ones) obtained by any party of the adventure are to be accounted for: consider for example a case where temporary repairs enable a faster continuation of the voyage and it is therefore asserted that prompt arrival of raw materials avoided the shut down of a production plant.

The first alternative amendment proposed by the WG goes in the same direction although it will eventually pose less problems that the deletion of the sentence *"without regard to the saving if any to other interests"*.

One problem which the amendment will carry is that the Adjustment will have to wait until the permanent repairs are carried out.

This problem will not arise if the second alternative will be adopted which, however, in IMLA view, carries even more potential difficulties.

Consideration should therefore be given, in IMLA view, to the proposal of either repealing paragraph two of the Rule, or reverse the principle set out therein by saying *"There shall be no admission as G/A of temporary repairs of accidental damage effected in order to enable the adventure to be completed"*.

Should these solutions appear too extreme IMLA would support the adoption of the amendment suggested by AIDE in the wording contained in its paper.

5. Time Bar

The issue had already been discussed in Sidney during the review of Rule E for which two amendments were proposed.

The first one was accepted and consisted in the insertion of paragraph 2.

The second one, concerning time bar, was dropped.

Its proposal carries the same issues and problems already examined and in particular the fact that under many law system the time bar is a matter of public order and cannot be governed by private agreements altering the statutory provisions.

This is certainly the case in Italy and **the problem could be solved only considering the time-limit not as a "prescriptive" time limit but as a conventional time bar to which the party agree by incorporation in the B/L of the YAR**.

The above solution also generates the problem of the duration of the time-limit, considering that, even if the time bar can be extended by agreement of the parties, this is exceedingly difficult in practice when there are several consignments.

In view of the above comments and looking at the proposed wording of the Rule IMLA suggests the following amendments.

1. Replace paragraph (a) with the following opening sentence: "*Subject to any mandatory rule of prescription contained in any applicable national law*"

(a) Any rights …… (add "*also*" after "*shall*");

2. Renumber paragraph "*c*" as "*b*";

3. delete "*Subject to the provisions of this rule*";

4. Consideration should also be given to deletion of the last sentence ("*This rule shall not ….…... insurers*") which does not appear as strictly necessary.

6. <u>Interest</u>

IMLA agrees the proposal to amend the present rule concerning interest but has some reserve about the method proposed.

IMLA suggests that reference should be made (as in some other instruments like the Norwegian Insurance Plan) to a fixed interest computing system such as LIBOR (at a given borrowing time) plus margin.

7. <u>Commission</u>

The proposed addition to Rule E reflects the practice applied.

Although there is no specific rule the suggestion to add it to Rule E (one of the Rules which cover general principle) is questionable.

To some extent the same remark applies for the proposed addition to Rule C.

Consideration should be given to draft a new Rule XX to cover the issues discussed in place of the present Rule XX which disappears.