

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

EAMONN MAGEE

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

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

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

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

* Paper delivered at the Toledo Colloquium in September 2000.

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

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

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

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

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

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

Proposed Re-definition

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

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

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

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

Ian Stevens

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

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

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

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

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

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

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

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

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

The argument is often made and the question put:

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

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

Conclusion

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

APPENDIX 1

REPORT OF IUMI G.A. DRAFTING WORKING GROUP**GENERAL AVERAGE
HOW SHOULD IT BE CHANGED?**

The purpose of this report is to point to possible changes which might be proposed by property underwriters to the rules governing General Average worldwide. The aim of these changes is to rein back the progressive extensions in the scope of General Average which have taken place over at least the last 100 years with a view to lessening the burden which General Average places on property underwriters worldwide. It is felt that now that insurance is so very much more universally held by shipowners, the loss should lie where it falls to a greater extent than it does at present. The current concept of General Average is now felt to be outdated for a number of reasons (including the increased use of insurance, the fact that under many laws salvage is apportioned between ship and cargo in proportion to their values and the increased complexity of modern commerce which frequently makes the collection of G.A. security and the adjustment of G.A. contributions disproportionately expensive). Despite this, it is recognised that there is an argument for continuing G.A. in certain limited classes of situation and that it would be difficult to abolish G.A. altogether (as it might be replaced by claims at common law for restitution in the UK, for example, and because the maritime legislative community worldwide is not yet “ready” for such a novel step). The first task of this report, therefore, is to propose a statement of principle governing General Average similar to Rule A of York-Antwerp Rules in its purpose.

1. Redefinition of General Average

It is proposed that a definition of General Average be drawn from a slightly amended Section 66 Marine Insurance Act 1906 which would state:

“(1) A General Average loss is a loss reasonably, proximately and directly caused by or consequential on a General Average act. It includes General Average expenditure as well as General Average sacrifice.

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

At first sight it might be thought that if an attempt is going to be made to radically confine the ambit of General Average, substantial amendments are going to have to be made to Section 66 Marine Insurance Act 1906. In practice we feel only minor changes are required. Perhaps the most significant change is the deletion of the words “imperilled in the common adventure”, coupled with the insertion of “for the common safety” in para. 2 as to which see Section 3.

With these minor amendments the wording of Section 66 Marine Insurance Act 1906 is a suitable basis for the new concept of General Average.

The broad intention behind the new definition would be to cover (where reasonable):

- jettison of cargo (see 10 below)
- salvage (but see 15 below)
- damage intentionally and reasonably caused to ships' engines by working them when aground in a reasonable attempt to refloat and/or lighten
- crews' extra wages and overtime and consumption of extra fuel and stores while in the grip of a peril (but not at a place of refuge)
- provided that the G.A. expenses/sacrifices claimed are intentional and reasonable, it should not matter whether the owner or master makes the decision to incur them.

We would suggest that the following types of expenditure should not be included in G.A. under the new regime:

- ordinary crew wages during the peril (except crew overtime while the vessel is in the grip of a peril)
- environmental expenses of any kind save only Article 13 salvage enhancements for environmental threats and Rule XI(d) expenses if for common safety
- costs of transhipment to destination
- ship's expenses at a port of refuge
- temporary repair costs (unless carried out while the ship and cargo are in the grip of a peril e.g. in a salvage operation)
- the cost of discharging, storing and reloading cargo while the vessel repairs at a port of refuge (these expenses will be borne by the carrier under the contract of carriage)
- consumption of extra fuel/stores once the immediate peril has ceased to exist.

We would propose that the draft rules should expressly state the types of claim included and excluded from G.A. as examples for the sake of clarity.

The foregoing does not consider how substituted expenses should be treated: on the one hand the substituted expenses can save property underwriters expense by permitting a shipowner flexibility in deciding what expenses he can safely incur whilst at the same time it can also be said that substituted expenses are a vehicle for allowing the shipowner to recover expenses which he otherwise would be unable to. Substituted expenses should be abandoned (see 9 below).

2. *"In time of peril"*

One of the key intentions behind the proposed reform is to stop expenses going into G.A. after the ship and cargo have been brought to safety (for example to a port of refuge). A definition of the word "peril" will therefore need to be reached. At present it is arguably the case at common law that a peril exists if a situation prevails in which the vessel and cargo "might or could" become a CTL (see Lowndes and Rudolph para A.27). It is submitted that a

peril should only continue until ship and cargo are in a condition of reasonable safety. It should not therefore usually continue after the arrival of the vessel at a port of refuge. Thus the costs of a standby tug in port would not be recoverable but the costs of a tug escorting a vessel proceeding to a place of safety would be recoverable in G.A. It is perhaps worth considering the words of Roche J in *Vlassopoulos -v- The British & Foreign Marine Insurance Co Limited* [1929] 1 K.B. 187. In that case the propeller of m/v *Makis* fouled some wreckage while on passage from Bordeaux to Cardiff and the vessel was obliged to put into Cherbourg for repairs. Roche J held that the ship and cargo were in danger and said:

“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 the danger. It would be a very bad thing if shipmasters had to wait until that state of things arose in order to justify them doing an act which would be a General Average act.

That is all I think which need be said with regard to that matter unless I add this: that “peril”, which means the same thing as “danger”, is the word used in General Rule (A), just as it is the word used in the Marine Insurance Act Section 66. The word is not “immediate peril or danger”. It is sufficient to say that the ship must be in danger or that the act must be done in order to preserve her from peril. It means, of course, that the peril must be real and not imaginary. It means that it must be substantial and not merely slight or nugatory. It must be a danger.”

It is hard to disagree with Roche J’s words and it is therefore probably unwise to confine the severity of the peril which would qualify for G.A. but merely the length of time over which G.A. expenses can be incurred and then recovered. It is submitted that the words “in time of peril” in Section 66(2) Marine Insurance Act 1906 should, properly interpreted, have this effect.

One question which may arise is whether contractual salvage awards or settlements involving services rendered in part when ship and cargo are in peril and in part after they have reached a place of safety shall be apportioned in G.A. and, if so, on what basis. To avoid complication it is suggested provisionally that no such apportionment should be done.

As to the severity of the peril or danger which qualify sacrifices/expenses for G.A., this must to some considerable extent depend on each case. Examples at Lowndes & Rudolph para A.33 are helpful when considering this aspect of the matter. It is further submitted that the peril must be real and not imaginary (at present, despite the words of Roche J, there is conflicting authority on the question of whether an imaginary peril is sufficient - see for example Lowndes & Rudolph A.37).

3. *Common Maritime Adventure/Common Safety*

We consider the concept of “Common Safety” should underlie the “new” General Average replacing the Common Maritime Adventure concept which now forms the basis of the York Antwerp Rules. There are 3 points to make about the concept of common maritime adventure:

- It is widely thought that expenses based upon the principle of common maritime adventure are more extensive than is necessary to give shipowners sufficient encouragement to take prudent steps to preserve ship and cargo in time of peril. Once the peril is past expenses such as those incurred in a port of refuge or temporary repairs are more properly in the domain of maintenance. In other words, the “Common Safety” approach will reduce the exposure of Hull and Cargo Underwriters to G.A. claims.
- Technically, where there are two or more discharge ports and the General Average act occurs after part of the cargo has been discharged, the common maritime adventure has finished and no G.A. can be recovered. Obviously this is dealt with in various ways by different adjusters worldwide and in practice contributions are recovered. Nevertheless, this is intellectually untidy and it would be better to have some specific proviso dealing with it. This could be resolved by providing that cargo contribute only up to the time when it leaves the ship (although it is recognised this might increase the amount of work to be done by Adjusters); there should be a special clause dealing with cargo in lighters between ship and shore.
- Another difficulty about the idea of a common maritime adventure is that the word “adventure” implies a voyage. In this way it is argued that a hulk storing a bulk product such as oil or wheat, not on a voyage, cannot declare General Average because there is no common maritime adventure. This seems inequitable but it is an inequity to which property underwriters would normally have no real objection. However, in the interests of fairness and consistency with the concept of “Common Safety” we are prepared to include in G.A. storage tanks, FPSO’s and vessels at sea, stationary or otherwise.

We further consider Tugs and Tows should continue to be allowed to declare General Average.

It follows from the foregoing that the Non Separation of Interests Clause now incorporated into Rule G of the York-Antwerp Rules 1994 will no longer be required (see also para. 9).

4. Reasonableness

A Rule Paramount would be included making it incumbent upon the claimant to show that the sacrifice/expense was both reasonably made and reasonable in amount. To the extent that it is unreasonable, credit should not be given in G.A. This was always the position at common law (before the York-Antwerp Rules were introduced) - see *Anderson -v- Owen SS Co* [1884] 10AC and is now enshrined in the Rule Paramount of the York-Antwerp Rules 1994.

5. Causation

The courts presently interpret Section 66 Marine Insurance Act 1906 to mean that the G.A. loss must be directly caused by the G.A. act even though the word “directly” is omitted before the word “caused” in the section. It is, however, rather unclear as to whether or not the cause should be reasonably foreseeable (see *McCall -v- Houlder Bros* [1897] 2 Com Cas 129 which is

authority for the proposition that it is not necessary for a particular loss to have been contemplated to be included in G.A. provided it is incidental to the General Average Act). We believe that losses should be reasonably foreseeable to be included in G.A. under the proposed re-definition.

In *Austin Friars -v- Spillers and Bakers* [1915] 3 KB 586 the defence was unsuccessfully raised that there can be no G.A. act if what was done consisted of inflicting a tort on a third person's property. Under the proposed redefinition of G.A. we do not believe that *Austin Friars* would be decided differently.

6. *Loss through Delay*

Rule C of the York-Antwerp Rules 1994 provides that:

"Loss or damage sustained by the ship or cargo through delay, whether on the voyage or subsequently, such as demurrage, and any indirect loss whatsoever such as loss of market, shall not be admitted as General Average."

We would not wish to change this position except to include the words "port charges and associated expenses of being in port" after the word "demurrage".

7. *The Effect of Fault*

Although the fault based regime of the Hamburg Rules is attractive, the Working Group felt that it would not be appropriate to include it in a re-drafted York-Antwerp Rules. However, the Working Group did not wish to provide any further exemptions for shipowners beyond those already contained in the Hague and Hague-Visby Rules. Recognising that a substantial number of general averages are caused by poor maintenance, particularly in the engine room, the Working Group wished to provide some incentive to owners to improve their record in this respect. The Working Group therefore recommends that the new Rules should include a clause which prevents shipowners from recovering contributions in respect of general average losses which are caused by breaches of the ISM Code, the STCW Convention (once it enters into force) and/or the Rules of the Classification Society with which the vessel is entered (if any). This would have the benefit of encouraging owners to comply with the International Safety Conventions (excluding all but Chapter IX of SOLAS (ISM)) which must surely appeal to Governments while at the same time offering a solution to the apparent injustice of asking cargo to pay for the consequences of the faults of the shipowner. Engine breakdowns arising out of latent defects which give rise to general average losses will continue to entitle shipowners to declare and recover general average contributions.

It is suggested that Rule D of the York-Antwerp Rules 1994 should be incorporated into any revised set of Rules with the following proviso:

"Provided that no party to the common maritime adventure shall recover any general average loss or be entitled to have made good any general average sacrifice or expenditure if and to the extent that such general average loss, sacrifice or expenditure is shown to have been directly

caused by or consequential upon any breach of the ISM Code or the STCW Convention or the Rules of the Classification Society with which the vessel is classed.

This Rule shall apply whether or not the party concerned is obliged by law or otherwise to comply with the ISM Code or STCW Convention and whether or not the vessel is in fact classed. If the vessel is not classed then for the purposes of this clause it shall be deemed to be classed with Lloyd's Register 100A1 and the Rules applicable to a vessel of that class shall apply to the vessel for the purposes of determining whether any breach of Class Regulations has occurred".

8. *Onus of Proof*

(a) Claiming losses/expenditure

It is proposed that no amendment to Rule E of the York-Antwerp Rules 1994 should be made and that it should be incorporated into the new Rules as it currently stands. In other words the onus of proof lies upon the party claiming in general average and the time limits for the presentation of documentation etc. contained in Rule E of the York-Antwerp Rules 1994 shall be incorporated into the new Rules.

(b) Resisting claims for G.A. Contributions on the merits

We believe that, as at present, the paying party (usually H&M Underwriters and Cargo Underwriters) should prove the shipowner is not entitled to collect a contribution. However, this should be made fairer than at present by the introduction of an obligation to allow access to the vessel and relevant papers by the paying party's surveyor(s) (see para. 31 below).

9. *Substituted Expenses*

We cannot recommend any changes to the way in which contributory values are calculated now.

We propose Substituted Expenses should be abandoned.

Rule F of the York-Antwerp Rules 1974 states:

"Any extra expense incurred in place of another expense which would have been allowed as General Average shall be deemed to be General Average and so allowed without regard to the saving, if any, to other interests, but only up to the amount of the General Average expense avoided."

The most usual substituted expenses scenario occurs when a vessel has suffered damage and put into a port of refuge where it will be necessary to carry out repairs before the voyage can be completed. The cost of discharging, storing and reloading the cargo would exceed the cost of on-carriage to destination and, under the York-Antwerp Rules as they stand, it seems quite reasonable that the shipowners should have the option of transshipping the cargo to destination and recovering the transshipment costs in G.A.

However, 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 a peril then 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 G.A.

It might be said that there could be other occasions on which a right to claim substituted expenses would be useful but we cannot think of an example of such an occasion: the definition of General Average set out in Section 66 Marine Insurance Act 1906 is wide enough to include any reasonable sacrifice or expense: it is submitted that Rule F is only necessary because of the way in which the numbered Rules of the York-Antwerp Rules have drawn the limits of G.A. so clearly and so widely. In the circumstances, we cannot see the need to retain a substituted expenses rule. To abandon substituted expenses would merely be to restore the English common law position (see Lowndes & Rudolph *General Average and York-Antwerp Rules 12th Edition* para F.02 et seq).

10. Jettison of Cargo

At present Rule I of the York-Antwerp Rules provides that no jettison of cargo should be made good in General Average unless such cargo is carried in accordance with the recognised custom of the trade. No change to this position is proposed.

11. Loss or Damage by Sacrifices for the Common Safety

Rule II YAR 1994 allows loss and damage to be made good in G.A. when incurred for the common safety. It is not proposed this should be changed.

12. Extinguishing Fire on Shipboard

Rule III of the York-Antwerp Rules 1994 allows for the making good of damage done to a ship and cargo by water or otherwise, including damage by beaching or scuttling a burning ship in extinguishing a fire on board, to be made good as General Average (with a minor exception in respect of smoke damage): it is submitted that this is perfectly reasonable and falls within the revised definition of General Average.

13. Cutting away Wreck

Rule IV of the York-Antwerp Rules prevents the recovery in G.A. of the costs of cutting away wreck or parts of the ship which have been previously carried away or are effectively lost by accident. Once again, this is consistent with the revised idea of G.A. if done when ship and cargo are in actual danger.

14. Voluntary Stranding

Rule V of the York-Antwerp Rules 1994 provides that intentional voluntary stranding for the common safety is a G.A. act and it is not suggested that this should change.

15. Salvage

In a talk on the 1994 York-Antwerp Rules delivered shortly after the final text of the Rules had been approved in Sydney, Ian Stevens of LCO said:

“For some reason or another, which I cannot readily ascertain, Rule VI – Salvage Remuneration - never seemed to get much of an airing. And yet if there is any rule which causes aggravation, this surely is it.

Prima facie, the wording of the rule is innocuous, particularly when the shipowner has incurred expenditure in the nature of salvage on behalf of all parties to the common adventure, and thereafter seeks to recover cargo-owner’s share or shares in General Average.

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

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

My section has seen a number of adjustments where the General Average expenditures comprised the salvage remuneration, and very little else. If the salvage had been excluded the adjustment fees would probably have been of limited amount, but the inclusion of the salvage has enabled a considerable inflation of the charges. Not good news for cargo or for underwriters.”

As is well-known, Rule VI was only introduced in the 1974 York-Antwerp Rules and has been accused of creating more work for General Average adjusters and more expenses for marine property underwriters than almost any other single change to the Rules in the last 50 years. Clearly this must be tackled, but how?

We propose the replacement of Rule VI by a clause along the following lines:

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

Outright abolition of Rule VI would create a situation where a shipowner

may have to pay the full amount of cargo's contribution and be unable to recover cargo's proportion. In many jurisdictions, such as the Netherlands and Spain, the shipowner is mandatorily or at the option of the salvor the debtor for the salvage remuneration. For this reason it is not felt that it would be practicable or fair to exclude salvage from G.A. completely.

All the foregoing applies only to Article 13 awards: as in Rule VI(b) YAR '94 Article 14 awards special compensation and SCOPIC remuneration should not be allowed in G.A.

16. Damage to machinery and boilers

Rule VII York-Antwerp Rules 1994, when read in conjunction with the new Rule Paramount requiring "reasonableness", would appear to be in accordance with the new definition of G.A. We assume that under the proposed re-definition of General Average (and, indeed, under the 1994 YAR) the "*Alpha*" [1991] 2 Lloyd's Rep 515 would, if heard today, be reversed.

17. Expenses lightening ship when ashore and consequent damage

Rule VIII of the York-Antwerp Rules 1994, emphasising, as it does, the fact that it does not apply to environmental liabilities, would once again appear to fall within the new definition of G.A. and, as such, would appear to be unobjectionable.

18. Cargo, ship's materials and stores used for fuel

The new Rule IX of the York-Antwerp Rules 1994 would appear on the face of it to be acceptable. Cargo etc. used as fuel will be made good only if used for fuel for common safety while ship and cargo are in actual danger.

19. Expenses, wages and maintenance of crew and other expenses in the port of refuge

As already discussed, we recommend Rules X and XI (a), (b) and (c) expenses should be disallowed in G.A. (but see para 33).

20. Damage to cargo in discharging, etc.

At present, Rule XII York-Antwerp Rules 1994 reads:

"Damage to or loss of cargo fuel or stores sustained in consequence of their handling discharging storing re-loading and stowing shall be made good as General Average when and only when the cost of those measures respectively is admitted as G.A."

The vast majority of cases where Rule XII allowances apply are in circumstances where cargo is discharged at a port of refuge. However, there are circumstances where damage to or loss of cargo, etc., might occur as a result of, for example, a ship-to-ship transshipment of oil at sea when salvage services are being rendered under a lump sum rather than a "no cure, no pay" contract. In such circumstances, it would appear reasonable to allow cargo losses in

transhipment to be recovered in G.A. However, if cargo losses are allowed, should also losses to the hull be allowed (such as, for example, ranging damage with the transhipment tanker)? We propose that the wording of Rule XII be amended to include wording to the effect that the damage/loss must occur to the cargo, etc., while the ship and cargo are in the grip of peril but not otherwise. The scope of this rule will be thus very substantially reduced.

21. Deductions from cost of repairs

Under the new concept of G.A., some repairs will still be allowed (e.g. repairs consequent upon a deliberate grounding to avoid a worse peril or repairs to boilers and machinery made necessary by a bona fide and reasonable attempt to refloat a vessel aground). However, there seems no reason not to make deductions in respect of “new for old” where old material or parts are replaced. It should not be forgotten that this was the case in the 19th century and because of the difficulty in arriving at a suitable deduction, certain “customary deductions” were applied to all repairs other than to damage sustained on a vessel’s maiden voyage. The customary deductions were fixed at 1/6th for chain cables and 1/3rd for all other repairs and replacements except for anchors and materials and stores that had not been put into use which were allowed in full. A different scale of deductions, depending on the age of the ship, was approved by the A.A.A. in 1887 as a rule of practice with the introduction of iron and steel ships. This was slowly whittled away until we now have the present position.

We tentatively propose the introduction of a modern scale to make the rule operable which will require the input of a hull and machinery surveyor. Alternatively, we could go back to the scale contained in the 1924 or 1950 Rules. We propose that we should consult with the London Salvage Association on this topic.

Although this proposal is in accordance with the laws of many countries (e.g. see Art. 226 Greek Maritime Code) it is contrary to existing hull practice (new for old - no deductions) and could therefore be regarded as inconsistent with market practice but we feel this objection is outweighed by the need to deter “maintenance G.A.’s”.

22. Temporary repairs

The comments relating to permanent repairs above apply equally to temporary repairs. Much of the criticism of Rule XIV arises out of the House of Lords decision in the “*Bijela*” [1994] A.C. which supported the accepted practice of average adjusters that temporary repairs of accidental damage effected at the port of refuge are allowable as G.A. up to the savings in general average allowances resulting therefrom. If temporary repairs at a port of refuge are no longer included in G.A. (as is proposed), there is no need to address this problem in the new Rules, as such temporary repairs will not be recoverable. The only sort of temporary repairs which might be recoverable are those consequent upon a G.A. sacrifice made while the vessel and cargo are in actual danger (such as, for example, deliberately grounding the vessel in order to save

both vessel and cargo by averting a risk of total loss). Deductions should be made for materials used in temporary repairs and later discarded and sold for scrap or otherwise disposed of and credited to the claimant.

Therefore, the scope of the temporary repairs Rule will be drastically curtailed but not, it is suggested, extinguished altogether.

23. *Loss of freight*

We think that it is only fair and reasonable that freight arising from damage to or loss of cargo shall be made good as G.A. either when caused by a general average act or when the damage to or loss of cargo is so made good. An example of this might be when cargo is jettisoned for the common safety. It is not felt that this is a loss which should be better borne by freight insurers.

24. *Amount to be made good for cargo lost or damaged by sacrifice*

We have no particular argument with Rule XVI of the York-Antwerp Rules 1974 and 1994 on this topic. Contributory values and damage to ship will be dealt with in paragraph 25 below.

25. *Contributory Values*

We cannot recommend any changes to the way in which contributory values are calculated now. Justice demands that G.A. contributory values should be assessed at the end of the adventure as stated in Rule G York-Antwerp Rules; we considered York-Antwerp Rules XVII and XVIII carefully. A number of questions arose including:

- (a) Should cargo value be assessed on the basis of the commercial invoice rendered to the receiver or, if there is no such invoice, from the cargo's shipped value (as at present)? We felt that on balance this is the most workable method of assessing cargo's contributory value.
- (b) Should the cargo value include insurance and freight at risk of "interests other than the cargo"? We decided it should not.
- (c) Should the ship's value be assessed without taking into account the beneficial or detrimental effect of any demise or time charter party to which the ship may be committed (as at present)? We felt the status quo should be preserved in this respect principally due to the difficulty and expense of arriving at a ship contributory value taking these factors into account.
- (d) Should the concept of "made good" be retained? If the concept of "made good" was to be abolished then provision would have to be made to ensure that the owners of sacrificed property only receive a fair proportion of the value of the sacrifice/expense which would otherwise have been "made good" and not 100%.
This is done by "making good" at present, it is a fair system and should be retained.
- (e) Where cargo is sold short of destination should it contribute upon the actual net proceeds of sale (as at present)? We felt it should.

- (f) Should cargo's contributory value be assessed only once it arrives at its eventual destination (which may be many hundreds of miles from the discharge port)? It is felt that despite the advantages of such a proposal from a cargo insurers' point of view that G.A., whether based on common safety or common maritime adventure, is primarily a shipping doctrine and that it is more suited to the sea voyage only where common interests face the same peril. Accordingly, contributory values should continue to be assessed at the discharge port.
- (g) Should Passengers' luggage and personal effects contribute in G.A. (at present they do not)? We felt that to ask these interests to contribute would greatly increase the cost of G.A.'s (and in particular, of obtaining security) for very little gain in fairness. Accordingly passengers' luggage and personal effects should not contribute in G.A.

26. *Undeclared or wrongfully declared cargo*

We have no particular argument with Rule XIX York-Antwerp Rules 1994 and recommend no change should be made to this rule.

27. *Provision of funds and interest*

It is proposed that commission on G.A. expenditure and the entitlement to pre-adjustment interest should be abolished.

(a) Commission

Historically the position at common law was to allow no commission for advancing funds in G.A.

The best argument we have heard for retaining Rule XX commission is that it is an historic custom in a substantial number of countries (although not the U.K.). For example, in Belgium, Lowndes & Rudolf say that the practice was to allow a commission of 2%, in Germany a customary commission of 1% was allowed on G.A. disbursements, while in the United States the figure was 2.5%. Commission came in before interest was introduced and was described as "the cost of raising funds". When interest was first introduced in 1924, the commission rule was not deleted and thus, in effect, the parties to G.A. are paying twice in respect of the same item. To tackle this criticism, adjusters now attempt to justify commission as being the administrative costs to a shipowner of dealing with a G.A. situation but then, in addition to that, seek sometimes to recover the same expenses under the heading "administration telexes etc." or "agency". This is often abused. We propose that administrative costs, telexes, telephones and other communication charges should be excluded from G.A. completely.

At Sydney an attempt was made to apply the 2% commission to all G.A. expenditure, but this was successfully opposed by observers from IUMI and LUA as being an unwarranted expansion of G.A. and the amendment was withdrawn.

(b) Interest

It is felt that G.A. Adjustments are taking too long to be published and that some incentive must be given to owners to co-operate with their adjusters more actively than at present. This should speed up the production of G.A. Adjustments to the benefit of all parties. It is therefore proposed that no interest shall be recoverable on general average disbursements until the publication of a final G.A. Adjustment. However, interest on general average contributions should from time to time be recoverable at the interest rate applied to judgments in the country of the currency of the Adjustment from the date of publication of the final Adjustment to the date of payment. It is recognised that the abolition of the 7% fixed rate will give rise to uncertainty but it was felt that fixing the new rate by reference to the currency of the Adjustment will be fairer in view of the very wide differences in the interest rates from country to country. In order to avoid "currency shopping" it may be prudent to oblige the Adjuster to publish the Adjustment in the currency in which more G.A. disbursements were incurred than any other.

It is recognised that this provision may give rise to increasing requests for payments on account in circumstances where underwriters may not know whether they are liable to contribute. Although it is not intended that special provision should be made for this situation in the rules, it may be necessary to reconsider the wording of general average guarantees and bonds to provide that payments on account shall only be made in circumstances where there is no doubt that the party demanding the payment on account is indeed entitled to receive his contribution.

28. *Jurisdiction*

At present, the Rules have steered clear on what jurisdiction should govern the adjustment and, in practice, we think this must remain a matter of contract between the parties.

29. *Time bar*

As is well known, there are a vast range of different time bars from jurisdiction to jurisdiction and Rule E of the 1994 York-Antwerp Rules is the first attempt to address this problem. Rule E is a rather watered-down version of the proposal put by LUA representatives at the BMLA G.A. Sub-Committee meetings which was that there should be a contractual time limit of one year within which parties claiming in G.A. should produce their adjustment and, if not accepted, should commence proceedings, failing which the claim becomes time-barred. The period of one year after discharge was chosen by analogy with the Hague and Hague-Visby Rules time limit. The argument against introducing a one year time limit was that frequently repairs were not completed within a year following completion of discharge. If the present proposals are adopted, repairs will form a smaller proportion of G.A. adjustments and so this argument will have less force. ILU statistics show that although 65% of G.A. Adjustments are produced within 2 years of the casualty

these comprise only 1/3 of the amounts claimed in G.A. We therefore propose a general contractual time limit for G.A. claims in an attempt to speed up the general G.A. process. A suitable clause might read:

“All parties to the general average and their guarantors (if any) shall in any event be discharged from all liability whatsoever in respect of claims for general average contributions unless judicial or arbitral proceedings have been instituted within a period of one year after the date upon which the general average adjustment has been published or six years after the general average act (whichever is the earlier). These periods may, however, be extended if the parties so agree after the cause of action has arisen.

This rule shall supersede any domestic law which provides for a different time limit to that specified herein for the commencement of suit in respect of claims for general average contribution between the parties to the general average and their guarantors. This rule shall not apply as between the parties to the general average and their insurers (except in so far as such insurers are acting as guarantors)”.

30. Currency Devaluation

No interest should be liable to contribute more than the total contributory value of his property involved in the G.A. as assessed in the currency in which the cargo is insured at the time the Adjustment is published. Any shortfall shall be borne by the claimant(s) in G.A. without recourse to the concerned interest or his insurer.

31. Surveyors

It is suggested that a new rule should be incorporated into the revised rules to the effect that no contribution shall be due from any party whose surveyor or surveyors has/have been refused access to the vessel and its documents and any documents relating to the vessel or its maintenance not on the vessel which are reasonably requested in writing to be inspected by any party or those acting on their behalf, with a view to determining whether or not that party shall be liable to contribute in general average. Whoever appoints the Surveyor should pay for him.

32. Drafting

The Working Group proposes that the re-drafted rules should not be divided into numbered and lettered rules. The distinction is confusing and unnecessary. Views are invited.

33. Environment

It is recommended that the existing position regarding the inclusion of environmental liabilities in G.A. as set out in Rule C and Rule XI(d) of the York-Antwerp Rules 1994 should remain. It is recognised that this will result in property underwriters continuing to bear the environmental liabilities they

do at present but limited to only those incurred while the ship and cargo are in the grip of a peril. The environmental liabilities currently allowable under the 1994 YAR are:

- Environmental element in salvage awards by virtue of Article 13(i)(b) of the Salvage Convention 1989 - Rule VI York-Antwerp Rules 1974 as amended in 1990 and 1994.
- The four circumstances listed in Rule XI(d) York-Antwerp Rules 1994 which states:
 - “(d) The cost of measures undertaken to prevent or minimise damage to the environment shall be allowed in general average when incurred in any or all of the following circumstances:
 - (i) as part of an operation performed for the common safety which, had it been undertaken by a party outside the common maritime adventure, would have entitled such party to a salvage reward;
 - (ii) as a condition of entry into or departure from any port or place in the circumstances prescribed in Rule X (a);
 - (iii) as a condition of remaining at any port or place in the circumstances prescribed in Rule XI (b), provided that when there is an actual escape or release of pollutant substances the cost of any additional measures required on that account to prevent or minimise pollution or environmental damage shall not be allowed as general average;
 - (iv) necessarily in connection with the discharging, storing or reloading of cargo whenever the cost of those operations is admissible as general average.”

Because of the overriding proviso that to be allowed in G.A. an expense of sacrifice should be made or incurred “in time of peril” allowances under Rule XI (d)(ii), (iii) and (iv) will be considerably rarer than at present (see also para. 19).

34. *Ballast G.A.’s*

The Working Party has considered whether owners should continue claiming G.A. contributions in respect of ballast voyages. Logically this should not be possible unless of course bunkers belong to someone other than the owner. However, by rule of practice B26 they are accepted as being recoverable by the market. It has been suggested to the Working Party by experienced adjusters that Rule B26 was intended to exclude ballast G.A.’s but unfortunately was incorrectly worded and as a result, for over 50 years the market has been paying up on ballast G.A.’s when the intention originally was that they should not have been doing so. It is therefore recommended a rule should be inserted specifically preventing ballast G.A.’s which would accord with current practice in some markets at present.

35. *Adjusters’ fees*

We regard this as outside our remit but we do have some thoughts which another Working Group may wish to consider.

A tariff might usefully be worked out for adjusters' fees to reflect a combination of:

- (a) time spent;
- (b) the number of items in the adjustment; and
- (c) the overall value of the adjustment

so that some way can be found to check that the fees are reasonable. Lawyers' fees can be taxed in accordance with (admittedly pretty complicated) criteria laid down by the courts but until June 1997 there appeared to be no way of reviewing an adjusters' bill without litigation (except by negotiation). We understand the AAA has recently established a costs taxation procedure for adjustments involving the London market which should go some way to addressing this problem. It may be helpful if this procedure could be extended to cover insurers and adjusters worldwide in due course.

36. *G.A. Security*

We regard this as outside the remit of this report.