

AVERAGE ADJUSTERS PAPER

REMARKS BY HOWARD M. MCCORMACK, CHAIR, ASSOCIATION OF AVERAGE ADJUSTERS OF THE UNITED STATES - “THE IMPETUS FOR CHANGE IN THE 1994 YORK ANTWERP RULES - REAL OR FANCIFUL”

1. INTRODUCTION

It has been a privilege and an honor to have served as your chairman for the year 2001-2002. The tragedy of September 11 had a substantial impact upon our association as it deprived us of three of our outstanding members, Bob Colin, Bob Miller and Bill Wilson of Aon.

As I said at the November meeting, I had returned to my original roots since I started my career in the maritime field, not necessarily in the practice of maritime law in which I have been engaged since 1961, but in the practice of marine insurance. For a few months I was a yacht and cargo adjuster at Atlantic Mutual Insurance Company and learned all about the arcane concepts of how many cocoa beans could fit into a bag, how many bales of rubber could be contaminated and how much the polarization of sugar was impacted by seawater. Although I found these absolutely exciting issues, I received a most welcome telephone call from Ed Cartier, one of the giants in the average adjusting community, who invited me to join him and others at the firm, then known as C. R. Black Jr. Corporation. That was probably one of the best moves I made in my entire career since I was a beneficiary of Ed's outstanding tutelage. I embarked upon what I then thought would be a lifetime career as an average adjuster.

At that time, as you know, I was also attending Fordham University School of Law as a student during the evening, together with other friends and colleagues in the marine insurance industry, including one of my oldest friends, Bill Craig, who recently retired from the American Club. During my time at Black I had the opportunity to change from the field of adjusting. I gave it a great deal of thought, but was intrigued with the thought of continuing on with the practice of marine insurance as a marine

insurance broker, which I then did for the balance of my time at Black. Once I completed my studies at law school, I then reflected again upon my career path. I made the choice at that time to leave the marine insurance industry in one phase, but continued it in another by becoming a member of the maritime bar with a leading law firm then followed by time as Maritime Counsel at Bethlehem Steel Corporation and ultimately as a partner in the law firm of Healy & Baillie. I am delighted to have followed my senior partner, Nicholas Healy, both as the President of the Maritime Law Association of the United States as well as the Chairman of this august group.

I have continued my activity in the field of average adjusting by membership on the Comité Maritime Internationale (CMI) Working Group on General Average. I am also the Chairman of a subcommittee on General Average of the Maritime Law Association of the United States. I have had a tremendous amount of help in these activities from members of the Executive Committee of this association, as well as my colleagues at the maritime bar and those members of the Maritime Law Association, who are intimately involved and work in the field of marine insurance and average.

I have changed the usual approach of Chairmen in their speeches in that I intend to discuss with you today issues which I believe are quite critical to the future of the average adjusting community as well as to shipowners and hull underwriters. These issues pertain to the proposal for changes to the York Antwerp Rules 1994, which are now being studied by the CMI Working Group. I will be discussing the history and background of this activity, (which started shortly before the Sidney experience when the 1994 Rules came in to existence as a result of the CMI meeting there) and the events leading up to the present time with the rather draconian proposals put forth by the International Union of Marine Underwriters (IUMI) which are now the subject of review by the CMI Working Group.

I believe it imperative that all involved in marine insurance industry, particularly shipowners, hull underwriters and those who are users of the marine insurance system be fully aware of the potential for the changes and the impact that they may have upon issues of coverage, and perhaps the way shipowners and cargo interests will now interact if these changes are made. Succinctly put, the main thrust is to amend the York Antwerp Rules to provide for the concept of common safety rather than the present concept of common benefit. The result would be to terminate the General Average upon reaching the port of refuge with any further expenses excluded from General Average.

BRIEF HISTORY OF THE YORK ANTWERP RULES

In the interest of completeness, I would like to share with you a short background of the history of the York Antwerp Rules as it is necessary in order to understand the issues we are now facing and how these issues have come about. Of course, I am preaching to the choir since all of you here today are fully involved in activities of marine insurance and average, but I think it worthwhile that we all start from the same page and have a full understanding of how we got to where we are today and what the potential changes are and the ramifications thereof.

As Leslie Buglass, a leading author on the subject of marine insurance has stated:

“General average is as old as the oldest commercial sea voyages and is a natural law of the sea founded on equity. . . . The international maritime law of general average has for centuries, recognized such inequities (a discussion of the issue of jettison) and the law of general average as it exists today has been evolved on the simple basis that, in such circumstances, all the parties engaged in a maritime adventure must be

contribute in proportion to the value of the property safely delivered.¹ These rules long preceded the continental law on the subject and can be traced back as long as 900 B.C. with comments in the Rhodian code, which was later incorporated by the Romans in their own civil law.”²

Those concepts in the Rhodian code and Roman law were continued in the various laws of Mediterranean states, but it was not until the latter part of the 19th century that real efforts were made to achieve international uniformity in the adjustment of general average.³ The York Antwerp Rules occupy a unique position in international maritime law in that they depend upon voluntary acceptance by the maritime community.⁴ As was stated by a learned author Knut Selmer “It may safely be said that general average is a field of maritime law where the international unification effort has succeeded to the greatest degree.”⁵

As described by Geoffrey Hudson in his excellent work, the quest for uniformity began in a letter of May 1860 to the maritime countries of Europe by the National Association for the Promotion of Social Science, signed by, among others, the chairman of Lloyds, the London General Shipowners Society, various Chambers of Commerce and other bodies representing shipping, mercantile and underwriting interests in the United

1Buglass Marine Insurance and General Average in the United States, 3rd Edition, Cornell Maritime Press, 1991, page 194-195.

2Buglass supra at 194-195.

3Buglass supra at 197

4York Antwerp Rules “The Principles and Practice of General Average Adjustment, 2nd Edition, N. Geoffrey Hudson, LLP 1996, page 7

5 The Survival of General Average (Oslo Universal Press 1958) page 58

Kingdom.⁶ As a result of that letter, a conference assembled in Glasgow and adopted a number of resolutions in order to allow Parliament to draft a bill with the view to being enacted into law by several nations.

The next step took place at the city of York in September 1864 when the Third International General Average Congress met to discuss the draft bill and other suggestions. Eleven Rules, known as the York Rules were agreed upon with a recommendation that the clauses be introduced into bills of lading. As with any activity in an international setting, there was no great urgency or rush to put these principles into practice. However, a further conference was held in Antwerp in 1877 where the York Rules were amended, thus becoming the York- Antwerp Rules and the foundation of the present York Antwerp Rules analysis.

From 1877 to 1890 there seemed to be a general consensus that the Rules, as formulated in 1877, were being given universal approval and adoption in the maritime industry. The 1877 rules made no attempt to define general average, and dealt only with specific situations, because general average developed along two different lines. One school of thought, (which was designated English), insisted the general average act must have been performed or the expenses incurred for the preservation of ship and cargo. This essentially is the present basis for the proposed changes now being considered. Another school of thought, (which was designated French), maintained that steps taken for the common good qualified as general average.⁷ It is the common benefit against the common safety issue which brings us to the discussion we are having today.

Further development of the rules continued in 1890 when they were extended to 18, again, without any effort to define general principles. The 1890 rules came into being at a meeting held in Liverpool. Those rules were continued in practice until 1924, after

6 Hudson supra at page 7

7 Hudson supra, page 5

the intervention of the First World War delayed consideration of the rules when there was a further revision.

It was at that time (1924) that an international conference at Stockholm took place and the great majority of the present rules were adopted and the statements of principle became the present lettered rules of the York Antwerp Rules.⁸ There was a dichotomy of position between the English and American market at that time, particularly in view of the fact that the Americans did not believe that Rule A was sufficient to allow expenses that would be expected to be made at a port of refuge.

There continued to be further refinements of the rules in the revisions of 1950. At this time, such revisions were undertaken under the auspices of the Comité Maritime International (CMI). They have continued to be the custodian of the York Antwerp Rules through today.

Between 1950 and 1974, when the rules were amended again, there were serious discussions undertaken by the European Association (AIDE) as well as by the general average committee of the International Union of Marine Underwriters (IUMI). The CMI set up a conference in Hamburg in 1974 with an emphasis upon simplification of the rules. Although the 1950 rules had worked fairly well in practice, there was still concern in the industry, particularly among the hull and cargo interests, for further simplification and modernization which led to the 1974 rules.

There was a further amendment at the CMI conference in Paris in June of 1990, solely with regard to Rule VI dealing with salvage. That history then set the stage for the further consideration of the Rules that ultimately led to the embodiment and establishment of the York Antwerp Rules in 1994 at the CMI meeting in Sydney.

2. THE SYDNEY EXPERIENCE

8 Hudson *supra*, page 10

1. Background of the Sydney Rules

a. UNCTAD REPORT 1991

In 1991, the United Nations Conference on Trade and Development (UNCTAD), particularly its Committee on Shipping and the Working Group on international shipping legislation, produced their report entitled “General Average - A Preliminary Review.”⁹ Essentially, the document was a primer on the issues of general average including a historical background, definitions, discussion of recovery of general average contributions, review of criticisms of general average and alternatives to the system.

In their conclusions, UNCTAD considered various issues, including the abolishment of general average, simplifying it, and reducing or abolition of contribution in selected instances. There was also discussion about the comprehensive analysis of general average by Professor Selmer.¹⁰ He concluded that abolition was the best solution.

One of the ultimate conclusions of the UNCTAD report was that UNCTAD, after consultation with CMI, should approach marine insurance interests with a view towards setting up and organizing investigations and discussions between insurance interests to ascertain whether new insurance arrangements could be brought into being which would allow the abolition of the existing general average system¹¹. If however, the insurance interests were to conclude that there was no possible insurance solution, then it would be appropriate to consider, as a second stage, how best the existing GA system and the York Antwerp rules might be simplified or reformed (whether a partial abolition or otherwise

⁹UNCTAD document TD/BC.4/ISL/58 August 19, 1991

¹⁰See footnote 5

¹¹ UNCTAD Document infra paragraph 175

updated.¹²⁾ This, then, was the basis for further discussion and consideration by the CMI, which as I have mentioned, was the custodian of the York Antwerp Rules.

3. 1992 CMI WORKING GROUP ON GENERAL AVERAGE

In 1992, the CMI Working Group on General Average reported to the CMI International subcommittee on General Average.¹³ David Taylor, now Honorary Secretary of the UK Association and Secretary of the Joint Hull Committee as well as a special adviser to the International Underwriting Association of London, was the Chairman of the CMI Working Group, a position he continued to hold and which he conducted with great enthusiasm and excellence at the 1994 Sydney meeting of the CMI. His 1992 report referred to a CMI decision in December 1990 to carry out a study of the law of general average and the York Antwerp Rules.

The Working Group was essentially European, with one Japanese representative. It considered replies to questionnaires prepared by the CMI to determine the issue of the future of general average and the York Antwerp Rules. Reference was also made to the UNCTAD report, *infra*. The 1992 CMI report reviewed the close working relationship between the UNCTAD secretariat and the CMI Working Group. This report should be reviewed by anyone who wishes to understand the history of this activity because it considered the responses by the various maritime law associations to the CMI questionnaire.

The Maritime Law Association of the United States (MLAUS) was quite instrumental in supplying substantial comments and contributed to discussions with the CMI on this issue. In his report, Mr. Taylor concluded that, although one comment indicated an absence of controversy with no demand from commercial interests for

12 UNCTAD Document *infra* paragraph 177

13 1992 CMI Yearbook, pages 97 - 113

abolition or radical revision of the general average system, this now seemed to be an appropriate time (1992) for work to be undertaken in considering improvements to the system. Mr. Taylor indicated that “close regard should be had to the unique uniformity of acceptance of the rules and to the extent to which those rules balance the interest of all parties.”¹⁴ He stated that with one exception, all responses were unanimous in expressing a desire to maintain the existing fundamental principles of general average concerning, as they do, (a) sacrifices and expenditures made and incurred for the preservation of the property at risk in the common maritime adventure (Rule A) and (b) expenditures incurred and respective measures undertaken to preserve the voyage with cargo.¹⁵

It should be noted that the UNCTAD 1991 Report¹⁶ discussed the issue of common safety as follows:

“Common Safety

37. Under Rule A of the York-Antwerp Rules the general average act must be made with a view to preserving from peril all interests involved in a common maritime adventure. Thus a sacrifice made or expenditure incurred for the safety of a part of the property involved in the adventure does not give rise to a claim for general average contribution, but will be a charge on the owner of the particular property preserved by such sacrifice or expenditure. (citations omitted)

38. Although Rule A adopts the English view of limiting the scope of the general average act to attaining common safety and, unlike the United States law, does not extend the principle to include the common benefit and the safe

141992 CMI Yearbook, page 98

15 1992 CMI Yearbook, page 100

16 UNCTAD Report infra paragraphs 37-38

prosecution of the voyage, yet certain numbered rules of the York-Antwerp Rules, such as Rules (X)b and XI(b) allow in general average certain expenditure of such nature. Since, by virtue of the Rule of Interpretation, the numbered Rules prevail over the lettered Rules, expenses incurred for the common benefit of the whole adventure and for the safe continuation of the voyage will be allowed under the York-Antwerp Rules(citations omitted). Thus, the expenses allowed in general average are not limited to those incurred for the attainment of safety, but also include expenses incurred for the mutual benefit of ship and cargo to enable the voyage to be completed, such as temporary repairs and other expenses incurred in a port of refuge.”

The CMI Working Group had also considered the leading work of Professor Selmer referred to infra. The Working Group considered each of the comments made by the various maritime law associations with reference to the 1974 York Antwerp Rules. There was some discussion in the CMI report as to the issue of General Average absorption clauses, which shall be discussed later. The CMI Working Group Report of March 1992 was then passed to the International Subcommittee of the CMI with the responsibility for further study of General Average and the York Antwerp Rules.

4. THE REPORT OF THE CMI INTERNATIONAL SUBCOMMITTEE

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MAY 1994

As indicated above, the International Subcommittee of the CMI then undertook the study of a potential review of General Average and the York- Antwerp Rules 1974 with a view toward full discussion at the plenary session to be held in Sydney in the latter part of 1994. The members of the Subcommittee at this time included an American, Doug Adams, former chairman of this Association, as well as various Europeans and a

Japanese participant.¹⁷ This report should be reviewed by all with an interest in this issue since it includes the report of the CMI International Subcommittee meeting of December 1993, the various proposals recommended by the subcommittee as well as suggestions contained in the report of AIDE of September 1993 and general average statistics.

Mr. Taylor, in his May 1994 report indicated that IUMI had established a specialist committee that year, but they had yet to produce its report (which I believe was still not available at the time of the meeting in Sydney in October 1994.) The general context of the CMI report was that the responses to the CMI questionnaire indicated a serious interest in the continuation of efforts to update, simplify and improve the rules to take account of present day circumstances.¹⁸ The general tenor of the report was no support for any tendency to extend the scope of general average, but merely to work with the members of the industry and commercial interest to consider the advantage and disadvantage of absorption clause and other items.

a. Further UNCTAD Report - March 1994¹⁹

Shortly prior to the 1994 report of the chairman of the CMI International Subcommittee, UNCTAD came out with a further report headed “The Place of General Average in Marine Insurance Today.” This document was an update of their prior document of 1991.²⁰ This 1994 report contained a substantial number of statistics and pie charts which I would leave to those with an interest in that for a more complete

17 1993 CMI Yearbook (Sydney 1), pages 140-193

18 1993 CMI Yearbook (Sydney 1) page 141

19 UNCTAD/SDD/LEG 1 8 March 1994

20 See 1991 UNCTAD Report *infra*

understanding. This report should be reviewed as a historical part of the process, since it was the work of a UN agency which had studied the extent to which insurance arrangements could simplify the general average system. It essentially indicated that the entire matter would be considered by the CMI at the meeting in Sydney. The UNCTAD secretariat was represented at the meetings of the International Subcommittee of the CMI as an observer and participated in those activities which were reflected in the report of Mr. Taylor.

5. THE US DELEGATION IN SYDNEY

The U.S. General Average Delegation was headed by Larry Bowles of Nourse & Bowles whose vice chair was Howard Myerson. At that time there was a substantial number of other marine insurance people and average adjusters who were present at the meeting in Sydney. There was a very spirited debate on the entire issue of the York Antwerp Rules. The modifications that came out of the Sydney meeting were to be known as the 1994 York Antwerp Rules. The full report of the Sydney meeting was set forth in the 1994 CMI Yearbook.²¹

There was also substantial debate and colloquy put forth by the various entities representing IUMI which apparently had produced an extensive report to their assembly at their meeting in Toronto in September 1994. That report was not readily available at the Sydney meeting in October, although the proponents of the report were quite active in putting forth their views. There was a consensus at the Sydney meeting that there was wide resistance to any tendency to expand the scope of general average. For the first time, a new rule was introduced, namely the Rule Paramount, to introduce the concept of reasonableness throughout the rules.

21 1994 CMI Yearbook (Sydney II), pages 134-165

I attended the Sydney meeting and was a member of the U.S. delegation on general average as well as a participant in the other U.S. delegations covering other subjects since, at that time, I was a vice president of the Maritime Law Association of the United States. I can attest to the dedication and hard work by all of the members of the American delegation, particularly those members of this Association who were full time average adjusters and who were of substantial assistance to the members of the Maritime Law Association. The MLA position had been set forth in their response to the questionnaire put out by the CMI, which, as you are aware, is composed of the various national maritime law associations.

Once the 1994 rules were put into effect, IUMI then continued their substantial commentary by the members of the cargo underwriting fraternity to limit the approach of the York Antwerp Rules from what it was, namely, actions taken for the common benefit. The IUMI position wanted to reduce General Average expenses and to limit them to actions taken for the common safety, which seemed to be a retrograde approach to the position that existed in the UK in the late 1800's.

6. ATTACK ON THE 1994 SYDNEY RULES

The substantial impetus for movement or changes in the 1994 rules originated with IUMI. Apparently the report of Matthew Marshall of IUMI as well as that the Toronto report of IUMI may have been known at the Sydney conference but it was not able to be considered in view of the fact that IUMI had just met the month before. The position of IUMI at that time (October 1994) continued to be that they wanted a change made in the York Antwerp Rules which would provide a radical reform in the scope of general average. One of the leading IUMI proponents said at the IUMI conference in Oslo in September 1996 "It is not beyond our combined wit or wisdom to produce a readily understood set of rules paying only sacrifices or expenses 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.”²²

The Oslo conference also considered a paper by Mr. Marshall on the statistical update of general average, which apparently was an update of his paper presented to IUMI in September 1994. One factor to be noted in Mr. Marshall’s comments was that the larger the loss, the heavier the cargo share of the total. The reason for this was that container ships had high values and, perhaps, greater expense than older ships and small ships which tended to carry lower valued cargoes.

The other comment from Mr. Marshall was that older ships, which had lower values of cargo, picked up a proportionally higher amount of General Average expenses.²³ Mr. Gooding took the position that there was only one marine body with real international muscle and that was IUMI and IUMI must back the call for change. That call has now been sounded throughout the IUMI comments since 1996 to the present time, with substantially more success than IUMI had in their arguments at the Sydney meeting. This then brings us to the issue of the demand for change by IUMI.

I believe that this demand is based upon an erroneous premise and I will discuss that shortly. It is my personal view that the position of IUMI is solely the position of the cargo underwriters side of IUMI and is not necessarily shared by the hull underwriters, nor have the hull underwriters in the United States or elsewhere paid particular attention to the substantial impact these changes may bring about, if the York Antwerp Rules are amended to reflect the common safety issue as opposed to the present common benefit concept.

²² *General Average Time for A Change*, Nicholas Gooding, Lloyds and Lloyds Underwriters Association Paper at IUMI meeting at Oslo, September 1996.

²³ *General Average A Statistical Update*, General Average presentation, IUMI Oslo conference 1996, Matthew Marshall

In essence, under the IUMI proposals, rules X and XI will no longer be applicable and general average will terminate once the vessel has reached the port of safety at a place of refuge with all other charges being imposed upon the owners or others, as the case may be, but certainly not upon cargo interests.

David Taylor was a participant at the 1996 Oslo IUMI conference. His paper attempted to reflect some of the more conservative commentary in view of the fact that the Sydney conference was not yet two years old when the IUMI proposals for change were put forward. He urged against seeking to write a new set of rules and strongly recommended that all participants i.e., IUMI, CMI, AIDE and others establish a much improved dialogue. He noted that insurers had not taken their places at the table of discussion within each maritime law association (I believe this also may reflect my understanding, even though we have a very active maritime law association marine insurance committee).

Mr. Taylor made a very prescient statement which I believe reflects the principal rationale for the attack on the York Antwerp rules. Mr. Taylor indicated “the complaint that the shipowner, who operates badly maintained and incompetently crewed vessels can benefit under general average and the York Antwerp Rules is, to my mind, not a criticism of a general average system, but a criticism of the fact that such shipowners are tolerated and even insured.”^{1/2} It is my opinion that the IUMI proposal to change General Average is an attempt to resolve a commercial problem that is not even remotely connected causally with the issue of General Average.

The October 1996 IUMI meeting was the beginning of the assault upon the concept of general average and has continued to date. I would like to discuss the activities that have taken place since the 1996 IUMI Oslo meeting with specific reference to the more strident tones that have been taken in this continuing debate.

24 Remarks of David W. Taylor on General Average Session at IUMI Conference, Oslo, 1996, page 6

7. FURTHER IUMI ACTIVITIES SINCE OSLO MEETING 1996

Since the meeting and program by IUMI in Oslo in 1996, there have been a series of papers setting forth positions taken by IUMI that continue to press the major point of their difference with the 1994 rules, namely the modification of the rules to provide that general average terminates when the vessel has reached the position of safety as opposed to the concept that the general average continues for the common benefit. The net result of the IUMI position would be that all GA charges would terminate once the vessel has arrived at a port of refuge and any charges thereafter, including loading/unloading cargo etc. would not be considered as general average charges unless they were necessary for the common safety. There are also other issues on some modifications and respective changes to the Rules , but this is the most substantive one.

IUMI had created a GA drafting Working Group which consisted of Nick Gooding, a Lloyds Underwriter, Eamonn Magee, an Irish underwriter, Matthew Marshall of ILU and Ben Browne, a solicitor then with Clyde & Co., now with Shaw & Croft. They prepared the document which is the basic document that the CMI Working Group is considering. This paper was prepared for presentation at the IUMI meeting in Berlin in 1999, although the article was apparently finalized in April of 1998. The articulated purpose of the report was to “reign back the progressive extensions in the scope of general average which taken place over at least the last 100 years with a view toward lessening the burden which general average places on property underwriters worldwide.”

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Their purpose is to have the loss lie where it falls to a greater extent than it does at present as they consider the current concept of general average outdated. Their primary

25 Report of IUMI GA Drafting Working Group, IUMI conference Berlin, 1999
page 1

purpose was to propose a statement of principle governing general average similar to Rule A of the 1994 Rules, which redefinition would be drawn from section 66 of the English Marine Insurance Act 1906. The IUMI concept would be that there was “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 purpose of preserving the property from peril.”²⁶ Their recommendation is that ordinary crew wages during the peril should not be included, the cost of transshipment to destination not be included, the ship’s expenses at a port of refuge should not be included, temporary repair costs, unless carried out when a ship and cargo are in the grip of a peril, such as in a salvage situation, are not to be included; the cost of discharging, storing and reloading while the vessel repairs at the port of refuge should also not be included. They reason that these expenses should be borne by the carrier under its contract of carriage, nor would consumption of extra fuels and stores, once the immediate peril had ceased to exist, be included.

Potentially, their concept would be that substituted expenses should be abandoned. The proposed reform is to stop expenses going into GA after the ship and cargo have been brought to safety, such as a port of refuge, therefore a definition of peril was needed.²⁷ The general theme of this proposal was that the concept of “common safety” should underlie the “new” general average replacing the common maritime adventure concept, which now forms the basis of the current 1994 rules. IUMI’s position is that once the peril has passed, expenses such as those incurred at the port of refuge or temporary repairs are more properly in the domain of maintenance, in other words, the

26 Report of IUMI GA Drafting Working Group, IUMI conference Berlin, 1999 Section 1

27 Report of IUMI GA Drafting Working Group, IUMI conference Berlin, 1999 Section 1

“common safety” approach would reduce the exposure of hull and cargo underwriters to general average claims.²⁸ This is the primary change that IUMI is seeking.

There were also other issues such as the effect of fault, as they wanted Rule D to be expanded wherein no party to the venture would recover any GA loss or sacrifice to the extent the loss was shown to have been directly caused or consequential upon any breach of the ISM code, the STCW convention or the classification society rules. The concept of going back to the initial common safety concept also had IUMI proposing that substituted expenses under Rule F be abandoned. Their argument was the “if it is intended to substantially amend the York Antwerp Rules to remove from general average expenses and sacrifices suffered or incurred, once ship and cargo are no longer in the grip of the peril and it would follow that this usual scenario could not arise because the cost of discharging, storing and reloading cargo would not in any event be recoverable in GA.”²⁹

Also a strongly pressed issue in their paper is Rule VI on the reapportionment of salvage which does irritate the cargo underwriters in IUMI. The IUMI position is that Rule VI(a) would indicate that the salvage payments, including legal fees, should lie where they fall and not be brought into general average, save only that any amounts paid by one party to the GA in respect to the proportion (calculated on salvaged values and not GA contributory values) of another party or parties, shall be apportioned between the parties to the GA in accordance with these rules. Their concept also requires the provision of Rules X and XI (a, b, and c) covering expenses to be disallowed in GA. Rule

28 Report of IUMI GA Drafting Working Group, IUMI conference Berlin, 1999 Section 3

29 Report of IUMI GA Drafting Working Group, IUMI conference Berlin, 1999 Section 9

XII would only cover to the effect that the damage and loss must occur to the cargo etc. while the ship and cargo are in the grip of peril but not otherwise.³⁰

They discussed Rule XIV - temporary repairs and the House of Lords decision in the BIJELA 1994 AC which supported the accepted practice of average adjusters that temporary repairs of accidental damage effected at the port of refuge are allowable as GA up to the savings in GA allowances. The IUMI position would be that if temporary repairs at the port of refuge are no longer included in GA (as they proposed), then there is no need to address the problem in new rules as temporary repairs would not be recoverable. The scope of the temporary repair rule XIV would be drastically curtailed but not, IUMI contends, extinguished altogether.³¹

I believe that this is a statement of an expectation that is not likely to be achieved and that the temporary repairs will go the way of all other parts of the Rules that they seek to remove.

There are some other issues which I believe that members of the adjusting community should review, such as commissions and interest as well as time bar. These had been discussed extensively in Sydney and time bar still remains a rather elusive concept to be able to achieve on the issue of uniformity.

IUMI also would like a new rule to the effect that no contribution shall be due from any party whose surveyor has been refused access to the vessel or documents and any documents relating to the vessel for its maintenance not on the vessel, which are reasonably requested in writing may be inspected by any party acting on their behalf to determine whether or not that party should be liable to contribute in general average.³² It

30 Report of IUMI GA Drafting Working Group, IUMI conference Berlin, 1999 Section 20

31 Infra Section 22

32 Infra at Section 31

is evident, therefore, that by these suggested changes the thrust of this issue of rule change is foisted upon the shipping industry by the cargo underwriters. Their avowed premise is that they are tired of paying general average for what they call substandard vessels, which they believe are using general average contributions to pay for what should be ordinary maintenance.

We submit that this argument is completely irrelevant in that, if cargo has been loaded on a substandard vessel, there are various remedies available to cargo interests, which they generally take advantage of on many occasions. One would also inquire as to the obligation of cargo underwriters, as well as their insureds, to consider themselves as to what duty each has to conduct due diligence of the type of vessels on which they are placing their valuable cargo and which they are seeking to have insured on an all risk basis.

We would suggest the possibility that cargo underwriters can resolve this perceived problem by imposing more stringent requirements and over age penalties, such as restricting insurance to certain flag vessels, increasing the premium for certain flag states, as well as restricting the coverage of vessels to certain classification societies, again, with additional penalties for those vessels which are not within the agreed upon classification society. In essence, there are many ways that cargo underwriters can achieve their desired result other than by making this substantive change to the York Antwerp Rules in what I believe is an unnecessary approach.

The IUMI Berlin drafting document on general average is still the basis of IUMI's position, which their representatives continue to press both with the CMI Working Group as well as in other venues in which they have been able to put forth their position.

8. CMI TOLEDO COLLOQUIUM - 2000

The CMI, at intervals between a plenary session, has a colloquium, which is a seminar on various topical issues of interest to the CMI. There was a colloquium that took place in Toledo in September 2000 under CMI auspices. One of the basic issues was the continued presentation of the IUMI position on their desire to reform general average. These comments and their positions can be found in the CMI Yearbook 2000 ("Singapore I") since the Singapore plenary session was to take place in February of the following year.

The IUMI proposal was well represented in Toledo by the detailed paper of Eamonn Magee, one of the authors of the IUMI 1999 Berlin document. In early 1999, the general secretary of IUMI requested the president of the CMI to place the case for revision of the York Antwerp Rules back on the working agenda of the CMI. Another CMI Working Group consisting of almost exclusively Europeans, was set up and a questionnaire prepared which was sent to all the international maritime law associations. That Working Group was chaired by Thomas Reme, a former underwriter and maritime attorney in Germany and a member of the CMI Executive Council.

In his report of February 2000, preceding the report of the Toledo conference, he indicated that he may have unintentionally created the impression that the concept of common benefit was introduced relatively recently whereas, in fact, it can trace its origins to 1890 and possibly to 1864.³³ The US and UK associations were rather strong in their views on this point in pointing out this oversight. Chairman Reme indicated that the answers to the questionnaire were not exactly strong one way or the other as to whether or not the concept of retaining the common benefit principle should be retained. Therefore the subject was to be open for discussion in Singapore in February 2001. In

33 2000 CMI Yearbook (Singapore 1), pages 290-291.

order to permit the delegates for the Singapore meeting to prepare for that discussion, the 2000 Yearbook included documents from the Toledo colloquium.³⁴

Mr. Magee, at the Toledo meeting, set forth his views which reiterated positions previously taken by IUMI in Berlin. Annexed to Mr. Magee's paper on general average reform, was the Berlin report of the IUMI drafting Working Group. The Berlin paper is the basic document upon which IUMI is making their entire presentation. It is evident as to what is bothering the cargo underwriters since Mr. Magee contends that some 67% of general average disbursements (per their statistics) show they have been funded by cargo interests or more likely, their underwriters. The majority of those disbursements, (which he considered inequitable) showed that the general average tended to be exclusively related to issues involving the management of the vessels, such as engine breakdown, mechanical and structural failure, grounding through negligent navigation and so on. He contends the IUMI recommendations are aimed at addressing these inequities.

There was no discussion in Mr. Magee's paper of the IUMI position relative to the Hague Rules or the Carriage of Goods by Sea Act as to the various defenses available to vessel owners such as negligent navigation and other relevant ones. His Toledo paper is a summary taken from the 1999 IUMI position paper.³⁵

The Colloquium was also fortunate to have the benefit of the response of Geoffrey Hudson, former chairman of the UK Average Adjusters and the author of the learned work on the York Antwerp Rules. He stated his very strong position with regard to the consequences in the market and shipping community, if the IUMI proposal should be put into effect. He analyzed the shipowner's expenditures at a port of refuge between the

34 2000 CMI Yearbook (Singapore 1) pages 294-324

35 Cf General Average Reform -The IUMI position, Eamonn Magee, 2000 CMI Yearbook 294-313

costs of discharging cargo, warehousing cargo, and costs of reloading cargo as well as outward port charges.

It was his position that the proposed curtailment of general average allowances would remove the positive incentive which the York Antwerp rules provide to encourage a shipowner to take the proper measures to fulfill his obligations under contract of carriage.³⁶ It was also his opinion that the proposed curtailment of GA allowances put forth by the IUMI at a port of refuge would directly increase the number of valid abandonment cases.

He then discussed various examples showing how that would be achieved.³⁷ The IUMI proposals, according to Mr. Hudson, would do away with all issues of saving the voyage by forwarding of cargo on a non separation agreement, since the IUMI proposal would have no allowances and general average in a port of refuge and moreover would abolish the principle of substituted expenses altogether.³⁸

10. 2001 CMI MEETING - SINGAPORE

One of the substantive topics discussed at the CMI plenary session in Singapore was the IUMI proposal. Mr. Magee was unable to attend but Ben Browne, one of the coauthors of IUMI Berlin draft proposal, was present in Singapore, and delivered a very eloquent argument in favor of the IUMI position. Mr. Hudson was also present. He reiterated the position he had taken at the Toledo conference as to the errors of the IUMI proposal and the difficulties in making the proposed changes that IUMI wanted to the

36 2000 CMI Yearbook, 314 at 321, *Lets Be Realistic*, N. Geoffrey Hudson

37 Hudson supra at 322

38 Hudson supra at 324

York Antwerp Rules.³⁹ I was the vice chair of the US GA delegation; and Howard Myerson was the chair of that delegation. The United States and two other entities, the International Chamber of Shipping and the International P&I Group were the only entities that voted against the proposal at Singapore that would consider what changes would be made, if any, to the York Antwerp Rules. In essence, the position of IUMI, which they were unable to achieve at the 1994 CMI Sydney meeting, has now been achieved in that they were getting an audience receptive to the proposals that IUMI have been making since Sydney, particularly their Berlin and Toledo proposals.

As a result of the Singapore meeting and the resolution of the GA session, a Working Group was nominated by the CMI to consider the entire issue of what, if any, changes should be made to the York Antwerp Rules 1994, despite the position taken by the United States that there was no necessity to take it up at this time as the 1994 Rules had not been given any time frame to achieve their desired effect.

11. CMI WORKING GROUP

CMI originally set up a Working Group under the chairmanship of Bent Nielsen. He is a Danish lawyer and the chairman of CMI General Average Working Group prior to the 1994 Sydney meeting. The vice president of the CMI, Frank Wiswall, a member of the MLA and a member of the CMI Executive Council was in overall charge of oversight of the activities of the Working Group. All members of the Working Group at that time (mid 2001) were European. They included an English average adjuster, a Danish average adjuster, and members of the UK, Danish and French insurance community plus Ben Browne and Richard Shaw, UK solicitors.

³⁹ His commentary in Singapore was identical to the position he articulated in Toledo

The first meeting took place at the offices of Ince & Co., the office of the president of the CMI, Patrick Griggs in May 2001. Fortunately, Jean Knudsen, former chairperson of the Average Adjusters Association was able to attend the meeting as was Howard Myerson. The viewpoint of these Americans was made fairly clear to the Working Group and was based upon the prior answers to the CMI questionnaire by the MLAUS. At that meeting the position of IUMI was reiterated once again by Mr. Browne and Mr. Marshall. Mr. Wiswall then prepared a report of that meeting which indicated the areas under discussion.

Mr. Wiswall had indicated he would recommend to the CMI Executive Council that the Council undertake a study of the IUMI proposals. This would be in the context of amplifying the resolution on the GA issue taken in Singapore a few months earlier. There was no representative of any hull underwriter present at the meeting in London of May 2001. Although the report of the meeting indicates that certain people were present for the hull and cargo insurers, actually these people were only the IUMI cargo representatives and the authors of the IUMI draft working paper given in Berlin. There were no other people present representing any other insurers except the London P&I interests. The meeting concluded with an agreement to continue the discussion at the second session of the group in December 2001.

In the interval between those meetings another IUMI meeting took place in Genoa. Unfortunately, a majority of the American participants were unable to attend due to the tragedy of September 11. Ben Browne spoke again on these issues at this meeting.⁴⁰

Mr. Browne gave an update on the IUMI proposals and discussed some particulars of the proposed reform. Mr. Browne did concede that some of the gains to be achieved by these changes would be offset by increased expenses, particularly for hull underwriters in port of refuge expenses, but he opined the net overall gain, even to hull

⁴⁰ The Progress of the IUMI Proposals for the Reform of the York Antwerp Rules - IUMI - Genoa, September 2001

underwriters, would be considerable. Unfortunately Mr. Browne did not discuss specifics as to what that would achieve.

I strongly recommend a review of his paper as it sets forth the specifics of the IUMI rationale. At that time (September 2001) the CMI Working Group was still under the chairmanship of Bent Nielsen. It also included Hans Levy, a Danish lawyer formerly with Skuld and now in private maritime law practice, Richard Cornah of Richards Hogg Lindley of Liverpool, Pierre Latron, who had been a member of the previous CMI Working Group prior to the Sydney meeting, Richard Shaw, a solicitor and former partner of Shaw & Croft and rapporteur of the CMI Working Group as well as the rapporteur of the Singapore conference on general average, Jens Middelboe, a Danish average adjuster and Mr. Browne. Subsequent to that time, I was able to obtain the agreement of Mr. Nielsen and the president of the CMI to have an American on the Working Group. The President of the Maritime Law Association thereafter appointed me as the U.S. delegate to that Working Group.

11. SECOND MEETING OF THE CMI WORKING GROUP IN LONDON, DECEMBER 2001

Fortunately, I was able to attend the meeting in London together with my good friend and colleague Howard Myerson, who has been of tremendous assistance to me in these activities. The December meeting was attended by the IUMI representatives i.e., Ben Browne and Matthew Marshall. There were also representatives of the UK Average Adjusters, as well as the United States Average Adjusters, and other members of the Working Group. Fred Robertie of the American Hull Syndicate was able to be present for a substantial portion of the meeting.

We were able to resolve some of the issues that had been discussed at the previous meeting in May. The meeting, chaired again by Frank Wiswall, evolved

essentially into a detailed discussion of some of the items from the IUMI agenda, particularly the proposal to amend the rules to reflect the “common peril” as opposed to “common benefit” issue and the salvage matters.

Mr. Wiswall conducted an outstanding meeting and was able to deflect some of the issues with an indication that they would probably not be taken up by the CMI, such as the issue of effect of fault. In his report to the Executive Council a few days later he indicated that the conclusion drawn by cargo interests from Mr. Marshall’s statistical presentation was that cargo’s share of GA expenses was unfairly burdensome in the magnitude of 60-65%. This was claimed to be partly as a result of substandard vessel operations.

There was a discussion on the issue of port of refuge expenses, since it appeared that the IUMI proposal would, in essence, make a change from general average to a series of particular averages and, even if they were not adjusted, the actual expenses would continue to be incurred and disputed. Mr. Wiswall recommended that certain of the IUMI points be taken up by the Working Group, including port of refuge expenses, absorption clauses, salvage claims, interest expense, temporary repairs, time bar and substituted expenses. He recommended that other points in the IUMI proposal should not be taken up by the Working Group and were withdrawn from consideration from the Working Group’s discussions.

12. WORKING GROUP MEETINGS

There have been two meetings of the Working Group in 2002. The position of the United States Average Adjusters and MLAUS was submitted to those attending the Working Group meeting in March 2002 in London through the assistance of Tim Madge, the present chairman of the UK Association. The results of the meeting in March were reflected in the June 24 draft report by Bent Nielsen, chairman of the Working Group on

General Average. This was submitted to the members of the Working Group about a week before the second meeting was to take place in Copenhagen.

The June 24 draft report was an excellent one in that it reflected the history of the General Average issues discussed in this paper, the position of IUMI and their recommendation for changes in the rules. The draft report suggested that various scenarios could be considered with the possibility of amending the rules to achieve certain IUMI objectives. The report also contained a list of arguments for and against accepting the “common benefit” expenses which was to be the subject of the further meeting in Copenhagen.

It is my assessment that the position of the Working Group seems to be heading toward making a recommendation of some changes to the York Antwerp Rules that would seek to adopt the position in part of IUMI. Although I was unable to attend the second meeting in Copenhagen in July, I was able to furnish to the chairman of the Working Group the position of the Average Adjusters Association of the U.S. as well as the position of the Maritime Law Association regarding the IUMI proposals. I was aided substantially in this by the comments of Jonathan Spencer and Howard Myerson in order to enable me to prepare the position report to Mr. Nielsen. I have not yet received the minutes of the Copenhagen meeting. I am advised by Mr. Nielsen that these should be coming by the end of October.

It is my expectation that the Working Group draft report will reflect the position of the majority of the Working Group (I seem to be in the minority) that the CMI should consider the possibility of amending the York Antwerp Rules 1994 to include some of the views put forth by IUMI. It is expected that this would be reflected in a more detailed document reflecting the majority and minority positions, if any, of the Working Group.

It is expected that the CMI will then form an International Subcommittee, similar to what they did for the meeting in Sydney, to consider what, if any changes should be made, based upon the draft report of the International Working Group. The composition

of the international subcommittee is to be determined by the President of the CMI. It is hoped and anticipated that there will be a member from the United States on that subcommittee when it is officially formed.

13. PRESENT STATUS OF THE PROPOSALS

As I have indicated above, it is my assessment that the CMI Working Group will come out with a draft final report proposing changes to modify the York Antwerp Rules on the basis of common safety as opposed to common benefit. This will represent a substantial shift in the present law as well as the present practice. It will also impact substantially upon vessel owners since they will now lose insurance coverage for their expenses incurred at a port of refuge, if the changes are made.

Hull underwriters pay for valid GA expenses. If the GA terminates at the port of refuge, then all the other expenditures that had been considered general average expenditures in the past and picked up by hull underwriters on their proportionate share will not be covered. The P&I clubs will not cover these expenses because they will only pay the vessel owner for the cargo proportion of uncollectible GA as a result of the violation of some statute or due to the unseaworthiness of the vessel directly causing the incident for which the owner is unable to obtain the benefit of the usual JASON clause.

The IUMI proposal also seems to suggest that all of this can be resolved by the presentation of GA absorption clauses. In my opinion this is a total misapprehension in that it is an attempt to resolve an underwriting problem (which is caused when cargo underwriters are insuring cargos on substandard vessels to begin with), by virtue of the absorption clause. It should be understood that an absorption clause is nothing more than a business transaction between the vessel owner and its hull underwriters. This is primarily done in the container trade due to intense competition although it may also be done on the bulk trade. In the liner container trade, if there is a general average, given

the number of containers and the substantial number of individual parties involved in the ownership of the goods, the vessel owner is looking at a possible substantial impairment of his business relationship with cargo interests due to the need to collect security.

Therefore, this trade has come up with an agreement whereby the hull interests will pick up the cargo's share of a valid general average contribution up to a certain amount, which is reflected in the hull insurance policy. Whether or not hull underwriters charge additional premiums for this is a matter of conjecture, but I would strongly recommend that hull underwriters give some consideration to this because the potential expenses to be incurred on behalf of cargo for GA can be extremely high. BIMCO has now come out with a Standard Absorption Clause which may be of assistance to the entire marine industry. The American Hull Syndicate also has an absorption clause.

The question therefore is, where are owners to go to seek coverage for what are now not going to be proper GA expenses because the York Antwerp Rules would not cover them? There seems to be to be a definite gap in insurance coverage. It may well be that hull underwriters would be willing to write additional risks for the prior usual port of refuge expenses and temporary repairs etc. if they would have been GA expenses prior to the amendment of the Rules for the common safety theory.

This may well be a new product that has to defined by the hull underwriters. However, it is evident to me that the marine insurance hull market is substantially unaware of the potential problems that they are facing in the future, if this change takes place. Their assureds, the shipowners, will clearly want coverage for these expenses. Essentially, it appears to me to be a substantial change proposed in which cargo underwriters are attempting to solve a commercial problem the wrong way.

Since they argue that the majority of their assureds' cargo general average contributions are impacted as a result of the engine problems or lack of performance by substandard vessels, therefore they propose that the York Antwerp Rules should be changed to take care of that. I would suggest, as indicated above, there are other and

better ways in the marine insurance market to take care of this perceived problem for cargo underwriters. These suggestions include

1. Reduce the over age penalty from 20 years to 15 years.
2. Cargo underwriters only accept risks if the vessels are registered in certain flag states and certain class societies. They should charge substantial additional premiums to the vessel owner if ships do not meet these standards.
3. If the cargo underwriting interests want to get rid of substandard vessels, there are ways to do that in the market place. They can limit the types of flag states for which they will accept coverage on those vessels. They should be prepared to increase the premium substantially to cover these perceived “substandard vessel” risks.

What are the potential side risks for all concerned? I believe that you will be looking at the possibility of more abandonment of voyages by vessel owners where they normally would have either discharged cargo, repaired the vessel and then reloaded it, or alternatively, would have entered into a non-separation agreement to carry the cargo to destination. It is expected that if the abandonment of the voyage takes place, cargo underwriters will be exposed even more to the risks of cargo damage, particularly if the port of refuge is in an area quite distant from good repair facilities or other problems of a similar nature. Cargo underwriters should be more aware of the business practices of their assureds. They should investigate how their assureds arrange to ship cargo on vessels, and who makes that determination, including the determination to use NVOCC's.

In essence, I would suggest that there could well be additional penalties imposed by cargo underwriters for not having vessels registered under a specific flag or a specific class society, or they must be of a certain age less than the 20 years. Cargo underwriters should also be able to check the detention records of various vessels to which their cargo assureds are entrusting valuable cargo and, if necessary, propose penalties on cargo interests for carriage on these vessels.

The proposals of IUMI, which are being considered by the CMI Working Group, are in my opinion, a substantial change in the philosophy of general average. It seeks to go back to what was the original English concept of common safety as opposed to the European and American concept, which has been embodied in the York Antwerp Rules, namely, common benefit. It is my view that there has been no significant substantive analysis of the effects of the 1994 rules and how these rules would impact on the proposed changes. It is also my opinion that the IUMI proposed changes were essentially considered at the Sydney meeting and rejected by the various delegations. Therefore, not having been able to achieve the result in Sydney, cargo underwriters are trying once again (and were successful in Singapore) in getting the CMI to enter upon a new study.

I trust that the ultimate report of the Working Group should produce the result that the 1994 rules are still valid and should continue to be used without substantial change. The problem lies not in the rules, but in the commercial activity of cargo interests and their underwriters in failing to take the proper steps to see to it that their assureds are taking all reasonable steps to place their cargo on ships that are run by good, competent operators registered in well known and well respected flag states and classed with well known and well respected class societies and are of a certain age, e.g. under 15 years.

It is submitted that this commercial quest cannot and should not be achieved by manipulating the York Antwerp Rules. Good commercial underwriters should be able to resolve, in the market place, the problems they are articulating as the rationale for the change in the rules. It is my hope and expectation that the United States marine insurance industry, particularly the hull market and the ship owning industry, takes this as

a call to become much more involved in these issues or suffer the consequences of their ostrich like approach.

I apologize for the lengthy discussion considering the history of these activities, but hull underwriters and the marine insurance market must understand how the IUMI arguments have been formulated and the basis upon which they have been put forth. It is, in my opinion, an imprecise premise and not a logical extension of the rationale as to how one resolves the issue of cargo interests and substandard vessels. It is obvious that 90 to 95% of the world ship owning interests are competent and take great care to see to it that they have competent crews with vessels which are well managed and well maintained.

There will always be a number of substandard vessels, substandard vessel owners and substandard vessel operators that exist. They can be permitted to exist only by the utilization of their vessels by those entities willing to get a cheaper freight rate , particularly if cargo interests feel that their cargo underwriters will pay for it in any event, since they perceive that this is the whole purpose of insurance. This is a position that should not be accepted. It is a position that all reputable underwriters should be able to resolve, not only the hull but also cargo interests.

The proposal for change is put forth essentially by cargo underwriters who have a desire to rid themselves of losses that are the result of their assureds making poor commercial decisions and placing at risk very valuable cargoes in order to achieve a lower freight rate.

As long as those activities continue to take place, this issue will remain with us. It is submitted that the way to resolve this problem does not include manipulating the York Antwerp Rules.