

CMI INTERNATIONAL WORKING GROUP ON GENERAL AVERAGE

INTRODUCTION

At the Plenary Session of the 2012 Beijing Conference the Chairman of the Working Group presented a summary of the deliberations and recommended to the CMI Executive Council *“that it should appoint a new International Working Group on General Average, with a mandate to carry out a general review of the York-Antwerp Rules on General Average, and, noting that the York-Antwerp Rules 2004 had not found acceptance in the ship-owning community, to draft a new set of York-Antwerp Rules which meet the requirements of the ship and cargo owners and their respective insurers, with a view to their adoption at the 2016 CMI Conference.”* This recommendation was accepted by delegates.

Following the Beijing Conference a new IWG was formed consisting of the following members:

Bent Nielsen (Denmark) - Chairman
Richard Shaw (UK) – Co-rapporteur
Taco van der Valk (Netherlands) – Co-rapporteur
Andrew Bardot (UK, International Group)
Ben Browne (UK) – IUMI
Richard Cornah (UK) – AAA
Frédéric Deneffe (France)
Jürgen Hahn (Germany)
Michael Harvey (UK) – AMD
Linda Howlett (Australia) – ICS
Jiro Kubo (Japan)
Sveinung Måkestad (Norway)
John O’Connor (Canada)
Peter Sandell (Finland)
Jonathan Spencer (USA)
Esteban Vivanco (Argentina)

The months following the Beijing Conference the IWG prepared a new questionnaire which was intended to achieve a broad consensus in advance of the 2016 Conference and encourage a general review of all aspects of the York-Antwerp Rules, and was therefore not confined to the issues that had proved to be controversial before and at the Beijing Conference. The questionnaire was distributed as of 15 March 2013 among CMI members (including titular and consultative members) and two organizations of average adjusters, the Association of Average Adjusters (AAA) and the Association Mondiale de Dispatchers (AMD). While the latter two organizations are not consultative members of the CMI, their input was thought to be invaluable considering the subject matter.

At the time of writing this report replies have been received from the following national maritime law associations:

Argentina
Belgium
Brazil
Canada
China
Croatia
Denmark
Finland
France

Germany
Israel
Italy
Japan
Netherlands
Norway
Slovenia
Spain
Switzerland
Ukraine
United Kingdom

Replies have also been received from the following organizations:

AAA
AMD
ICS/BIMCO (both consultative members of CMI)
IUMI

The following report is a collation of the responses that were received on the basis of each question contained in the questionnaire.

The text of the questionnaire is included almost in full in this report. The text of the questionnaire is printed in italics whereas all the responses are printed in roman.

In principle each response is placed directly below the relevant question. Where the response is more general, covering several (sub)questions at a time, and difficult to assign to particular (sub)questions, the response is placed below all those questions, but a reference '[IWG: See below]' has been placed behind each (sub)question to make this fact known.

Where no response was given to a particular (sub)question by a member or organization that did send in a reply to the questionnaire, this particular member or organization is indicated, but with a blank space to indicate no response was given.

All individual replies will be made available on the CMI's website under "Work in Progress" together with other documents relating to this project. Endeavors will be made to publish an updated version of this report on the website shortly before the Dublin-meetings.

As in the questionnaire, references in the report to the York Antwerp Rules (YARs) are to the 1994 Rules, unless otherwise stated.

This report is to be circulated prior to the CMI symposium in Dublin which is due to be held 29th September – 1st October 2013. The symposium will include an International Sub-Committee meeting which will seek to identify areas for further work.

The ISC will meet on the 28th and 29th. Both days at 10:00 hrs. The meetings are expected to continue after lunch until 16:30. The International Working Group will not meet on Saturday the 28th as it was indicated in the questionnaire.

SECTION 1 – GENERAL

Germany: The German MLA generally supports and welcomes the efforts made by CMI to create a convergence of interests between the various stakeholders of General Average (GA) cases.

As is well known in practice, most shipowners and their Associations refer to the YAR 1994 in bills of lading and freight contracts, whilst marine insurers in general favour the YAR 2004. This has led to the result that the YAR 2004 have not found much acceptance in practice. A new version of the

YAR has to find its way into bills of lading and charter parties and therefore has to be acceptable to all stakeholders.

The German MLA is strongly against the abolition of the YAR, which would, of course, not be a solution, although the GA Absorption Clause has proven its worth in practice. The German MLA appreciates the efforts made by CMI to develop the present detailed Questionnaire on the General Review of the Rules on General Average. Nevertheless, we are of the opinion that a lengthy discussion of every aspect/detail of the YAR 2004 might result in an unnecessary widening of the debate towards issues of minor importance, whilst a concentration on the major issues, which have resulted in a non-application of the YAR 2004 in practice, seems favourable in order to achieve a satisfactory result.

For this reason, the German MLA prefers to focus its answer to the Questionnaire on main issues of general and practical importance. The German MLA is of the opinion that finding a common ground on these issues, which serves the interests of shipowners as well as insurers and be accepted by the various stakeholders, could benefit the future development of the YAR.

The German MLA would like to comment on the following six points:

- a. Rule VI. Salvage Remuneration
- b. Rule XI. Expenses at the Port of Refuge
- c. Rule XX. Commission of Funds
- d. Rule XXI. Interest on Losses
- e. Rule XXII. Bar Depot
- f. Rule XXIII. Time Bar

Israel: There are some statutory provisions in Israeli law relating to General Average, particularly Chapter 12 of the Ottoman Law of Maritime Commerce. Although somewhat archaic, this chapter provides a more or less complete code of GA rules. There are no judicial precedents setting out which set of rules (the Ottoman law or the YAR) is superior.

Furthermore, sect. 40 and 43 of the Shipping Law (1960) subordinate the right of ship owners to GA contributions, to priority claims including sale expenses, post charges, salaries of the crew, salvage, damages due to collisions and necessities.

ICS/BIMCO: Presently there is widespread uniformity of General Average adjustments on the basis of the YAR 1994, which are well-functioning, widely known and applied. For a new set of Rules to be supported, a compelling need for change must be demonstrated and the proposals for change must be clear improvements on the present system.

1. THE BIG PICTURE

1.1 *During the discussion leading up to the 2004 Rules some parties advocated the "abolition" of General Average.*

a) *Would you support this approach?*

Argentina: No, the General Average is still the fairest system to deal with these situations.

Belgium: No.

Brazil: The Brazilian Maritime Law Association does not support the abolition of G/A. It is a tradition in the Shipping Industry, in use since the beginning of the commerce by sea, obeying principle of equity and fairness in distributing the risks of the sea venture.

Canada: No

China: No. One from cargo insurers expressed his support to abolish g.a. who stated:

- i) taking the reference on absolute liability system as that the expenses would be born by shipowners themselves.
- ii) for sacrifice, to be born by respective owners.

Croatia: No.

Denmark: The Danish MLA does not support an abolition of General Average. It is a very democratic institute which is known and accepted worldwide, incorporated in national legislation in most countries and into most contracts of carriage of goods. No other set of rules are available and it will take many years to establish and obtain agreement on a new set of rules to use instead of the York Antwerp Rules.

Finland: There has been debate for decades concerning this issue, not least in the Nordic countries. The Finnish Maritime Code includes provisions on general average in Chapter 17. It refers to the application of the York-Antwerp Rules 1974, unless otherwise agreed by the contracting parties.

The insurance market through applicable absorption clauses fixes a number of potential GAs itself. An average adjuster receives GA cases in Finland only rarely, whilst particular average cases are much more common.

GA has so far withstood all efforts, if any, to abolish it. It seems that the proper approach to the question is to study whether or not the market involving marine insurers, shipowners and cargo interests acknowledge the need for GA rules. As rightly pointed out in the Questionnaire, the matter, in the end, is contractual. Should the contracting parties agree upon GA, there seems to be no reason for any court or arbitral tribunal to disregard such a contract. It is quite another matter what binding effect in such cases a GA adjustment will have, but even this is primarily a contractual question and secondarily an issue for courts, arbitral tribunals and enforcement authorities.

Therefore, it is neither necessary nor possible to state clearly whether GA should be abolished or not. The market will have to decide on this matter and as long as GA rules are applied, there is reason for the CMI to uphold and, from time to time, reassess the substantive rules within GA. The market will either "suffocate" GA or keep it alive.

France: No comment on our side on those various questions regarding this first issue.

Germany: The German MLA is strongly against the abolition of the YAR, which would, of course, not be a solution, although the GA Absorption Clause has proven its worth in practice.

Israel: We would definitely not support the abolition of General Average.

Italy: There are no indications of a trend towards the abolition of the General Average. On the contrary:

- a) the market tends to strike a balance through mechanisms which in different ways (Small GA Clauses, preventive Club's involvement etc.) often avoid cases where costs are disproportionate or litigation is likely to arise;
- b) the modern communications technologies (exchanges of instructions and guarantees by email, etc.) have largely reduced, compared to the past, the most cumbersome elements of the procedure, except perhaps for accidents involving a large number of units (container ships).

Japan: We would not support "abolition" of general average.

As the system of general average still has the vital and indispensable function of adjusting the conflicting interests among the parties to the common maritime adventure, it should not be abolished.

The Netherlands: No. The *Commissie Avarij-grosse* (General Average Committee) of the Dutch MLA (hereafter: the "Committee") is of the opinion that it is in the interest of all parties to a maritime adventure that the Master and Owners are encouraged to take measures in case of danger to preserve ship and cargo and that those measures are taken that are the best measures at the time, irrespective of the question who has to bear the costs. In the absence of a different mechanism to obtain this result, general average seems the best option and should thus be maintained.

The Committee does not support a 'knock for knock' system.

Norway: We do not agree to an abolition GA, and also do not consider this to be a practical solution. This more than 2000 years old system is today incorporated into the legislation of most countries and into most contracts for the carriage of goods by sea. To obtain agreement on a new International Convention from all countries across the world would be insurmountable and would take at least 20 years to get into law.

GA is in particular considered beneficial when it comes to dealing with problems of getting cargo to destination following the arrival of a vessel to a port of refuge, and in avoiding the need for time-consuming and costly argument between ship and cargo about the apportionment of expenses. Some amendments to further improve the system are suggested in the responses below.

Slovenia: No.

Spain: No, we do not support the abolition of General Average.

Switzerland: No. It should only be envisaged to abolish General Average in case:

- a) the benefits of the institute/procedure are generally outweighed by the required efforts to bring the adjustment about.
- b) the institute/procedure is predominantly used in a malicious way, e.g. by owners of substandard tonnage declaring General Average very soon after having left port in an attempt to have their "ordinary maintenance cost" funded by cargo contributions.

Ukraine: No.

United Kingdom: The BMLA would not support the abolition of General Average. It is a long established principle with which all interests are familiar.

AAA: No

AMD: The arguments in favour and against the abolition of General Average (GA) have been rumbling on for very many years. Indeed, a paper published in 1877 entitled "GENERAL AVERAGE: Its Evils and their Remedies" indicts the GA system on the grounds-

1. of uncertainty of operation,
2. of delay,
3. of costliness and
4. of questionable morality.

Then as now it appears that the principal objections to the system are not to the basic concept, that what is given for all should be contributed to by all, but to the length of time and complexity of the whole process of collecting security, preparing an adjustment and settlement under it. Suggestions have been made to address this problem, but it is difficult to see how this might be dealt with via the York-Antwerp Rules.

ICS/BIMCO: ICS and BIMCO are opposed to the “abolition” of General Average. The system is widely understood and generally works well.

Shortly after the adoption of YAR 1994, the International Union of Marine Insurance (IUMI) requested CMI to amend the Rules. IUMI proposed initially that General Average should be abolished. However, the proposal was modified when the difficulties of abolishing a concept that is embedded in the law of most maritime nations were recognised. Nevertheless, in the lead up to the Vancouver Conference and the adoption of YAR 2004, the proposal to abolish General Average was exhaustively debated and rejected. ICS and BIMCO do not see any need for the arguments to be rehearsed again now. As intimated in questions 1.1 (b)(i) and (ii), the historic acceptance and practical recognition of General Average in the commercial law of maritime nations means that abolition would require international consensus with all the attendant challenges of securing such agreement; or, alternatively, clauses would need to be included in contracts of affreightment, which mutually (i.e. both ship and cargo) waive the right to claim General Average contributions. If General Average was abolished, either by law or by agreement, some other method of dealing with the losses or expenses that are at present divided between ship and cargo would have to be devised. Changes to the well-known system would inevitably lead to uncertainty, which would be resolved slowly, and at great expense, through the legal systems of leading maritime nations.

Further, while the remit for the IWG is drafted in broad terms, the understanding of the ICS and BIMCO representatives that participated in the Beijing discussions was that the work would focus on practical improvements and would not touch on fundamental issues. This question therefore, in inviting comments on the abolition of General Average itself, is contrary to the agreement that was reached in Beijing as to the scope of any review.

IUMI: [IWG: See below]

b) *If so,*

i) *How would this be achieved, given that the York Antwerp Rules are incorporated as a matter of contract and their principles are embedded in the national law of maritime nations?*

Argentina:

Belgium:

Brazil: Not applicable

Canada:

China: One from cargo insurers expressed his support to abolish g.a. who stated:

i) taking the reference on absolute liability system as that the expenses would be born by shipowners themselves.

ii) for sacrifice, to be born by respective owners.

Croatia:

Denmark: No suggestions.

Finland:

France: No comment on our side on those various questions regarding this first issue.

Germany:

Israel:

Italy:

Japan: N/A

The Netherlands: Not applicable

Norway:

Slovenia:

Spain: Not applicable.

Switzerland:

Ukraine: No comments.

United Kingdom:

AAA:

AMD: The process of abolition would be problematic. The most obvious candidate would be via an international convention. But the Convention would have to be unanimous and there are few Conventions which have been, if any; otherwise it would be possible for a provision to be put in contracts of carriage providing for GA to be drawn up in a state which had not ratified the "abolition" convention.

ICS/BIMCO:

IUMI: [IWG: See below]

- ii) *How, and to which parties, would you allocate the expenses and losses now dealt with as General Average?*

Argentina:

Belgium:

Brazil: Not applicable

Canada:

China: One from cargo insurers expressed his support to abolish g.a. who stated:

i) taking the reference on absolute liability system as that the expenses would be born by shipowners themselves.

ii) for sacrifice, to be born by respective owners.

Croatia:

Denmark: No suggestions.

Finland:

France: No comment on our side on those various questions regarding this first issue.

Germany:

Israel:

Italy:

Japan: N/A

The Netherlands: Not applicable

Norway:

Slovenia:

Spain: Not applicable.

Switzerland:

Ukraine: No comments.

United Kingdom:

AAA:

AMD: The allocation of losses now dealt with as GA would almost certainly involve an insurance solution; either an extension of existing hull and cargo insurances or the insured bill of lading approach. In the case of the former there would be a perception (in some cases a reality) of increased risk so premiums would rise. There would almost certainly be an increase in disputes under contracts of affreightment with, perhaps, Shipowners not being so ready to undertake and finance measures taken for the ultimate benefit of others.

It is understood that some large cargo owners already provide in their contracts of carriage that they will not contribute in GA leaving the shipowners to insure this exposure.

ICS/BIMCO:

IUMI: [IWG: See below]

IUMI: If MPUs were establishing a system of maritime insurance law from scratch today GA might very well not find a place in it. However GA is over 2000 years old and is incorporated into the legislation of most countries and into most contracts for the carriage of goods by sea. The practical difficulty of abolishing GA would be insurmountable and would involve obtaining the agreement of all countries across the world to an International Convention which would take at least 20 years to get into law. Accordingly “abolition” is not a practical option.

Even if GA was abolished a substantial number of the allowances currently incorporated into the YAR would probably be allowable as a matter of general law under the equitable principles of unjust enrichment in English law and probably in a similar way in many civil law countries. The abolition of G.A. would therefore lead to a number of very “interesting” legal cases which, after much expensive litigation over a lengthy period of years, would establish a set of precedents something along the lines of G.A. as it existed prior to the YAR which might then be reduced to writing with a view to achieving uniformity of law and practice in the same way that the YAR first came into existence in 1860.

In short there is little to be gained by debating the question raised in paragraph 1.1 of the questionnaire.

Having said all this, the question does not ask whether MPUs should continue to insure G.A. liabilities: this is a question entirely outside the scope of the questionnaire and will not be addressed in this memorandum.

1.2 *The current edition of Lowndes includes the following:*

“The principles of general average, as now embodied in the York-Antwerp Rules, also continue to perform a useful function in patrolling two important borders that lie between:

- *Matters that form part of the shipowners’ reasonable obligations to carry out the contracted voyage, and those losses and expenses that arise in exceptional circumstances.*
- *Property and liability insurers as their differing responsibilities meet and sometimes merge, in the context of a serious casualty.*

Both of these difficult areas benefit from the reservoir of established law and practice that general average provides, helping to secure a degree of certainty that is always the object of commercial interests. However, practitioners must be aware that such commercial interests will have little patience with any system that becomes inflexible or too demanding of time and money, and the principles and practice of general average will continue to need to be kept under review.”

- a) *Looking at the big picture, are there areas of the maritime adventure where the York-Antwerp rules are an impediment rather than a help to commerce?*

Argentina: GA is not an impediment, but it is a process too complex to deal with small general average cases.

Belgium: If properly applied and interpreted, with fairness and professionalism, and a timely execution of all the procedures, the YAR can be definitely be a help to commerce. However, studies show that GA can be a slow, expensive and unfair exercise. Therefore, cargo insurers emphasise, it should not be extended and the application of YAR 2004 should be promoted. On balance it is a beneficial system.

Brazil: In the container vessel’s industry due to the large number of boxes carried in a single vessel nowadays, the settlement of a G/A is a strenuous experience,

delaying the quick delivery of the boxes, therefore comes to be a difficulty for the industry.

The main problem is to collect the cargo value of each box in order to request a security before delivering the cargo.

A solution to be examined would be to consider a medium value of boxes in relation to certain trades.

Canada: No

China: Not seen.

Croatia: In our opinion, generally the YAR are not an impediment to commerce.

Denmark: We do not in general deem that the York Antwerp Rules are an impediment rather than a help, as they are a thoroughly worked through set of rules which offer a solution to General Average situations. In case of a substantial number of consignments, the requirement of documentation from each consignee may complicate and delay release and delivery of goods unnecessarily. Some guidelines may be helpful in order to ensure a more smooth delivery operation.

Finland: The GA rules might be an impediment at least outside the application of absorption clauses where the shipowner/his insurer has not properly prepared the documentation. In large cases the necessity to extensively supplement relevant documentation is time consuming and may seriously delay the release of cargo and the final GA adjustment. Another impediment might arise in cases of GA for ro-ro and similar ships. The large number of containers, trailers and other means for consolidating goods creates serious obstacles for speedy solutions. This can possibly be corrected by modernising the YAR. More simple alternatives should be found than what is at present possible under any version of the YAR. Some kind of simplified procedure could be thought of, including a review of what documentation is really necessary for average adjusters.

France: No comment on our side on those various questions regarding this first issue.

Germany:

Israel:

Italy:

Japan: In cases of large container ships where a great number of parties interested in the huge volume of cargoes are involved, the delivery of cargoes at the port of discharge would be considerably delayed due to collecting securities.

The Netherlands: No. We are not aware of situations where the rules are an impediment.

Norway: YAR are balanced and offer a foreseeable solution to perilous situations for ship and cargo, and we do not agree that the rules are an impediment rather than a help to commerce.

Slovenia: No.

Spain: We deem that the York-Antwerp Rules could become an impediment rather than a help to commerce in incidents or disputes involving a multiplicity of cargo interests. For instance, in liner traffic if the incident affects a container vessel carrying cargo corresponding to hundreds of different interests. In such circumstance, general average adjustment would prove to be too costly and time consuming.

Switzerland: Yes, particularly in container carrier casualties, where a multitude of cargo interests are involved (think about less than container loads, LCL in particular) the application of the rules leads to lengthy and work-intensive adjustments. Moreover, the collection of non-separation agreements, average guarantees and bonds is very work-intensive as well.

Ukraine: At present we have no information about any areas, where the YAR are an impediment and where the 'general average' approach can also be usefully used.

United Kingdom: It is recognised that the costs and time associated with the process of the declaration of GA and the application of the York Antwerp Rules can be perceived to be a problem. One unsatisfactory aspect of this process is the incidence of delay in delivering cargo pending the provision of GA bonds and guarantees. This raises issues both for GA adjusters and underwriters. The extent of such issues can be best illustrated by casualties on containerships.

AAA: No

AMD: None come immediately to mind.

ICS/BIMCO: No. If General Average (as a system of adjusting and recovering expenses) was abolished, there would be uncertainty as regards recoverability in the short and medium term. No party would be inclined to incur expenditure in the first instance to progress matters with the result that cargo would be delayed. Indeed, a widening of the expenses admissible at a port of refuge in order to deal with cargo operations would speed up the way in which large casualties can be managed, thereby facilitating maritime commerce.

IUMI: [IWG: See below]

b) *Alternatively, are there new areas where the "general average" approach could usefully be applied?*

Argentina: Piracy cases can be solved with the application of the principles of YAR.

Belgium: Taken the peculiarity of General average, it would be very difficult to apply, in a savvy manner, its approach to other areas.

Brazil: No.

Canada: No

China: Not seen.

Croatia: We believe that the YAR are generally adequately worded and uniformly interpreted to be applicable to a diversity of cases that merit to be treated as general average.

Denmark: No suggestions.

Finland: We have not thought of any completely new areas for GA (though a return to earlier versions of the YAR will be discussed later).

France: No comment on our side on those various questions regarding this first issue.

Germany:

Israel:

Italy:

Japan: Nothing in particular.

The Netherlands: No. In the Committee's opinion the YAR are flexible enough to cover situations in which the general average approach could be applied usefully.

Norway: No suggestions.

Slovenia: No.

Spain: No, we do not envisage new areas.

Switzerland: What about other means of transport? In land transportation, by sharing loss prevention cost in the same manner as under GA, e.g. the sharing of cost of extinguishing a railway wagon which caught fire and could have led to the explosion of a series of other wagons.

What about wreck removal cost (the decisive criteria for the cost to fall on H&M or P&I insurers of whether a ship is a ATL or not to determine who pays seems relatively random): could the countries of the ports of call of the casualty-stricken voyage be asked to contribute in some way based on e.g. what part of GDP is generated through imports by sea?

Ukraine: At present we have no information about any areas, where the YAR are an impediment and where the 'general average' approach can also be usefully used.

United Kingdom: Not in the opinion of the BMLA.

AAA: No

AMD: The recent history of YAR revisions has been trying to reduce rather than expand its scope. However, consideration might be given to Geoffrey Hudson's proposal for the cost of reloading shifted cargo to be allowable.

ICS/BIMCO: No new areas immediately come to mind though it is possible that unforeseen areas will arise from time to time. Somali-type piracy is an example of an unforeseen area where GA has been applied. When hijacking a vessel and holding the crew as hostages for ransom was a new phenomenon many owners did not have K&R cover. GA was declared and payment of ransom has been accepted as a legitimate expense.

IUMI: [IWG: See below]

IUMI: There has been a huge amount of criticism of the institution of G.A. for over 150 years and this was well set out in a paper by Nick Gooding entitled “General Average – Time for a Change” dated September 1996 which contained the following passage:

“Moving onto 1915 Mr N.C. Harrison of the United States of America presented a very hard-hitting paper entitled “The Abolishment of General Average”. He suggested that: “Commerce by sea has been fettered by this growing land barnacle for nearly 3000 years. It was useful prior to the introduction of marine underwriting, but has served its time, and should not be allowed to remain as a drag upon the interests of mankind”. He was most certainly not sitting on the fence! In presenting his arguments and his plan he gave three reasons that demanded abolishment of the system completely:

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

Second – the amount of work required by those interested parties is getting too great.

Third – the expense is enormous”

A detailed analysis of over 1,700 adjustments was carried out by Matthew Marshall (Technical Director, Institute of London Underwriters) in the 1990s which added support for these arguments. Mr Marshall’s report revealed that GA was:

- Too expensive: The annual cost of GA claims to insurers was approximately US\$300 million. 10% (US\$30m.) was made up of adjusters’ fees and a further 12% was comprised of interest and commission;
- Too slow: Almost two-thirds of adjustments were published in the first two years after a casualty but these accounted for only one third of the money apportioned in GA. Even after seven years only 95% of GA adjustments had been published; and
- Too inequitable: 80% of GA cases were acknowledged to have been caused or were likely to have been caused by the fault of the shipowner or his crew. Nevertheless 60–65% of the total cost of GA claims is charged to innocent cargo interests.

Other criticisms have also been levelled at the system; One that was very commonly heard in the 1980s was that it was used by unscrupulous ship owners as a way of detaining cargo fraudulently so as to extort agreements not to pursue claims for damages for breach of contract and/or to get cargo interests to pay money for the release of the cargo on the vessel to its rightful owners. It was perhaps with this sort of practice in mind that Mr Joseph Hillman, one of the representatives of Lloyd’s at the Antwerp Conference of The Association for Reform and Codification of The Law of Nations in 1877, wrote a letter to the Times to describe the system of G.A. as “a nest of fraud and abuses, a lurking place for speculation and waste. It was in its origin a cumbrous form of partial insurance but the necessity for its use is rendered obsolete by modern underwriting”. He concluded by saying that the chief interest of the subject for the general public lies in the fact that the waste and unproductive outlay incidental to a system which violates the soundest principles of the economy are, in the long run, at the charge of the consumer.

Having said all this there are a number of advantages of a mature G.A. system as well. These include:

- GA encourages ship owners to incur expenses and liabilities for the good of both ship and cargo in the event of a G.A. incident which otherwise they might be reluctant to do in view of the expense involved and the uncertain prospects of recovery from hull and cargo insurers.
- G.A. avoids the need for time-consuming and costly argument between ship and cargo about the apportionment of expenses incurred in the common interest in the aftermath of a GA incident at a port of refuge.
- GA particularly assists in dealing with the problems of getting cargo to destination following the arrival of a vessel at a port of refuge either where it needs repairing so as to continue the voyage or the cargo needs transhipping to destination in another vessel.

- Although the majority of GA sacrifices are made by the owners it should not be forgotten that sacrifices for the common benefit by cargo (e.g. by jettison or by wetting in an attempt to extinguish fire in one or more of the ship's holds) are allowed in GA too.
- Some systems of law (e.g. Spain and the Netherlands) allow a salvor to recover all his salvage remuneration from the shipowner. GA allows the owner to recover cargo's proportion and if GA did not exist then the owner might find it difficult to enforce this right.
On balance therefore G.A., despite its many downsides, is beneficial but should not be extended.

2. ROTTERDAM RULES

Article 84 deals with the topic in general terms:

"Nothing in this Convention affects the application of terms in the contract of carriage or provisions of national law regarding the adjustment of general average."

Two earlier Articles deal with the specific points of dangerous goods and cargo sacrifices.

"Article 15

Goods that may become a danger

Notwithstanding articles 11 and 13, the carrier or a performing party may decline to receive or to load, and may take such other measures as are reasonable, including unloading, destroying, or rendering goods harmless, if the goods are, or reasonably appear likely to become during the carrier's period of responsibility, an actual danger to persons, property or the environment."

"Article 16

Sacrifice of the goods during the voyage by sea

Notwithstanding articles 11, 13, and 14, the carrier or a performing party may sacrifice goods at sea when the sacrifice is reasonably made for the common safety or for the purpose of preserving from peril human life or other property involved in the common adventure."

Articles 15 and 16 are referred to in Article 17.3 (o) as one of the excepted list of events. The effect of the "notwithstanding" in both Articles is rather confusing, and the question could be raised as to whether the carrier could escape any liability for a cargo sacrifice (say jettison to lighten the ship) if the ship had first got into difficulties due to unseaworthiness (Art 14).

By 2016 it is likely that the Rotterdam Rules may be more widely adopted.

- The IWG invites your general comments as to whether the YARs need to be changed in any way to accommodate the new approach that the Rotterdam Rules bring to contracts of carriage.*

Argentina:

Belgium: Notwithstanding the fact that, given the actual situation, it is unlikely to see the RR in force before 2016, it must be considered that, with the exception of the issues related to unseaworthiness, the RR have little involvement in the regulation

and development of General Average. It is therefore not necessary, at this stage, to take steps in order to accommodate YAR to the potential impact of RR. In a second moment, if and when RR will be in force and practical issues may arise, it could be interesting to reconsider this position. It is useful according to cargo interests, to consider a Rule requiring all parties to provide documentation and other evidence in order to reduce losses and expenses and speed up the process of GA situations.

Brazil: No

Canada: We do not believe there should be any change because of the Rotterdam Rules, and that the YAR should remain as is. The Rotterdam Rules will never be universally in force and it would thus be dangerous to make a change to accommodate one set of rules only.

China: No. Even the RR would have been taken force, the YAR could still work normally.

Croatia: Although Article 84 of the Rotterdam Rules expressly states that the rules on general average shall not be changed, in reality the Rotterdam Rules shall affect general average. Namely, general average contributions are only due from cargo interests when there has been no breach of the contract of carriage. The Rotterdam Rules (Article 17) abolish the so-called “nautical defence”, i. e. an error in navigation, which under the Hague/Visby Rules does not constitute a breach of contract, providing due diligence to make the vessel seaworthy has been exercised, under the Rotterdam Rules it is considered as a breach. Therefore, under the Rotterdam Rules if a casualty arises because of an error in navigation (negligence of the master or crew), no general average contributions will be due from the cargo interests, and an error in navigation is a very frequent cause of marine casualties. Secondly, the Rotterdam Rules prescribe the shipowner’s duty to maintain the ship in a seaworthy condition throughout the voyage, whereas the Hague/Visby limit that duty to the beginning of the voyage. Therefore, under the Rotterdam Rules, it shall be much easier to claim a breach of the contract of affreightment due to unseaworthiness of the ship. In these circumstances, it is to be expected that under Rotterdam Rules the shipowners will be more reluctant to declare general average and demand contributions from the cargo interests. Consequently, if the Rotterdam Rules come into force, it can be expected that more shipowners will be adding a general average absorption clauses to their hull policies or increasing the limits of these clauses. If this is not an intended effect, and if a compromise is to be reached that in the above referred cases of a breach of contract under Rotterdam Rules general average should still be claimed and the cargo contributions due, than in our opinion the YAR should be amended accordingly. However, these potential amendments should only be taken into consideration if it becomes certain that the Rotterdam Rules shall enter into force. Otherwise, any amendments of the YAR in this direction would be premature.

Denmark: The York Antwerp Rules should not be changed to address the Rotterdam Rules. How much impact the Rotterdam Rules will have on General Average is still to be discovered. However, one could consider how to streamline the complexities of the General Average security and recovery processes between the parties involved in a common maritime adventure in order to reduce delay and costs.

Finland: [IWG: See below]

France: We consider this issue to be premature as long as Rotterdam rules are not

yet in force. As far as we can consider Rotterdam Rules they are not bound to have any effect as such on Y&A R.

Germany:

Israel: This question about the relationship of General Average and the Rotterdam Rules is, at least as far as Israel is concerned, premature and presently irrelevant. The Rotterdam Rules are not in force and have not been adopted by Israel.

Italy: Reserving a further assessment of the impact of the Rotterdam Rules and, in general, on the evolution of the liability regime of the carrier, the mechanism based on Rule D - which has always favoured YAR 's success - should not be abandoned: YAR regulate the general average, leaving undecided (being beyond the scope of the YAR) liability issues.

Japan: We consider that there is no need to revise the current YARs. In cases where the carriers (shipowners) are found to be liable under the contract of carriage and/or applicable law adopting Rotterdam Rules, there will be no way to adjust the conflicting interests among the parties to the common maritime adventure other than the adopting Rule D.

The Netherlands:

Norway: [IWG: See below]

Slovenia: No

Spain: We do not deem that the YARs need to be changed in any way to accommodate the new approach that the Rotterdam Rules bring to contracts of carriage. YARs are not intended to rule on carrier's liability, but only on the adjustment of general average. Further, according to the article 84 of the Rotterdam Rules the Rotterdam Rules clearly established that general average is not governed by said Rules.

Switzerland: [IWG: See below]

Ukraine: We are of the opinion that it is doubtful that the Rotterdam rules will come into force in 2016. Moreover, at this stage we have no information about the willingness and readiness of Ukraine to ratify this convention. That is why we propose not to consider this issue before coming into force of the Rotterdam rules. In any case, if Rotterdam rules come into force as of 2016 or later, we believe that the YAR will be in line with this convention before the following revision of the YAR.

United Kingdom: It is the view of the BMLA that there will be time for reflection about any changes to the York Antwerp Rules which might be necessary to accommodate the Rotterdam Rules if and when the Rotterdam Rules come into force.

AAA: The Rotterdam Rules seem to the Sub - Committee to affect only the capacity of creditors in GA to recover the contributions otherwise due to them, and to have little bearing on the subject matter dealt with in the YAR viz: whether a GA situation exists, and, if so, what the proper GA allowances should be, which parties should contribute to them, and on what basis.

AMD: It is not considered that the YAR should be amended to reflect the changes in approach proposed by the Rotterdam Rules. In fact, like all other earlier conventions concerning Carriage of Goods by Sea they do not have any impact on GA and the YAR. They concern the ability of creditors under an adjustment to recover a contribution or otherwise.

ICS/BIMCO: ICS and BIMCO support the Rotterdam Rules and are actively promoting ratification. It is assumed that the introduction of a continuing obligation of due diligence throughout the voyage to maintain a seaworthy ship and the repeal of the nautical fault defence will result in cargo interests having a defence to a claim for general average contribution in more cases than under the Hague/Hague-Visby Rules. However, it would be premature to make any changes to YAR until it is known whether the Rotterdam Rules will achieve widespread acceptance and the provisions have been tested.

IUMI: [IWG: See below]

b) *The following practical issues have been arisen in the context of a serious casualty:*

“While hull insurers would not be greatly affected (except in the relatively rare cases of ship sacrifice) the P&I Clubs would clearly be paying cargo's proportion of general average much more frequently, as cargo declines to pay on the grounds of a breach of the contract of affreightment.

An immediate practical implication would be that the greatly increased likelihood of cargo sustaining a defence to contribution would make it unwise to automatically incur the costs of an expensive security collection from a multi-interest cargo. However, deciding not to collect security is not a call the shipowner should make without consulting the P&I Club, whose cover is likely to be conditional on proper security having been collected and a demonstrable breach of contract having occurred.

In most salvage cases (see Article 13.2 Salvage Convention 1989), cargo will still have a direct liability to provide security to salvors and pay their proportion of the award, before seeking recovery from the carrier, albeit with a much greater chance of success under the Rotterdam Rules. Counter-security in respect of cargo's rights to recover salvage paid (to salvors) may become a much bigger issue and this may result in delays. It is possible that Owners and their P&I Clubs may sometimes agree to provide security and pay 100% of the salvage in order to reduce costs and achieve a quick negotiated settlement, but the bigger the exposure the greater the pressure will be to let matters run their normal course.

That pressure can only be increased by the Rotterdam Rules repeated reference in Article 17 to "all or part" of liability for a loss and the concept of a loss being apportioned somehow if the carrier can partly disprove his fault.

*“Article 17
Basis of liability*

- 1. The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility as defined in chapter 4.*

2. *The carrier is relieved of all or part of its liability pursuant to paragraph 1 of this article if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 18.*
3. *The carrier is also relieved of all or part of its liability pursuant to paragraph 1 of this article if, alternatively to proving the absence of fault as provided in paragraph 2 of this article, it proves that one or more of the following events or circumstances caused or contributed to the loss, damage, or delay:*
 - (a) *Act of God;*
 - (b) *Perils, dangers, and accidents of the sea or other navigable waters;*
 - (c) *War, hostilities, armed conflict, piracy, terrorism, riots and civil commotions;*
 - (d) *Quarantine restrictions; interference by or impediments created by governments, public authorities, rulers, or people including detention, arrest, or seizure not attributable to the carrier or any person referred to in article 18;*
 - (e) *Strikes, lockouts, stoppages, or restraints of labour;*
 - (f) *Fire of the ship;*
 - (g) *Latent defects not discoverable by due diligence;*
 - (h) *Act or omission of the shipper, the documentary shipper, the controlling party, or any other person for whose acts the shipper of the documentary shipper is liable pursuant to article 33 or 34;*
 - (i) *Loading, handling, stowing, or unloading of the goods performed pursuant to an agreement in accordance with article 13, paragraph 2, unless the carrier or a performing party performs such activity on behalf of the shipper, the documentary shipper or the consignee;*
 - (j) *Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;*
 - (k) *Insufficiency or defective condition of packing or marking not performed by or on behalf of the carrier;*
 - (l) *Saving or attempting to save life at sea;*
 - (m) *Reasonable measures to save or attempt to save property at sea;*
 - (n) *Reasonable measures to avoid or attempt to avoid damage to the environment; or*
 - (o) *Acts of the carrier in pursuance of the powers conferred by article 15 and 16”*

In a collision where it seems likely that both ships are equally to blame, the owner knows that he is no longer protected by the "nautical fault" exception, but equally he

is not at fault in respect of the blame attaching to the other vessel. On that basis could he not recover 50% of any general average contribution due from his cargo? That would seem to be the case.

Many of the most serious casualties in recent years have involved containership fires originating in cargo. These have given rise to complex legal disputes, particularly on factual issues with the shipper alleging poor stowage (perhaps over a heated bunker tank) and the carrier pointing to the (undeclared) dangerous nature of the cargo. This situation arose in the recent High Court judgement in the "Aconcagua". The carrier (actually the charterer seeking indemnity for US\$27 million paid to the shipowner) won the day on the basis that it was a rogue cargo and the shipper could not prove that the heating of the bunker tank was causative. However if the heating of the tank had been causative the Court indicated that this would have constituted negligence in the management of the ship – an excepted peril under the Hague Rules. Under the RR the carrier will lose the protection of that excepted peril but this would surely be a case in which the point about contributing causes (rogue cargo/fault of crew) would be at issue.

Whilst under the Rotterdam Rules it is highly likely the carrier will usually have to accept some degree of fault there will remain considerable incentive to allege partial fault of others. Some difficult decisions will need to be made very quickly about whether to collect general average and/or salvage security in such cases."

Is there anything that the YARs can or should try to do in resolving these practical issues?

Argentina: Since most of the situations that could lead to a general average declaration are caused by nautical fault or error in navigation, given the possible breakthrough in the acceptance of the Rotterdam Rules, it is imperative that the new rules expressly provide that payments of contributions in general average will not be committed and/or be recovered in cases of nautical fault or errors in navigation, provided that the vessel was seaworthy at the moment of the incident. Otherwise, GA will lose its main advantages: to encourage Owners to incur in extraordinary expenses and sacrifices and to defer controversies to a time when the peril has been left behind and the maritime adventure is safe.

Belgium: No.

Brazil: No. The applicability of Rule D depends on the governing law of the adjustment.

Canada: No

China: No. Even the RR would have been taken force, the YAR could still work normally.

Croatia: As already stated above, in our opinion any potential amendments of the YAR in the direction of their adjustment to the Rotterdam Rules should only be taken into consideration if it becomes certain that the Rotterdam Rules shall enter into force. Otherwise, any such amendments would be premature. Providing that the Rotterdam Rules eventually do come into force, we think that the YAR should be amended to resolve the above presented practical issues. We think that the distribution of the risks between the hull and cargo interests within the concept of general average should be maintained in line with the current state of the matter, i.e. certain provisions should eventually be inserted in the YAR to allow the shipowner to

claim general average contributions from the cargo interests despite the existence of his liability under the Rotterdam Rules for nautical fault. This would guarantee some more legal certainty and would maintain the status quo as regards the distribution of risks under general average. Considering the continuous positive results of cargo insurance on one hand, and a trend of a rather poor balance of premium and losses for hull insurers on the international markets, we believe that the proposed position would be commercially justifiable.

Denmark: See above.

Finland: [IWG: See below]

France:

Germany:

Israel: This question about the relationship of General Average and the Rotterdam Rules is, at least as far as Israel is concerned, premature and presently irrelevant. The Rotterdam Rules are not in force and have not been adopted by Israel.

Italy: Reserving a further assessment of the impact of the Rotterdam Rules and, in general, on the evolution of the liability regime of the carrier, the mechanism based on Rule D - which has always favoured YAR 's success - should not be abandoned: YAR regulate the general average, leaving undecided (being beyond the scope of the YAR) liability issues.

Japan: There is no need to revise the current YARs. These practical issues should be resolved between carriers(shipowners) and their P&I insurers.

The Netherlands: No. The Committee is of the opinion that the liability issues should not be included in the YAR. Further, the YAR should not be adjusted to match a particular convention or regulation, also in view of the fact that there are many different conventions/regulations in place, whereas it is as yet uncertain whether the Rotterdam Rules will enter into force and if so, whether they will be applied worldwide.

The described practical issues can and should in the Committee's opinion, be solved in a different way, for example by amending the P&I Club Rules or the cargo insurance liability cover.

Norway: [IWG: See below]

Slovenia:

Spain: Not applicable.

Switzerland: [IWG: See below]

Ukraine: See above.

United Kingdom: The issues raised are certainly noted. The difficulty with resolving the practical issues raised is that different cases will raise different issues. A solution of sufficiently broad application is not easy to identify.

AAA: The Rotterdam Rules seem to the Sub - Committee to affect only the capacity of creditors in GA to recover the contributions otherwise due to them, and to have

little bearing on the subject matter dealt with in the YAR viz: whether a GA situation exists, and, if so, what the proper GA allowances should be, which parties should contribute to them, and on what basis.

AMD: The text refers to “difficult decisions” about collecting GA and Salvage security. This is nothing new. But however obvious it may appear that cargo have a defence to payment of their GA contribution, in practice P&I clubs insist in the great majority of cases that security be collected.

ICS/BIMCO: As in response to a), it would be premature to make any changes to YAR until the Rotterdam Rules have entered into force internationally and the provisions have been applied in practice.

IUMI: [IWG: See below]

Finland: We do not fully see the problem referred to in this question. Article 84 is all-decisive and the exemptions in article 15 and 16 together with article 17(3)(o) from the carrier’s liability will refer such cases to GA, always provided that the preconditions for GA as such are satisfied.

The word “Notwithstanding” is only intended to take away the carrier’s obligations enumerated in articles 11, 13 and 14 of the RR and to give priority to the provisions in articles 15 and 16. “Notwithstanding” is in reality a U.S. necessity to make it perfectly clear for any judge not to confuse the priority order of the respective provisions in the RR.

Concerning article 84 of the RR, one problem might be the fact that this article is not as extensive as article 24 of the Hamburg Rules. The latter article reads as follows:

“1. Nothing in this Convention shall prevent the application of provisions in the contract of carriage by sea or national law regarding the adjustment of general average.

2. With the exception of Article 20, the provisions of this Convention relating to the liability of the carrier for loss of or damage to the goods also determine whether the consignee may refuse contribution in general average and the liability of the carrier to indemnify the consignee in respect of any such contribution made or any salvage paid.”

The above cited paragraph 2 clarifies the position more than the RR in cases where carrier liability would exist and in relation to GA. It can also be read together with letter D of the YAR. Article 20 paragraph 2 of the Hamburg Rules probably represents the Nordic approach to this matter, even without an explicit codified provision, on the basis of the Faste Jarl judgment (Norwegian Supreme Court, Rt. 1993.965).

It might be a possibility to weigh up whether an “article 20.2 - the Hamburg Rules” could be considered as an additional standard clause in contracts of carriage and also in bills of lading or sea waybills or in corresponding electronic transport records now that the RR have omitted to repeat this provision. To include such a clarification in GA rules may or may not be an appropriate solution.

Undeniably, the omission of the “nautical fault” exemption from the Rotterdam Rules might make GA adjustment less necessary or less meaningful than under the Hague and Hague-Visby Rules, but on the other hand it might be that the concept of “nautical fault” is perhaps construed narrowly in many jurisdictions meaning that the difference between old regimes and the new regime (=RR) is not as dramatic as it seems at first sight.

With the above-mentioned Hamburg-interpretation in mind it could in addition well be a correct solution in collision cases with equal blame that the owner could recover 50 % of any GA contribution due from the cargo carried on that owner’s ship. Similarly, loss of or damage to the goods carried is not a GA occurrence, but additional measures might be, such as the ship taking into a port of refuge. Again, a clarification in the contract of carriage might be a solution, but as above, it might not be totally out of place to consider the YAR to be the clarifying source.

Norway: The scope of the YAR should not be extended to address the Rotterdam Rules. However, we would encourage the MLA to consider a Rule requiring all parties to the common maritime adventure to co-operate in the production of documents and other evidence to each other to reduce losses and expenses arising out of the voyage. The aim of such a Rule would be to assist in reducing the overall financial consequences of a GA incident.

Switzerland: Yes, the depicted situations where carriers collect average guarantees "for nothing" given that they are now more likely to be responsible for the casualty under the RR and that hence no contribution is ultimately due from cargo is highly ineffective.

In light of the

a) deletion of the "error in navigation" defense

b) continued duty of seaworthiness, successful subrogation/recovery claims by cargo interests under the Rotterdam rules are indeed likely.

The carriers must hence make quick judgment calls on whether to collect security or not.

What could the YAR do? Why not have a "best practice" section – where these three cases are depicted, encouraging the carriers to take responsibility to advance salvage (salvage scenario) or not collect (excessive) average security too quickly at all (collision, fire). This obviously comes at the risk that the P&I clubs would not compensate carriers if the cargo interest defaulted.

The following could be a solution:

If the CMI were to introduce a dispute resolution body, it could help assessing such questions.

Such a dispute resolution body would not just handle

a) issues arising from the YAR rules but,

b) recourse claims against carriers as well (e.g. Article 77 of the Rotterdam Rules would allow for agreement by the parties on e.g. such an arbitration body - ex post) as well as

c) recourse claims of ship owners against liable cargo interests (e.g. arising out of mis-declared cargo). This latter aspect might prove difficult in practice given that malicious cargo interests are probably going to be reluctant to join an arbitration of the described nature.

Having said the above, given that the determination of liability of carriers takes time and that they want their potential claims to be secured, the collection of security is unavoidable, unless commercial credit insurance is taken out by carriers (with the passing on of the premium to cargo interests). Thanks to the dispute resolution body, security would have to be issued for lower amounts and a shorter period of time.

The cost of credit insurance could actually be cheaper than collecting the securities. This would also do away with the problem that carriers do not accept guarantees from non-classed insurance companies.

In the context of large container ship casualties, the "Landmark Policy" concept (see attachment) would do away with the problem.

IUMI: The YAR are designed to govern the allocation of expenses incurred following a GA incident. By YAR Rule D the rights of the parties between themselves arising out of the contract of carriage are expressly excluded from the scope of the Rules. This is largely what the Rotterdam Rules deal with. It is in the interest of all in the maritime community that generally the scope of the YAR is not extended and therefore great caution should be exercised when considering whether and how the Rotterdam Rules should be addressed in the YAR.

However IUMI would like the WG to consider including a new Rule requiring all parties to the common maritime adventure to co-operate in the production of documents and other evidence to each other to reduce losses and expenses arising out of the voyage and the economic consequences of the G.A. incident. Such a Rule might, for example, oblige a ship owner to assist cargo interests with evidence to defend a salvage claim which either he had settled or is not concerned with as the ship has a zero salvaged contributory value.

Likewise such a Rule could oblige a cargo owner to provide evidence regarding the contents of containers on the vessel which had perhaps caught fire unexpectedly. The introduction of a Rule along these lines should assist in reducing the overall financial consequences of a GA incident.

3. **DEFINITIONS**

The YARs do not make any attempt to define the terms used. For example, in the “Trade Green” [2000] (see Lowndes 11.25 – 11.30) the judge rejected the view that the terms “voyage” and “common adventure” had the same meaning, saying that the voyage only referred to the vessel’s progress from the load port to arrival at the port of discharge. Most practitioners would consider that the voyage lasts from the commencement of loading up to the completion of discharge. However, since one of the objectives of the YAR is to achieve a uniformity of practice, it is obviously undesirable that there is any variance in the interpretation of important words and phrases.

a) *Should the YARs include a section of definitions?*

Argentina: Yes. It will be helpful to avoid some misinterpretations at the Courts.

Belgium: Trying to delineate punctual definitions it is very difficult and it may give more troubles than positive effects. In fact, the idea of the rules themselves is to produce uniformity but also to be adopted by the widest range of players possible. In this view, it is therefore hard to find definitions that can be satisfactory for all Countries and all systems of law. Adopting a precise list of definitions could lead to the exact opposite of the result sought, with an increase of additions and/or further explanations left in the hands of the freedom of the parties, while drafting the relevant contracts.

Brazil: No. Our juridical culture (Civil Law Country) does not use definitions in laws.

Canada: It might be nice in theory but very difficult in practice, so the answer is no.

China: No. Many concept have been formed by understanding.

Croatia: No, we think that a section of definitions would unnecessarily burden the text of the YAR, which anyway is rather complex and ample. It seems to us that over many decades of the application of the YAR a sufficiently uniform interpretation of the YAR has been developed through the practice of the average adjusters and the courts.

Denmark: No.

Finland: It is common practice in international conventions to include definitions, cf. article 1 of the RR. Definitions might be helpful in the YAR as well, but the difficulty will be where to draw the line concerning the number of definitions.

France: We do not see the practical interest to add definitions in the Y&A R. This leaves flexibility to use those rules as deemed necessary.

Germany:

Israel: We agree that there is no need to add definitions to the YAR.

Italy: All the attempts made to redraft clauses or rules internationally adopted have proven too ambitious, either because they aimed at encompassing too much, or because they tended to introduce definitions which have never been accepted by the market, and they have been eventually rejected (such as, in marine insurance, the IHC or the ICBR).

Japan: We believe that there has been no serious problem under the current provisions. Although we believe that the meaning of "voyage" was wrongly decided in the "Trade Green" case, such a case in itself does not require a new definition section in the new YAR.

The Netherlands: No. In the Committee's opinion there is no need for a definition section. It is the adjuster's task to make sure that the rules are applied in a uniform way. The Committee's impression is that this generally works satisfactorily. The "Association of Average Adjusters (AAA)" or the "International Association of Average Adjusters (IAMAA)" could provide the adjusters with information of the application in the various jurisdictions in order to increase the uniformity even further.

However, the Committee is concerned about the explanation given to the term 'common maritime adventure' in the English *Trade Green* case. In order to prevent that the decision is followed, the Committee suggests that the terms 'voyage' and 'common maritime adventure' are synchronised in the YAR. It should be clarified that the common maritime adventure/voyage starts for a particular cargo at the moment it passes the ship's rail/ramp on loading on board the carrying vessel and lasts until it passes the ship's rail/ramp on discharge at the port where the passage per the carrying vessel ends. However, when a cargo is carried forward under a Non Separation Agreement from a port of refuge to the original scheduled port of discharge per the original carrying vessel, the adventure ends on passing the ship's rail/ramp of the cargo at that scheduled port of discharge.

Norway: We support the inclusion of definitions in YAR, as this will enhance a common understanding of the terms used. Whereas many textbooks on GA offer definitions, these textbooks may not necessarily be accepted in all jurisdictions and the definitions may vary between them.

Slovenia: Yes; but in our opinion only those terms which are not specified with existent jurisprudence

Spain: The YARs should not include a section of definitions. The fact that in a specific case in 2000 an English judge has rejected that the terms "voyage" and "common adventure" have the same meaning is not sufficient by itself to insert a section of definitions. We understand that the essential terms are similarly interpreted in the different jurisdictions and have not given room for discrepancy.

Switzerland: Yes

Ukraine: To use definitions in Ukrainian legislation is useful, but taking into account the fact that YAR relates to and used by international shipping community, we prefer to avoid inclusion of any definitions into YAR. One of the reasons is that definitions may lead to complexity of YAR's application in different jurisdictions. So, our answer is 'no'.

United Kingdom: On balance the BMLA does not favour the introduction of a section containing definitions. Whilst there are certainly terms which could usefully be defined, there would be a concern that so doing would have unintended

consequences. Further adjusters and practitioners have encountered few problems in practice in applying commercial common sense to generic words such as “port charges” or “wages”. Introducing definitions might also bring with it disputes as to what falls within the definition.

AAA: Pace the Trade Green, the Sub - Committee felt that practitioners were on the whole fairly clear on the meaning of terms used in the YAR. They consider that a definition section would add to the bulk of the Rules and would run the risk of creating confusion rather than resolving it.

AMD: Whilst it might appear to be an attractive idea to include definitions in the YAR, drawing up these definitions would be a time-consuming and potentially contentious exercise. The selection of words or phrases to be defined would also be problematic; for example would “voyage” and “common adventure” dealt with in the Trade Green case be natural candidates?

ICS/BIMCO: ICS and BIMCO do not see any need for the inclusion of a section of definitions in the YAR. Terms and phrases used are understood by practitioners but where questions of interpretation or application arise, they are most appropriately resolved through legal process. In contrast, any attempt to list and define words or phrases could be expected to be incomplete and problematic.

IUMI: This question asks whether definitions should be included in the YAR and, if so what terms should be defined.

Uniformity and clarity is important but a definition section would be difficult to achieve without:

- (a) Analysing all occasions on which the relevant expression or word appears in the YAR; and then
- (b) Thinking of examples of situations involving each Rule in which the word appears and, from this exercise, deriving a common set of characteristics of the word concerned which should then form part of the definition.

b) *If so, what terms need to be defined?*

Argentina: Peril, common safety, common adventure, voyage, sacrifice, paramount rule, salvage, tug & tows.

Belgium: In consideration of the above answer, no terms need or should be defined.

Brazil: Not applicable.

Canada: None

China:

Croatia:

Denmark: No.

Finland:

France:

Germany:

Israel:

Italy:

Japan: N/A

The Netherlands: The term “common maritime adventure” should be defined. See under Section 1 - 3a above.

Norway: We suggest including the following expressions that could be usefully defined:

- Port Charges - (See YAR Rule XI).
- Wages - (See YAR Rule XI).
- Voyage and Common Adventure - (See YAR Rule G).
- Delay - (See YAR Rule C).
- Indirect Loss - (See YAR Rule C).
- Peril - (See YAR Rule A).
- Extraordinary - (See YAR Rule A).
- Expenses of Entering... Port or Place - (See YAR Rule G).
- Machinery and Boilers - (See YAR Rule VII).
- Prolongation of Voyage – (See YAR Rule X(a)(ii)).
- Expenses – (See YAR Rule F).

Slovenia: For example the term “maritime adventure”

Spain: Not applicable.

Switzerland: YAR 1994:
Rule Paramount: reasonably
Rule A: extraordinary

Ukraine: N/A.

United Kingdom: See 3(a) above. The BMLA has noted, however, that the role played by the GA adjuster is not well understood and it might be helpful to find a mechanism at international level to remedy this defect.

AAA: Clarification, where considered necessary, might better be included in the specific Rules where it is thought to be required.

AMD: Definitions, where deemed necessary, might best be included within the rules where the words or phrases appear.

ICS/BIMCO:

IUMI: It would be a big task to include a definition section for the WG but if it is felt to be worthwhile then words which could perhaps usefully be defined include:

- “Port Charges” - (See YAR Rule XI).
- “Wages” - (See YAR Rule XI).
- “Voyage” and “Common Adventure” - (See YAR Rule G).
- “Delay” - (See YAR Rule C).
- “Indirect Loss” - (See YAR Rule C).
- “Peril” - (See YAR Rule A).

“Extraordinary” - (See YAR Rule A).
“Expenses of Entering... Port or Place” - (See YAR Rule G).
“Machinery and Boilers” - (See YAR Rule VII).
“Prolongation of Voyage” – (See YAR Rule X(a)(ii)).
“Expenses” – (See YAR Rule F).

4. **SCOPE**

The York-Antwerp Rules are frequently admired for dealing with complex issues in a very succinct manner. This approach relies in part on average adjusters and, occasionally, the Courts filling in the gaps by reference to established law and practice; this leaves room for flexibility when dealing with different types of vessel or trade in a commercially effective way, and for practice to adapt to changing circumstances.

The possible downside is the risk of a lack of uniformity, particularly where inexperienced Courts are asked to rule on GA matters.

Do you consider the existing approach should be maintained, or should the YARs, at the expense of brevity, provide a more self-contained and complete code that needs less knowledge of external practice or law?

Argentina: No. It should be maintained as it is.

Belgium: In order to see the Rules widely adopted and applied uniformly, it is advisable to keep the actual approach. Trying to provide a more detailed and complete code could not be seen by Courts and practitioners as a viable and helpful solution, provoking instead more controversies and disputes, in the application and use of the rules. The nature of the Rules, as an instrument to be adopted within the frame of the freedom of the parties in the contract, even though conditioned by a long established practice and application, must always be kept in mind.

Any attempt to provide a more punctual and ‘complete’ code would probably result in a minor degree of flexibility and in a compression of the discretionary choices of the Adjusters, in their effort to achieve the optimal solution for the parties, while assessing a claim.

Brazil: The Brazilian Maritime Law Association considers that the existing approach should be maintained.

Canada: Maintain the existing approach.

China: A more self-contained and completed code is certainly helpful.

Croatia: We consider the existing approach should be maintained.

Denmark: The existing approach should be maintained. An extension would have to take into account so many different clauses in national laws in all discharge ports that the York Antwerp Rules would be impossible to use.

Finland: As mentioned above, simplified formalities for reaching a GA adjustment are necessary in today’s shipping in order to save time and expense. This is particularly true of container and ro-ro ships and consolidated shipments.

France: We do not have any problem with this question but we feel such detailed approach could overweight the rules.

A more comprehensive regulation could create a lack of flexibility.

Germany:

Israel: A more self-contained and complete code would mean a re-codification of the YAR which would unnecessarily open the way for extensive deliberations and discussions. We have witnessed this in the past in connection with relatively minor amendments which should be avoided as much as possible.

Italy: All the attempts made to redraft clauses or rules internationally adopted have proven too ambitious, either because they aimed at encompassing too much, or because they tended to introduce definitions which have never been accepted by the market, and they have been eventually rejected (such as, in marine insurance, the IHC or the ICBR).

Japan: There is no need to alter the current manner. We believe that there has been no serious problem caused under the current succinct provisions of YARs.

The Netherlands: It is the Committee's opinion that the existing approach should be maintained. One of the YAR's strengths is that the YAR are relatively brief. Moreover, it will be difficult to extend the YAR in such a way that it will not clash with the national legal systems of the countries where they will have to be applied.

Norway: No need for change. The benefits of brevity outweigh those of "a more self-contained and complete code". The YAR will not be able to cover all situations, and much must nevertheless be based on law and practice and merits of each case.

Slovenia:

Spain: We do not consider that the YARs should provide a more self-contained and complete code. In practice, the intervention of courts in filling the gaps by reference to established law and practice is so occasional that this exercise would not be justified.

Switzerland: To achieve uniformity in practice, I suggest that the most salient and complex issues in which average adjusters used to fill the gaps should be better defined.

Ukraine: YAR as a self-contained and complete code will be useful, but, as in case with definitions above, it will make the YAR more complicated and may effect the uniform application of rules in different jurisdictions. So, our answer is 'no'.

United Kingdom: In principle a wider and more detailed self-contained code would be helpful. However the view of the BMLA is that the brevity of the York Antwerp Rules is to be commended and the maintenance of such brevity probably outweighs the advantages of a more elaborately drafted self-contained code.

AAA: The Sub - Committee was firmly of the view that any temptation to try and make the YAR an all embracing and self contained code ought to be resisted. If contracting parties fear that the courts dealing with their potential disputes have limited knowledge of GA, their difficulty may perhaps better be dealt with by amendment of their jurisdiction clauses.

AMD: To turn the YAR into "a more self-contained and complete code" would be a massive task. The idea has been raised before and rejected. How one deals with "inexperienced courts" is not a problem that can be dealt with and unless the Code was of great length it must be doubtful that it would help. Those drawing up contracts of affreightment should be encouraged to insert clauses providing for jurisdiction in countries with courts which do understand GA and the YAR.

ICS/BIMCO: ICS and BIMCO consider that the existing approach should be maintained. The YAR are mainly read and applied by average adjusters and accordingly there is no need for more information to be included. However, the “downside” noted in the question is recognised; there is a risk of a lack of uniformity when inexperienced courts are asked to rule on GA matters, and enforcement can be problematic in such jurisdictions.

IUMI: IUMI believes the benefits of brevity outweigh those of “a more self-contained and complete code”.

5. **FORMAT**

The 2004 Rules introduced several “tidying up” amendments, including a more extensive numbering system.

Do MLA’s consider this should be maintained?

Argentina: Yes.

Belgium: The 2004 format proved to be a good solution. The numbering system, being in use for long time, should therefore be maintained, in order also to avoid potential confusion and misunderstandings, in case any major modification would be put into existence.

Brazil: Yes.

Canada: Maintain

China: No.

Croatia: Yes.

Denmark: Yes, it should be maintained.

Finland:

France: We do not see the point of such issue. Format is now known and does not raise any questions.

Germany:

Israel: We do not see the necessity of “tidying up” the 2004 Rules. They are tidy enough.

Italy: See above. Amendments driven by the sole desire to reach a “perfect” definition would be probably difficult to accept by the shipping community. These kind of forms can succeed only if continuity is ensured.

Japan: We favor “tidying up” the YAR’s wording as was done in YAR2004.

The Netherlands: Yes. The Committee supports the ‘tidying up’ amendments.

Norway: Yes, Cefor supports the numbering system in the 2004 Rules.

Slovenia: Yes.

Spain: Yes, provided that the average adjusters are happy with the 2004 “tidying up” amendments.

Switzerland: Yes

Ukraine: Yes.

United Kingdom: Yes.

AAA: The tidying up provisions inserted in the YAR 2004 should be maintained.

AMD: This was one of the more sensible aspects of the 2004 revision and should be retained in the 2016 Rules.

ICS/BIMCO: If it is agreed that other amendments should be made to YAR 1994 then ICS and BIMCO could support the introduction of the more extensive numbering system adopted in the 2004 Rules.

IUMI: The wording of the YAR should be as easily understood as possible and so it is therefore in everyone’s interest to “tidy up” the wording as was done in the 2004 Rules.

6. **DISPUTE RESOLUTION**

Many codes or contracts include provision for arbitration in the case of disputes. CMI is accepted as the custodian of the YARs, should it also offer itself as part of the 2016 Rules as providing an arbitration or mediation facility on dispute resolution relating to the application of the Rules (excluding issues pertaining to the contract of affreightment)?

Argentina: No.

Belgium: This is another delicate point in which the need for uniformity could ‘clash’ somehow with the freedom of the parties in choosing and drafting their contracts. It seems very unlikely that a proviso envisaging an arbitration, lodged possibly in an administrative body to be designed or created within CMI, could be welcomed openly and without resistance in the commercial world. A general use of arbitration clauses, however, is already widely spread and adopted in the contracts of affreightment. A mediation facility on disputes resolution, in the application of the Rules, should be theoretically an interesting solution, but it could hardly produce sensible results in the short and mid-terms. The International Association of Average Adjusters has implemented a Mediation possibility, this avenue should be explored

Brazil: ADR practice should be suggested as a tool for the settlement of disputes related to the G/A settlement.
The G/A associations have a mechanism to deal with disputes.

Canada: No - Unnecessary

China: Not necessary.

Croatia: No.

Denmark: An exclusive arbitration clause may well complicate matters and prevent consolidating various is-sues into one court trail. A voluntary mediation facility within the CMI might be a good idea.

Finland: It is recommended that the future YAR should provide for ADR alternatives guided by average adjusters.

France: This point is not relevant to us as Y&A R are incorporated into contracts such as BL or CP which already incorporate legal and jurisdiction clauses.

Germany:

Israel: We agree with the comment of the French MLA about dispute resolution if provided for us in B/L or C/P as regarding the relations between the carrier and the shipper. However we believe there is justification for an arbitral or judicial forum in relation to the GA adjustment. This would not necessarily require an amendment of the YAR but can be recommended to be inserted in the B/L or C/P as a contractual provision.

Italy: If the disputes concerned the regulation of the general average, there is no indication of requests for arbitration specifically related to YAR or CMI. If the disputes were those related to liability, it would be contrary to the approach that has boosted thus far YAR's success: see comment under 2 above.

Japan: We believe that the demand for the GA dispute resolution services would be probably very limited. Therefore, we do not support the introduction of such services.

The Netherlands: No. The committee does not support an extension of the YAR with an arbitration or mediation facility. The Committee is concerned that this will cause tension with the contract of carriage which generally also contains an arbitration/jurisdiction clause. In addition, introduction of an arbitration or mediation facility may mean that a claim for cargo damage and a claim for a general average contribution may no longer be litigated in the same set of proceedings. It should also be noted that if an arbitration facility would be included in the YAR, a place of arbitration should also be inserted. The chosen place may be completely unrelated to the general average accident or the provisions of the relevant contract of carriage, which would cause extra and possibly unnecessary costs.

Norway: There are few arbitrations and forums that offer such arbitration are already in place. It should be up to the parties involved to agree where and how to arbitrate.

Slovenia: Yes.

Spain: No, we do not deem that the 2016 Rules have to establish the CMI as the arbitration or mediation facility on dispute resolution relating to the application of the YARs.

Switzerland: Yes, similar to the Lloyd's Salvage Arbitration Branch. Awards of the proposed dispute resolution/arbitration body could then easily be enforced based on the New York Convention.

Ukraine: No. This issue shall be agreed between the parties involved and/or by applicable law.

United Kingdom: In practice the agreement to adjust GA in accordance with the York Antwerp Rules is contained in a contract of carriage which will often contain express

provision for dispute resolution. The drafting of a reservation to CMI to adjudicate disputes as to the meaning of the York Antwerp Rules is an interesting idea. Shipbuilding contracts often reserve to Class the power to adjudicate on disputes between a builder and a buyer as to compliance with Class during the construction process. The BMLA has an open mind on this issue and will be pleased to consider any ideas which other MMLAs might bring forward. A practical issue would be what provision would be made for the costs involved in such an adjudication.

AAA: Both the AAA and the AMD have in their Rules arrangements for resolving disputes concerning GA on the relatively rare occasions when matters are not resolved by negotiation and discussion between parties. It seems unlikely that CMI would be easily able to arrange for a tribunal of greater expertise than exists within these bodies.

AMD: Although the CMI might usefully offer a dispute resolution facility, it should be noted that both AMD and the AAA have established tribunals to perform this function. These bodies call upon their members as experts in the law and practice of GA to provide this service. Perhaps the CMI should consider promoting the use of these existing facilities.

ICS/BIMCO: No. CMI's role must continue to be that of custodian of YAR leaving questions of interpretation, meaning or application to be determined through the courts or other means of dispute resolution.

IUMI: The Average Adjusters Association in the UK already offers an opinion service inexpensively and with reasonable speed but only receives a handful (less than five) of references each year. The demand for a GA dispute resolution service would probably not justify the trouble and expense involved in establishing it.

7. **ENFORCEMENT**

The York Antwerp Rules have never touched on areas relating to the legal basis for contributions, cost of exercising liens, the terms of security documents etc. Bills of Lading may incorporate terms dealing with some of these matters, but often they are left to the law governing the contract of affreightment or the Courts at the ports of discharge.

a) *Could additional provisions in the YARs offer greater uniformity and certainty in these areas?*

Argentina: No.

Belgium: No. Any attempt to enter in details would potentially lead to some resistances in certain jurisdictions, leading at the end to more differences in the application of the Rules, rather than more uniformity.

Brazil: No, the governing law of the Country should prevail.

Canada: No

China: The enforcement is not the role of the YAR.

Croatia: No, we think it would be redundant to introduce special rules in this respect in the YAR.

Denmark: No need - may often be in conflict with national law and hardly of any advantage to be included in the York Antwerp Rules.

Finland: This question has partly to do with necessary documentation in the first place. Again, without the possibility at this stage to provide concrete solutions, simplification of procedure is important. The question in subsection b) can be referred to a recommended standard issued by the CMI, but does not have to be included in the YAR.

France: We do not have any specific problem with the present documentation used to secure cargo commitment to GA. We consider according to the "flexibility principle" that such documentation should remain an open issue dealt with the parties involved on a case by case approach. Therefore we do not see the interest of such question.

Germany:

Israel:

Italy: As regards question (a) it is worth repeating what pointed out under 2: it is better to maintain the traditional approach for YAR being limited to the general average regulation. Moreover, some of the above mentioned legal issues differ from jurisdiction to jurisdiction, and one cannot see how (or on which basis) the YAR could regulate them within an uniform regulation.

Japan: There is no need to include a section dealing with enforcement in the areas illustrated in the questionnaire in the new YAR.

The Netherlands: No. According to the committee, the issues mentioned will eventually have to be decided in accordance with the applicable national law. Additional provisions in the YAR are likely to cause difficulties.

Norway: No need for change.

Slovenia: Yes.

Spain: No, these matters shall remain left to the corresponding applicable law. Further, the commented additional matters would fall beyond the purpose of the YARs, which is the adjustment of general average and the rules to be applied on that respect, establishing which expenditures or sacrifices are to be allowed under general average and which not.

Switzerland: Yes, I however do not know whether this is required.

Ukraine: No need.

United Kingdom: The BMLA would be concerned that, in so far as judicial or other remedies would be sought, care should be taken not to interfere with the procedural or other substantive remedies available under the law of the relevant state.

AAA: [IWG: See below]

AMD: This idea has been debated before in the discussions before the 94 Rules, but rejected. With regard to liens in particular, it is foreseeable that provisions in the YAR may conflict with local laws at the place of discharge. However it is considered that there would be a significant benefit in including an express provision providing a

lien enforceable at the time and place of discharge, particularly in relation to large container carriers.

ICS/BIMCO: A noble idea in the interests of uniformity but unlikely to be followed in all jurisdictions in practice.

IUMI: [IWG: See below]

- b) *Should CMI consider offering, or including in the YARs, a recommended standard version of key documents such as the Average Guarantee and Average Bond?*

Argentina: Yes.

Belgium: The adoption of recommended standard versions of General Average Guarantees and Bonds documents has to be seen as a useful tool to eliminate misunderstandings, expediting at the same time the 'paper work' in the procedure. The use in practice of similar, but not exactly equivalent, documents is nowadays time-wasting and not producing any positive outcome. Thus providing templates and recommended standard versions would probably result in more clarity and faster procedures.

Brazil: Yes.

Canada: Yes – A single bond and guarantee with suggested wording would save time and expense.

China: The standard forms are helpful. However, it is not suggested to included the same in the Rules. It could be suggested by CMI at their website.

Croatia: No, we think that the practice has developed sufficiently in this respect.

Denmark: Offering standard version of Average Guarantee and Average Bond could be a good idea.

Finland: This question has partly to do with necessary documentation in the first place. Again, without the possibility at this stage to provide concrete solutions, simplification of procedure is important. The question in subsection b) can be referred to a recommended standard issued by the CMI, but does not have to be included in the YAR.

France: We do not have any specific problem with the present documentation used to secure cargo commitment to GA. We consider according to the "flexibility principle" that such documentation should remain an open issue dealt with the parties involved on a case by case approach. Therefore we do not see the interest of such question.

Germany:

Israel: We believe that a recommended version for Average Guarantee and Average Bond is a good idea but this must not necessarily be by formal incorporation into the YAR but can be promulgated by the Secretariat after being adopted by the CMI.

Italy: As to proposal (b) there are, in principle, no objections, even though the wordings of Average Guarantee are today standardized on the English form. As for

the Average Bond, its real meaning and use is controversial even in the English legal system, therefore it would be even more complex to export such a model into other legal systems.

Japan: We consider that it should be useful if CMI can offer (not in the YAR) recommended standard versions of key documents related to GA.

The Netherlands: No. In the Committee's opinion, there is no need to provide a standard version of key documents. The documents used in practice are more or less similar. They can now be tailor made in order to comply with the specific merits of the matter (non-separation agreement, jurisdiction provision, extension of time bars etc.).

Norway: We support the inclusion of a recommended standard version of Average Guarantee and Average Bond.

Slovenia: Yes.

Spain: No, we do not consider it as necessary.

Switzerland: Yes, this would be to the benefit of emerging markets and inexperienced shippers.

Ukraine: It will be useful to have a recommended standard, drafted separately, without incorporation into the YAR.

United Kingdom: The BMLA considers the settling of a standard form of average guarantee and average bond as a constructive idea. It is recognised that jurisdiction agreements in particular in Guarantees have raised practical issues in the past. However the BMLA supports the concept of recommended forms of average guarantees and bonds.

AAA: [IWG: See below]

AMD: The use of a standard form of security document would be beneficial but unless it were included as an appendix to the YAR it is likely that it would fall by the wayside as have other attempts to produce standard documentation. The use of a single standardized document would simplify the collection of security and thus reduce cost. However, it is recognized that the use of a standard form has some challenges; particularly in relation to jurisdiction.

ICS/BIMCO: The development of CMI standard versions of key documents such as the Average Guarantee and (the BIMCO) Average Bond merits consideration.

IUMI: [IWG: See below]

AAA: The members of the Sub - Committee were wary of including any provision concerning security or enforcement within the YAR themselves, because of the likelihood of conflicts with the law at destination or provided for in the contracts of affreightment. They feel, however, that the subject might benefit from further discussion if any of the parties involved had strong views on the matter.

IUMI: IUMI would support any scheme which simplifies the collection of General Average security. GA security from cargo interests usually comprises a GA guarantee signed by the cargo insurer and a GA bond signed by the receiver. The GA guarantee usually

provides a guarantee to the shipowner that sums properly payable in GA by the cargo covered by the insurer will be paid when the adjustment is completed. The bond acts not only as additional security but also as a declaration that the signatory will pay, whether or not it is legally liable to do so, because it owns the cargo at the time the maritime adventure terminates. It usually also states a provisional cargo value. Both bonds and guarantees may also deal with non-separation agreements (see Section 3, paragraph 7 below) and may make provision for other issues as the case demands (e.g. which YAR will apply to the adjustment where the bills of lading incorporate different sets of YAR).

The Questionnaire suggests consideration be given to the drafting and inclusion of standard form GA guarantees and bonds in the YAR: IUMI believes this idea should be approached with caution and will very much depend on the precise wording proposed but have no strong objection to the principle of such a proposal.

John McDonald (a well-known London average Adjuster with MacDonald Hebditch – tel: +44 (0)1428 715 533)) came up with a suggestion a few years ago which, if fully implemented, could do away with the need to collect GA bonds and guarantees from cargo interests in most cases. This could yield very substantial savings in the cost of handling GA claims especially in those cases where there are many bills of lading. His concept involves the following:

- (a) All bills of lading issued by the shipowner or bareboat charterer (if any) contain a clause by which the parties agree inter alia that the receiver will be liable for all sums properly payable in GA by the cargo described in the B/L. With this in mind BIMCO approved and published a clause for inclusion in Bs/L in 2005 as follows:

“BIMCO Average Bond Clause

On presentation of this bill of lading and payment of any freight due it is agreed that, in consideration of the delivery of the cargo described on the face of this bill of lading (“the cargo”) to the presenter of the bill of lading, or to order, without providing an average bond, the party or parties which present(s) this bill of lading, or their assigns, shall:

- (a) pay the proper proportion of any salvage and/or general average and/or special charges which may be ascertained to be properly due from the cargo or the shippers or owners thereof,
 - (b) where appropriate, contribute to salvage and/or general average and/or special charges in accordance with an adjustment prepared pursuant to the non-separation wording contained in Rules G and 17 of the York-Antwerp Rules 1994,
 - (c)(i) at the time of presentation of the bill of lading, furnish a copy of the commercial cargo invoice rendered to the receiver, and the identity and contact details of the insurer of the cargo together with such details of the policy as will enable the insurer to identify the cover, and;
 - (c)(ii) as soon as is reasonably practicable following delivery of the cargo, notify the Carrier, their Agent or appointed average adjusters of the nature and value of any damage to or loss of the cargo.
 - (d) following delivery of the cargo make a payment on account of such sum as is certified by the average adjusters to be properly due from the cargo and is payable in respect of such cargo by the shippers or owners thereof. Except when the adjustment is made in accordance with the York-Antwerp Rules 2004, rights to claim under this Clause shall be extinguished, unless an action is brought by the party claiming within a period of six years from the date of issue of the general average adjustment.”
- (b) All cargo insurers worldwide agree to assume a direct liability for GA contributions for the cargo they insure (subject to any policy defences of which they might be aware at the termination of the common maritime adventure). This could be done by the inclusion of suitable policy wording with a clear intention that shipowners and other parties to the common adventure should benefit from this undertaking which could be enforced under English law direct against the cargo insurer by virtue of The Contract

(Rights of Third Parties) Act 1999. However such a mechanism may not be effective under other legal systems.

This is clearly where the problem with the concept arises as it is quite unclear how this could ever be achieved on a sufficiently wide scale. It might be thought that this is an area where the leading cargo markets could take a lead by producing a new cargo policy wording and IUMI could support this effort by encouraging its widespread adoption. However, such a view would almost certainly be incorrect as marine property insurance markets are very diverse and disunited and would be resistant to the concept of having to issue cargo policies which all included a direct liability clause in it. For this reason the proposal has virtually no prospect of widespread adoption. Having said that, the MacDonald proposal would require no amendment to the YAR as they currently stand as they do not address GA security (except in the form of cash deposits).

8. ABSORPTION CLAUSES

Absorption Clauses (whereby Hull insurers pay GA in full up to a certain limit) are now found in almost all Hull Policies, and have played a significant role in reducing the number of smaller uneconomic collections of security and contributions from cargo.

Are there any changes that might be made to the York Antwerp Rules that might further assist in this process?

Argentina: Yes. It should be mandatory in order to force the H&M Underwriters worldwide to include that clauses in their policies.

Belgium: No. The players in the market have already dealt broadly with the issue. The extent and the wording of such clauses have to be left to the freedom of the parties.

Brazil: No.

Canada: No

China: Not to include the clause in the Rules. The Clause is the multi-choice by the shipowners and Hull Underwriters. And, it is not always the intention of the Hull Underwriters for all the shipowners (to be granted of such benefit).

Croatia: We have no further proposals in this respect. We think that this matter should be dealt within the wording of the absorption clauses.

Denmark: No - absorption clauses are agreed on between shipowners and H&M underwriters and should not be included in the York Antwerp Rules as the latter rules regulate the relationship between carrier and interests representing the cargo.

Finland: There is no need to include specific text in the YAR relating to absorption clauses. GA is based on contract in any case with full freedom for the contracting parties to decide upon the way of risk division and outside the scope of applicable mandatory provisions. That said, an increased use of absorption clauses could address many of the current complexities related to GA.

France: We do not have any recommendation on such issue.

Germany:

Israel:

Italy: The matter of Small GA Clause is mostly related to insurance. An adaptation of the texts (very different among them) currently used could be desirable, but one cannot see how YAR could host them.

Japan: GA Absorption Clauses are the matters in respect of hull insurance policies and/or the practice of hull insurance. Therefore, they have no direct relation to the provisions of YAR.

The Netherlands: No. The Committee respectfully submits that the absorption clause should be dealt with in the commercial agreements that have been concluded in respect of the carriage, so the charterparty and Owners' insurance policy. The decision whether an absorption clause could be and/or is invoked depends on the wording of the clause and Owners' decision whether or not to invoke the clause. In the Committee's opinion, no further regulation in the YAR would be necessary or useful.

Norway: The Absorption Clause is a commercial agreement between the shipowner and the hull underwriters and does not require any regulations in YAR.

Slovenia: No.

Spain: We deem there are no changes to be made to the YARs that further assist in the process played by absorption clauses in reducing the small number of uneconomic collections of security and contributions from cargo.

Switzerland: No, I do not think so. The carrier currently has to make the judgment call, whether collection of security and contributions from cargo is economically viable. One way to handle the issue as depicted is the GA absorption clause. Another one would be the Landmark concept (as attached).
It is better to leave the market react to such trends as opposed to re- or overregulate.

Ukraine: The Absorption clauses are the contractual terms agreed between the Hull insurer and the shipowner. There is no need of regulation by the YAR the commercial matters.

United Kingdom: The scope of GA absorption clauses are, in the opinion of the BMLA, matters for property underwriters and their insured and not the York Antwerp Rules.

AAA: Absorption Clauses have successfully played a significant role in avoiding uneconomic security collections, and their near universal appearance in hull policies has been welcomed by this Association. However, such Clauses appeared to the Sub - Committee to concern solely questions of insurance, and, as such, to lie outside the scope of the YAR.

AMD: The best course of action would be for Hull Underwriters to offer much larger absorption figures and of course offer them to those less fortunate owners who at present do not get them.
It is not considered that there is anything that could be done in the YAR to further assist the reduction in the number of small GAs which get adjusted.

ICS/BIMCO: ICS and BIMCO do not have any suggestions for changes that might be made to the YAR to assist in the use of Absorption Clauses or other methods to reduce the number of smaller uneconomic collections of security and contributions from cargo. Instead, changes should be made to the H&M policies (e.g. use of the BIMCO GA Absorption Clause).

IUMI: IUMI can think of no changes which require amendments to be made to the YAR to deal with Absorption Clauses.

9. PIRACY

Under many maritime jurisdictions it has been accepted as a matter of law or practice that the payment of ransom is a legitimate expense. Where the normal criteria for Rule A are met (as has generally been the case with the Somali pirate seizures) allowances have been made without the need for express wording relating to piracy.

Belgium: This matter deserves an extensive discussion on its own, as it raises interesting aspects in the General Average doctrine, in consideration also of the increasing incidence of piracy casualties in the recent years.

To be brief, it must be pointed out that, according with the classic definition of General Average, the General Average act should be 'intentionally and reasonably' made.

The extent of a free resolution can be obviously questioned, when a decision has to be taken after a threat to life (namely the crew) and, subsequently, property (the vessel and cargo) is posed, as in a piracy act. Thus, to follow a strict interpretation, it should not be allowed to include the payment of ransom in the GA allowances. On the other hand, for practical and moral reasons, to exclude this disbursement would equal in an unfair result and the established practice of the recent years has gone in the direction to consider ransom as a legitimate expense, even in the absence of an express proviso in the Rules.

- a) *Do you consider that express wording in YARs would be desirable to deal with the general principles or regulate specific allowances?*

Argentina: Yes.

Belgium: [IWG: See also above] There is a practical aspect that has arisen and that can still be controversial. Recently, especially in West Africa cases, pirates have taken control of the vessel, and then took part or the totality, of cargo. Shipowners, in this case, are 'saving' the vessel and crew, in some cases without even suffering significant delays or deviations to the planned voyage, but the expenses suffered by cargo Owners are not included in those allowed as valid General average expenses. This leads to an unfair and disproportioned application of the allowances, definitely pending in favour of Shipowners. CMI should try to tackle the issue and provide an appropriate and equitable solution to this matter.

However, the Royal Belgian Shipowners Association (RBSA) are of the view that it is not necessary to include express wording relating to piracy/payment of ransom in the YARs to deal with general principles or regulate specific allowances.)

Cargo interests point of view is that the 'flexibility' shown for the Piracy Ransom cases, namely not dispute the GA in such situations, should be met with the same 'flexibility' when cargo is 'sacrificed' as in the mentioned West Africa cases.

The position of the Belgian Association of Maritime Law representing a large panel of legal professionals, would not take any position on this subject

Brazil: No.

Canada: No. No express wording is needed – It should be left to the adjuster.

China: No.

Croatia: No.

Denmark: No need to include specific provisions in relation to ransom payments.

Finland: Piracy, and especially piracy in Somalia, has proven to be a challenge in GA. The ransom amounts and ancillary costs have caused problems for all parties, but in particular for cargo interest who are typically outside any negotiations on these matters.

That said, the concrete situations related to ransom and piracy might vary considerably and it may be dangerous to define some kind of factual standard giving rise to GA. The best solution is probably to decide upon the status of ransom paid in casu and, for that, the general rule describing GA in the YAR is appropriate.

It's another matter that various jurisdictions might consider the payment of ransom as illegal, but it seems not to make much difference once the ransom has been paid. A party that has executed such payment in order to save the common adventure should have the benefit of sharing such a cost through GA, provided that an in casu discretion leads to a true GA in accordance with the YAR.

France: We understand the accuracy of such question and approach but we consider it should not be maintained as there are a lot of issues around the piracy legal concept which is not still defined.

We still face strong discussions regarding the relation between Piracy and GA. Moreover regulators may dislike the official recognition of piracy being incorporated into a mutuality principle between ship and cargo under GA institution.

We may have more problems with such issue being raised in this questionnaire than any expected solutions.

Germany:

Israel: Contrary to certain U.K. judicial decisions, payment of ransom would at present be probably considered illegal in Israel and not only that - it would probably not be recoverable but would also expose the payer to criminal proceedings. A CMI resolution (not necessarily by way of amendment or addition to the YAR), would aid to alter this position.

Italy: The approach has been based thus far on the application of the general principles to these new (or renewed) issues. After several hesitations the practice seems having taken a direction, but - to answer to the question (a) - a specific rule could be useful in order to remove the remaining uncertainty on (i) the general average nature of the ransom paid and the related requirements [purpose of common safety and so forth etc.] and (ii) limitations to the admission [for instance excluding that the detention under pirates control is equal to the release into a port of refuge, which would seem obvious but the English Adjusters Association, felt necessary to stress the point in order to stop the abuses]. It would be worth however to draft a new Rule on the topic.

Japan: As the matter of the payment of ransom for the release of the vessel and the cargo on board is an issue related with each state's public policy, it is not appropriate for YAR to deal with this issue. Whether the ransom in the specific case can be allowed in GA or not, should be judged in the light of Rule A.

The Netherlands: No. It is the Committee's opinion that the current wording of the YAR is sufficient to cover piracy situations.

Norway: No changes required to the YAR, as it is nevertheless each jurisdiction's law that will apply.

Slovenia: Yes.

Spain: We deem that this issue is already properly governed under the relevant charterparties, not being needed to consider an express wording in the YARs.

Switzerland: No (the peril has been shifted to the war market anyway)

Ukraine: At the present time the issue of piracy is complicated and not resolved and regulated in all jurisdictions on a consistent basis. For this reason we propose not to consider this issue now and let it lie.

United Kingdom: As a general comment, the BMLA would point out that individual adjustable losses are not presently defined in the Rules and doubts whether it would be appropriate for such a route to be adopted at this stage. So far as concerns English law, there is authority confirming that ransom payments are a legitimate expense which can be adjusted in GA. In the event, therefore, BMLA does not consider it would be desirable to introduce express wording.

AAA: The Sub - Committee considered that whether or not piracy and ransom lay within GA was already adequately dealt with in the existing YAR.

AMD: It is considered unnecessary to include specific provisions in the YAR with regard to piracy as allowances will flow from the application of Rule A. However, if it was felt necessary to include provisions it might be preferable for them to be set out in a subset of rules to avoid any possibility that the principles might taint the rules as a whole. This subset of rules might only apply when specifically referenced in the contract of affreightment to create GA by agreement.

ICS/BIMCO: ICS and BIMCO are of the view that it is not necessary to include express wording relating to piracy/payment of ransom in the YARs to deal with general principles or regulate specific allowances.

IUMI: Ransoms are recoverable in General Average only when the payment is legally made under all applicable laws. The laws applicable are usually that of the carrier's/ship owner's principal place of business and the place where payment is actually made. Some countries make ransom payments illegal either totally or for the purpose of procuring the release of crew (as opposed to the ships or their cargoes). Most countries impose restrictions on payments to criminals and terrorists (e.g. money laundering legislation) so that permission from the relevant authorities must be obtained before such payments can be made legally. If the payment is illegal or made illegally then it will not be "reasonable" within the meaning of Rule A or the Rule Paramount in the YAR 1994 or 2004 and will therefore not be recoverable in GA from cargo or hull insurers due to the implied warranty of legality (Marine Insurance Act 1906 Section 41).

There is nothing that can go into the YAR that will override national criminal laws and it would therefore be inappropriate to deal with this aspect of piracy specifically in the Rules. However having said this IUMI can see no real harm if the MLAs advise whether, in their jurisdictions, there are statutory or other restrictions on the payment of ransoms or other related expenses as requested in Section 1, Para. 9(b) of the Questionnaire.

The Belgian Association of Marine Law's response to the Questionnaire raises an interesting issue: where pirates remove all or part of a ship's cargo and then release the ship and crew should the parties to the common maritime adventure treat the removal of cargo as a GA sacrifice in the same manner as a ransom? Morally IUMI

feels this issue has considerable force but as a matter of law the cargo interests would have considerable difficulty in arguing their case as the YAR are currently drawn; Because the removal of a cargo will usually be theft it may be unreasonable and outside the Rule Paramount and Rule A. IUMI would therefore be in favour of a new numbered piracy rule which brings takings of cargo by pirates into GA.

- b) *To build up a general picture it would be useful if MLAs could advise whether in their jurisdictions there are statutory or other restrictions on the payment of ransoms, or other related expenses.*

Argentina: There are no restrictions on the payment of ransoms in Argentine Law.

Belgium: [IWG: See also above] In Belgium payment of ransom will in principle be organized in close consultation with the European Union.

Brazil: No. This is a matter to be ruled by the governing law.

Canada: Canada has anti-terrorism legislation. Terrorism is unlawful and therefore if piracy is a form of terrorism it too would be unlawful.

China: The lawfulness of ransom has not been confirmed by the PRC laws.

Croatia: So far there have been no such restrictions under Croatian law.

Denmark: None.

Finland:

France:

Germany:

Israel: Contrary to certain U.K. judicial decisions, payment of ransom would at present be probably considered illegal in Israel and not only that - it would probably not be recoverable but would also expose the payer to criminal proceedings. A CMI resolution (not necessarily by way of amendment of an addition to the YAR), would aid to alter this position.

Italy:

Japan: Under Japanese jurisdiction there is no rule or regulation which explicitly restricts payment of ransom or other related expenses.

The Netherlands: The Committee is not aware of any such legislation or regulation.

Norway: In respect of question 9b, we would like to add that there are no particular prohibitions of paying ransom in Norwegian law, even if the receiver may be affiliated with an international network of terrorists.

Slovenia: Yes.

Spain: As a general rule, payment of ransoms would not be admitted and could be considered as a criminal offence (cooperation with pirates). However, particular circumstances should be taken into account as, for instance, the payer's state of necessity which would exclude the criminal behavior.

Switzerland: No, none: to pay ransom is legal under Swiss law, however not to claim for it or e.g. concealment of the funds obtained ("Hehlerei" according to Article 160 StGB). Pls note however that sanction/ITC legislation may apply.

Ukraine: Actually Ukraine does not have any restrictions to pay ransoms, but due to some strict foreign exchange regulations it is almost impossible to pay a ransom abroad legally.

United Kingdom: Whilst it is understood that, in some jurisdictions, the payment of a ransom might be illegal, the BMLA is unaware of any law which stipulates that a pirate attack is not a GA event.

AAA: The Sub - Committee noted that, in English Law, the payment of a ransom to pirates was not unlawful, unless it constituted a payment to terrorists. The obtaining of this kind of information from other jurisdictions would undoubtedly be beneficial, but may not have any direct bearing on the text of YAR.

AMD: It is understood that the only restriction according to English law is that the payment of a ransom is not permitted if it is to be used to finance terrorism. The situation is similar in USA, France and Canada. However, in Denmark it is illegal to pay a ransom to pirates on the basis that it is funding an illegal activity although it is understood that the point has so far not been taken by the authorities. In Germany the payment of a ransom is not illegal as it is considered an "excusatory emergency" when life and property is at risk.

ICS/BIMCO: This is for MLAs to answer.

IUMI:

10. COSTS

Are there any areas of the General Average process where the costs could be avoided, reduced or controlled, including:-

Belgium: Indeed costs in General Average proceedings should be monitored and kept under control.

a) *Adjusters fees*

Argentina: [IWG: See below]

Belgium: [IWG: See also above] Fees need to be kept within reasonable amount and applied fairly.

This however is more an issue that has to be dealt by the professional associations, rather than through explicit provisions in the Rules.

Brazil: [IWG: See below]

Canada: No

China: An adjuster stated that the modern technology could help to reduce the work load of the adjuster, such as using EXCEL to include the calculation, the concept of data-sharing, etc.

Croatia: [IWG: See below]

Denmark: No.

Finland:

France: [IWG: See below]

Germany:

Israel: [IWG: See below]

Italy:

Japan: If low value cargoes on board the container ships are excluded from contributory value, the adjustment fees and costs of collecting securities should be reduced considerably.

The Netherlands: [IWG: See below]

Norway: No proposed changes.

Slovenia: No.

Spain: [IWG: See below]

Switzerland: This should be left to the forces of the market.

Ukraine: Issue on reasonableness of adjusters fee has to be settled, but we believe, that it shall not be covered by the provisions of YAR.

United Kingdom:

AAA: [IWG: See below]

AMD: People have probably been complaining about about adjusters' fees since Pontius was a pilot. Requiring adjusters to justify their fees by recording hours and work accomplished is not unreasonable but this issue has little to do with the YAR. Also a tariff system, under which fees are expressed as a percentage of the claim, prevails in some adjusting centres.

ICS/BIMCO: Adjusters fees. Adjusters' fees are highest in complex casualties where security is problematic and there are issues on-shipping the cargo; as suggested in 1.2 a) above, a widening of the expenses admissible at a port of refuge in order to deal with cargo operations would speed up the way in which large casualties can be managed, and correspondingly reduce the fees for all professionals involved.

IUMI: At present adjusters' fees are universally allowed in GA. In the run-up to the debate which led to the adoption of the YAR 2004 IUMI proposed that the adjuster's fees should be paid by whoever appointed him and IUMI remains of the same view.

b) *Costs of collecting security*

Argentina: [IWG: See below]

Belgium: [IWG: See also above] This tool should be also kept under strict control. In the long term, it could also be possible to rethink it, in order to reduce sensibly this part of the costs. Costs exposed by cargo interests should also be taken into consideration.

The RBSA underlines that the use of the BIMCO Average Bond Clause should be promoted.

Brazil: [IWG: See below]

Canada: No

China: Sometime the assistance of P&I service and ship's agent at destination would be more efficiency and sometime free of charge.

Croatia: [IWG: See below]

Denmark: No.

Finland:

France: [IWG: See below]

Germany:

Israel: [IWG: See below]

Italy: As for point (b) costs of collection of the guarantees are usually considerably reduced thanks to the new technologies. Except for cases involving large quantities of goods, for which we refer to the comments raised under point 1(a), there is no indication of specific requests as regards points (c) and (d).

Japan: If low value cargoes on board the container ships are excluded from contributory value, the adjustment fees and costs of collecting securities should be reduced considerably.

The Netherlands: [IWG: See below]

Norway: The costs of collecting security are usually included in the fee of the adjuster. No proposed changes.

Slovenia: Yes.

Spain: [IWG: See below]

Switzerland: Down to the owners to decide what is deemed useful security. What currently drives cost is the prevalent request for security issued by a rated insurance company (as opposed to just a properly registered insurance company).

Ukraine: No.

United Kingdom:

AAA: [IWG: See below]

AMD: A single standard security document (which might usefully encompass salvage security) would reduce the cost of collecting security as might be the establishment of market bodies to provide GA security on behalf of all insurers in that market.

ICS/BIMCO: Costs of collecting security. Use of the BIMCO Average Bond Clause should be promoted. In addition, there may be merit in requiring GA security to be provided at the POR (rather than at destination) and within a prescribed time of the survey being completed, failing which the adjuster could take steps to sell the cargo.

IUMI: Currently the costs of collecting GA security are normally allowed in GA as part of the Adjuster's fee. There is nothing in the YAR or the Rules of Practice adopted by the Association of Average Adjusters which sanctions this practice but IUMI understands it is almost never questioned. IUMI takes no position on this issue.

c) *Format of adjustments*

Argentina: [IWG: See below]

Belgium: [IWG: See also above] Nothing to say on this point.

Brazil: [IWG: See below]

Canada: No

China: No.

Croatia: [IWG: See below]

Denmark: No.

Finland:

France: [IWG: See below]

Germany:

Israel: [IWG: See below]

Italy: As for point (b) costs of collection of the guarantees are usually considerably reduced thanks to the new technologies. Except for cases involving large quantities of goods, for which we refer to the comments raised under point 1(a), there is no indication of specific requests as regards points (c) and (d).

Japan: Nothing in particular.

The Netherlands: [IWG: See below]

Norway: The format of adjustments is adequate as today. There must be a balance between on the one hand explaining all events and all recoverable items, and on the other hand not making it too elaborate and voluminous to digest.

Slovenia: No.

Spain: [IWG: See below]

Switzerland: Setting out a required format for adjustments will do away with the freedom of adjusters to present in whatever way suitable and ultimately increase the cost.

Ukraine: No.

United Kingdom:

AAA: [IWG: See below]

AMD: Even if adjustments were to be reduced to one page of A4 the underlying work would have to be done and charged for. Attempts have been made on a sporadic basis to produce so-called “short form” adjustments. These have not always met with acceptance from claims examiners.

ICS/BIMCO: Format of adjustments. This could be considered, though most adjusters have more or less the same format so this is probably not an issue.

IUMI: IUMI can see no reason to regulate the format of adjustments done under the YAR in the Rules themselves. There is however one innovation which would make reading adjustments a great deal simpler: this is that for every allowance made in GA the adjuster should be required to state precisely under what Rule the expense is allowed so that MPUs and their advisers who have to go through these documents do not have to try and second guess why the expense is included. This is a requirement which would best be introduced through a Rule of Practice rather than an amendment to the YAR themselves.

d) *Involvement of legal and other representatives*

Argentina: [IWG: See below]

Belgium: [IWG: See also above] It seems very difficult to limit or compress the involvement of legal and other representatives through a direct formulation in the Rules. Again, this is more a matter for the parties involved and, in a certain extent, it pertains to the ‘craftsmanship’ of the Adjusters. Implementing Rule ad hoc could not solve the problem. Cargo interests submitted that only costs of this nature that are made to avoid or minimize the liabilities of the parties to the common adventure should be allowed.

Brazil: [IWG: See below]

Canada: No

China: No.

Croatia: [IWG: See below]

Denmark: No - the Rule Paramount regulates that costs shall be reasonable in order to be recoverable.

Finland:

France: [IWG: See below]

Germany:

Israel: [IWG: See below]

Italy: As for point (b) costs of collection of the guarantees are usually considerably reduced thanks to the new technologies. Except for cases involving large quantities of goods, for which we refer to the comments raised under point 1(a), there is no indication of specific requests as regards points (c) and (d).

Japan: If salvage payments where the law or contract already provides a means of distribution between the parties to the common maritime adventure (such as salvage award under LOF) will not be allowed in GA and will not be deducted from contributory value, major part of legal costs which has been allowed in GA can be excluded from GA.

The Netherlands: [IWG: See below]

Norway: Legal costs that relate to items allowable in GA may be included. The Rule Paramount should be a safeguard that the costs are reasonable.

Slovenia: No.

Spain: [IWG: See below]

Switzerland: No.

Ukraine: No.

United Kingdom: Although, as noted above, there would be potential costs benefits in the relevant processes involved in GA and adjustment under the York Antwerp Rules could be streamlined, the BMLA is unaware of any strong held views in the London Market concerning the costs of adjustments.

AAA: [IWG: See below]

AMD: Such persons usually extend the time and consequent cost of preparing adjustments and should ideally not be employed until after the adjustment has been issued.

ICS/BIMCO: Involvement of legal and other representatives. No.

IUMI: In principle IUMI does not see why such costs should be allowed in GA unless they avoid or minimise the liabilities of the parties to the common maritime adventure arising out of or connected with the GA incident (one example of such costs is the legal costs of the ship and cargo interests in defending a salvage claim).

Argentina: Yes, but this can only be determined by the Adjuster depending of the characteristics of the case.

Brazil: Costs should be suggested by G/A associations, aiming to maintain standards of reasonability.

Croatia: In our opinion, not significantly.

France: No problem with such questions.

Israel: Costs could be saved by providing for a mediation process between adjusters/ship owners/cargo under the auspices of the CMI and adoption of a mediation set of rules and a panel of CMI mediators.

The Netherlands: Yes. In the Committee's opinion, the costs of a general average process may in specific circumstances be avoided or reduced. However, the Committee feels that the way in which a reduction could be obtained and the extent of such reduction will depend on the circumstances of a specific matter. In view of the reasonableness requirement of the Rule Paramount, the Committee does not advocate that a specific regulation is inserted in the YAR.

Spain: Considering recent experience in the last years, we understand that general average adjustments are often too time consuming and costly, being adjusters fees the bulk of the costs which are borne in a general average adjustment. Therefore, we would not disregard that some further thought is made on this respect.

AAA: The Sub - Committee considered that the opportunity afforded for forthcoming CMI meetings to discuss these matters should be taken - particularly in relation to the costs of collecting security - but did not feel it had a bearing on the text of the YAR.

11. OTHER MATTERS

It is open to all parties receiving this questionnaire to raise questions or points that are not already covered by the questionnaire.

Argentina: No comments.

Belgium: At the present stage, and in consideration of the amount of issues already tackled by the present questionnaire, there are no other issues to add.

Cargo interests, however, refer to GA's involving large container vessels: it could be investigated if small value cargo could be ignored when the inclusion of this cargo would only have negative effects on the Adjustment (time, more expensive to find and collect than the actual contribution etc...).

See also 17.1 Rule XVII. On the currency of the Adjustment it is arguable to state that each and every adjustments should be done in a single widely accepted currency.

Brazil: Not applicable

Canada: Nothing

China:

Croatia:

Denmark: No.

Finland:

France: We would like to submit the idea that cargo interest should be recognized a clear access to the cargo while under GA in order to determine the present material situation of the cargo at stake. Such information about general state of the cargo should be available to the cargo owner via his representatives without any restriction. In order to balance such recognized right of cargo interest the latter should admit they have a duty to cooperate in

order to allow the GA adjuster to collect all information and documentation to obtain the GA guarantee and the GA Bond.

We propose that such point should be raised.

We would also like to raise the question of delay to finalize GA.

We experience longer delays to obtain the GA final report and calculation. We think that it is of common interest to reduce delays and settle the overall GA in a shorter period.

We recommend to consider such question.

Germany:

Israel: We join the recommendation of the French MLA to give cargo not only access to GA information but also to enable cargo owners a legal way to declare GA and take the right to declare GA out of the exclusive bonds of ship owners who may have (and have) selfish interests which are by definition contrary to the interests of cargo owners.

Italy: No further comments.

Japan: Nothing in particular.

The Netherlands: The Committee does not have any questions or points to raise.

Norway:

a) Low value cargoes:

Discarding of low value cargoes should be considered in line with what was introduced in Lloyd's Open Form in 2011. This would ease the work of the adjuster, and low value cargo owners, often without insurance, will not be exposed to GA.

b) The currency of the adjustment:

The uncertain question of the currency of the adjustment causes underwriters difficulty in predicting their exposures to GA contributions. It may today take months or years from the time expenditure is converted to the time the parties are asked for their proportionate contributions.

One possible solution would be to introduce a reform where all adjustments are stated in one currency unless otherwise agreed. Although this could lead to an increased exposure (depending on how exchange rates develop), this is outweighed by making the insurers able to predict what their exposure would be and take the necessary steps to protect their position. Cefor would thus urge the Norwegian MLA to recommend such a change to the YAR.

Slovenia:

Spain: No other questions or points to be raised.

Switzerland: Throughout the years, the number of average adjusters has drastically diminished. In light of the importance of this function for the industry, this is of great concern.

How does the CMI intend to tackle this problem?

Ukraine: Nothing.

United Kingdom:

AAA:

AMD:

a) SDRs

When working on the revision which led to the YAR 94 the AIDE (former name of AMD) committee considered having a Rule providing for all adjustments should be prepared in SDRs. At that time, there was much interest in and concern about the currency of the adjustment. Since then the US dollar has reigned supreme and interest in the subject has died away. But will this always be the case? At the moment, despite the weakness of the US economy, alternatives are even less attractive; the Euro, the Pound Sterling and the Yen are all currencies of troubled economies, so people stick to the US dollar. But we must try and look ahead to 2036, twenty years after the introduction of the YAR 2016. Should we consider SDRs again?

The advantages are that, first any possible dispute about the currency of adjustment is removed and second, that the question of interest is disposed of because SDRs have their own interest rate.

This is what it says about them on Wikipedia:

“Special drawing rights (SDRs) are supplementary foreign exchange reserve assets defined and maintained by the International Monetary Fund (IMF). Not a currency, SDRs instead represent a claim to currency held by IMF member countries for which they may be exchanged. As they can only be exchanged for euros, Japanese yen, pounds sterling, or US dollars, SDRs may actually represent a potential claim on IMF member countries' non-gold

foreign exchange reserve assets, which are usually held in those currencies.

While they may appear to have a far more important part to play, or, perhaps, an important future role, being the unit of account for the IMF has long been the main function of the SDR.

Created in 1969 to supplement a shortfall of preferred foreign exchange reserve assets, namely gold and the US dollar, the value of a SDR is defined by a weighted currency basket of four major currencies: the US dollar, the euro, the British pound, and the Japanese yen. SDRs are denoted with the ISO 4217 currency code XDR. SDRs are allocated to countries by the IMF. Private parties do not hold or use them. As of March 2011, the amount of SDRs in existence is around XDR 238.3 billion, but this figure is expected to rise to XDR 476.8 billion by 2013”.

b) Exclude sacrifices

The most radical way to reduce the scope of GA would be to exclude sacrifices from allowance in GA. They are under almost all insurance regimes paid in the first instance by insurers, under English law in accordance with the Marine Insurance Act. So the interest suffering the sacrifice does not remain out of pocket very long and indeed once he has recovered from insurers has little or no continuing interest in any sacrifice dealt with in the adjustment.

There are more Rules about sacrifices than expenses and they probably involve more complicated and therefore expensive estimates and calculations; cost of refloating damage, loss on discharge and reloading of cargo, water and fire damaged cargo. There is also the requirement to add back the “made good” when calculating contributory values.

The Rules about expenses on the other hand are a means of dealing with money expended in a perilous situation, which in the absence of those Rules would give rise to endless disputes.

ICS/BIMCO: None at this stage.

IUMI:

(a) Large Container Ships

The Questionnaire does not identify what is contemplated under this heading but at the CMI Conference in Beijing the debate identified the problems posed by the large volume of cargoes on container ships for adjusters as being an issue which may need to be addressed in the new YAR. This issue is of increasing importance in relation to large

container ships where some cargo is of low value and often uninsured and where the cost of collecting security exceeds the cargo's contribution in G.A.. In a paper on LOF Salvage prepared in December 2007 Richard Cornah of Richards Hogg Lindley pointed to the rapid growth in the capacity of large container ships and the problems which this posed for adjusters as well as salvors and continued:

".....Discarding Low Values

Starting from an adjuster's viewpoint, it is a common practice in dealing with General Average adjustments to consider excluding low value interests from a security collection, or even at the settlement stage, on grounds of economy. Clearly, there is little point in spending US\$200 in fees to collect a contribution of US\$190.

A recent container vessel general average illustrates the point. The total cargo value was an unusually high one of US\$437 million, made up of 3,084 separate interests. (the number of interests is different from the number of containers or TEU on board. It refers to the number of separately owned items of cargo). If values of less than US\$10,000 are omitted the total value drops marginally to US \$435 million, but 484 interests are taken out of consideration. On a 2% general average their contribution would have been only US \$40,000, so the potential savings are clear.

A more radical approach of excluding values below US \$30,000 cuts out no less than 1,100 interests, while reducing the total values by only US\$16,000,000, or 3.6%.

An example with more modest values involved a General Average and Salvage case on an East/West mainline vessel that suffered a fire. The total cargo value is around US\$180 million, made up of 3,898 interests. Omitting values of less than US\$10,000 removes 880 interests but the fund drops by only US\$4 million. The contribution of those 880 interests to a 10% salvage would be around US\$400,000. If they were taken out of consideration, other interests would in theory be paying US\$132 extra each, but if those interests had been excluded ab initio considerable savings would have resulted in adjusters/solicitors/Lloyd's costs in:

- collecting security
- obtaining information regarding damage/claims etc.
- calculating salvaged values
- ascertaining representation
- notices regarding arbitration and awards
- collecting settlements

Our experience shows (and I am certain Lloyd's and solicitors personnel would agree) that lower value cargoes absorb a disproportionate amount of time that also extends the arbitration process. They are more likely to be uninsured or part of a consolidated box or are simply unfamiliar with the commercial procedures. In cases where their presence has a minimal effect on the salvaged fund and the eventual award, is it necessary or sensible to insist that they are brought in, only to gum up the works and increase costs?

The problem of low value cargo in 4,000 TEU vessels may be an irritant that is bearable, but our topic is vessels of twice or three times that size. Even the best systems for handling security would expect to see situations in which the release of higher value cargo will be delayed by the sheer volume of low value cargo competing for attention.

LOF already excludes from consideration personal effects (box 2) and extends this to accompanied motor cars (LSSA Cl. 3.2), for obvious practical reasons. However, if a salvor were to exclude other low value cargo in a container vessel case on the basis that it made practical sense to do so, his decision would be open to attack by other interests at the arbitration. The arbitrator would be obliged to consider his award on the basis of all the cargo, high and low value, on board the vessel and the salvor would be left with a shortfall. If it is accepted that excluding low value cargo is the right way to proceed when dealing with super-size vessels, it seems inequitable that the salvor should be penalised for an approach that is beneficial to all interests.

If the contractual freedom offered by LOF can be used to exclude personal effects and accompanied motor cars (the York-Antwerp Rules 1994 and 2004 do likewise, but there is no equivalent provision that I can find in the Salvage Convention), then consideration should surely be given to create an option to exclude cargo below a specified value, in appropriate cases.

Having an agreed sliding scale based on size of vessel would be simple if inflexible, and an alternative would be a box to fill in when the LOF is signed by the parties. Entitlement to fall within the exclusion and to be released without security would be demonstrated by producing the CIF invoice for the goods, which is frequently a customs requirement in any event.

The Values Problem

Salvors face some difficult dilemmas when it comes to deciding on the amount of security to demand and the extent to which they use the power given them by LOF, the Salvage Convention and many jurisdictions. Sometimes one encounters a "belt and braces" approach that may be appropriate with a single interest bulk carrier, but does not recognise the difference in exposure when dealing with one interest amongst thousands.

Nonetheless the problems are very real. Too little security demanded or an overly relaxed attitude towards arrest may leave the salvors exposed. Too high a demand will raise the temperature in dealing with salvaged interests and prompt abandonment of cargo. Much of this difficulty is to do with values.

If we examine the container vessel cases that we have on record covering the past 21 years the average value per container comes to around US\$25,000 per TEU. Our average figure has been given wide circulation and often appears in the press, but it needs to be viewed with caution.

Of particular interest is the fact that the average value has changed little during that period, whereas the effects of inflation should have pushed it well over the US\$50,000 mark. The explanation lies in the significant reductions in unit freight costs during that period due to the efficiency of the modern shipping and logistics industries, without which the process of globalisation of trade would never have got off the ground. In the early days it was only viable to ship relatively high value goods around the world – for example electronic goods from Japan – but now everything from cane furniture to T-shirts can be sent at a profit. The relative uniformity of values from one ship or trade to another has therefore gone and we are faced with radical variations. The highest value we have seen for one container is in excess of US\$20 million (encryption software) and containers of US\$1 million values (e.g. pharmaceuticals, blood plasma) are not uncommon. At the other end of the scale, items are sent that have minimal value other than the cost of the pre-paid freight. Looking at values on a per vessel basis we have seen average values of US\$75,000 per TEU at the higher end of the scale and US\$11,000 per TEU at the lower. It is therefore important to understand the particular trade in question.....

Cargo Insurers

Given the relatively low cost of cargo insurance (0.2% of CIF value for door to door cover on "All Risks" terms is a commonly quoted indication) it is surprising how much cargo is found to be uninsured. On a recent fire case involving an East/West mainline service there were over 750 uninsured cargo interests on board, roughly 18.75% of the total. We thought this was high, but looking back at six previous cases we found that the average is just over 12%.

If cargo is uninsured it is necessary to obtain a cash deposit, which invariably comes as an unpleasant surprise to the receiver. If the security demand is a high one, their reaction may often be to consider abandoning their cargo; if a cash deposit is forthcoming the costs of the administrative process are often out of proportion to the values involved. During the lengthy and sometimes acrimonious telephone conversations that ensue, it often emerges that receivers have little idea of the modest cost of cargo insurance, perhaps basing their expectations on their latest

motor insurance renewal. If the figures regarding annual container movements are correct, 12% of that total surely presents a tempting marketing target for cargo insurers. Although the majority of uninsured cargo is usually of low value, this is not always the case, and we have seen shipments valued in the millions.

Container Operators

Many consortium agreements and slot charterers show little attention to possible issues that may arise in the event of a casualty. Whilst this is understandable in the context of container vessels suffering serious casualties only infrequently, it is something that could be looked at by the industry bodies with a view to producing recognised procedures and protocols. Typical areas in which one often seems to be re-inventing the wheel each time a casualty occurs include:

- Responsibility for holding cargo in relation to a general average lien by the shipowner or a salvor's lien.
- responsibility for port of refuge expenses, such as handling, storing or forwarding cargo.
- agreement to provide an ISU 2 undertaking to salvors.

Consortium operation often leads to a clash of interests once a casualty has occurred, as consortium members seek to prove that one of their number brought (for example) the spontaneously combusting container on board. Separate legal representation then follows and the developing disputes can slow down the effective management of the casualty and its aftermath.

Although not exactly comparable, the oil industry has developed offshore fields on a consortium basis for many years. Liabilities are effectively pooled by extensive "hold harmless" clauses which often embrace the main contractors. Should a similar regime be appropriate for the modern container operation, so that the focus remains on client service rather than attributing liabilities?

Consolidators

Not all shippers wish to send a complete container load and a separate branch of the industry has grown up to serve their needs. Various referred to as freight forwarders, Non Vessel Owning Common Carriers and consolidators, specialist companies ship their containers under an ocean bill of lading, and then issue their own documents to the owners of goods they consolidate into that container.

At present the responsibility to provide salvage security rests with the individual owners of the goods rather than the consolidators. This creates a number of significant practical problems:

- the owner of the goods is one step further removed in the communication link following the casualty.
- a container cannot be released until all cargo in it has been secured, so that interests that provide security promptly will be held up by those that do not.
- those shipping goods in consolidated containers typically fall within the lower bands of values referred to above.

I am sure that Lloyd's Salvage and Arbitration branch and all solicitors regularly involved in such matters would confirm our experience that consolidated cargos involve time and trouble that is wholly disproportionate to their contribution to the salvaged fund and ultimate award. Figures from six recent cases showed that on average only some 5% of boxes were consolidated, but consolidated cargo interests (i.e. separate receiving parties) formed 30% of the total number on board, which gives a clear indication of the imbalance between the costs of collecting security and eventual contributions.

At present, we seek a partial solution by obtaining special undertakings on a case by case basis. These allow the consolidator to take delivery of the containers without security being provided; the consolidator can then unstuff the container in his premises and release parcels of cargo as and when these are secured. If any cargo is released without security the consolidator becomes liable for the relevant salvage payment. This is at best a partial solution – the terms of the agreement have to be

agreed by salvors and if, as often happens, an ISU 2 form has been signed, by the issuer of the ocean bill of lading. The situation would be improved if such undertakings were built into the contract between the consolidator and the carrying line, but the cleanest solution would undoubtedly be for consolidators to assume, and insure, the liability of "their" cargo for general average and salvage.

Summary

The current system has the potential flexibility to adapt to the demands of the super-size vessels. However, steps need to be taken to explore and utilise the insurance options that are available, at the same time recognising that collection of security in order to "pass around the hat" will still be necessary in some cases, and that the systems for doing this need to be reviewed. Such a review should be a matter for all parts of the salvage community to be involved in, to ensure that a rational and commercial system is maintained."

The Lloyd's Special Salvage Arbitration Clauses 2011 have now partially addressed some of the problems caused by large container ships in LOF salvage arbitrations by introducing clauses 13 – 15 which (in their recently revised form) read as follows:

"13. Where an Owner of salvaged cargo has not appointed an agent or representative on his behalf to receive correspondence and notices but security has been put up on behalf of that Owner of salvaged cargo, service of correspondence and notices upon the party or parties who have provided such salvage security shall be deemed to constitute proper notification to such Owner of salvaged cargo.

14. Where any agreement(s) is/are reached between the Contractors and Owners of salvaged cargo comprising at least 75% by value of salvaged cargo represented in accordance with Clause 7 of these Rules, the Arbitrator shall have the power to take into account the terms of any such agreement(s) and to give it or them such weight as seems to him to be appropriate as regards the Owners of all salvaged cargo who were not represented at the time of the said approval.

15. Subject to the express approval of the Arbitrator, any salvaged cargo with a value below an agreed figure may be omitted from the salvaged fund and excused from liability for salvage where the cost of including such cargo in the process is likely to be disproportionate to its liability for salvage."

As the YAR stand Adjusters are bound to apportion G.A. expenses over all the parties interested in the common maritime adventure even if this is not economic. The practice of Adjusters of ignoring low value cargoes has no legal basis and is consequently open to challenge (although it is hard to comprehend why any party would go to this trouble and expense). Since the practice is plainly in everyone's best interests it should be explicitly sanctioned in the YAR themselves. IUMI is therefore in favour of a change in the Rules allowing the practice of ignoring small value cargo in the adjustment if the increase in the rest of the parties' contribution to G.A. disbursements would be outweighed by the reduction in the cost of including the small value cargo in the Adjustment.

(b) The Currency of the Adjustment

The currency of a GA Adjustment under English law is chosen in the same way as a claimant chooses his currency of claim in a tort case. This was summarised by Wilberforce L.J. in *The Folias* [1979] A.C. 698; [1979] 1 Lloyd's Rep. 6 as follows:

"A Plaintiff has to prove his loss: if he wishes to present his claim in his own currency, the burden is on him to show to the satisfaction of the Tribunal that his operations are conducted in that currency and that in fact it was his currency that was used, in a normal manner, to meet the expenditure for which he claims or that his loss can only be appropriately measured in that currency (this would apply in the case of a total loss of a vessel which cannot be dealt with by the 'expenditure' method). The same answer can be given to the objection that some companies, particularly large multi-national companies, maintain accounts and operate in several currencies. Here again it is for the Plaintiff to satisfy the court or arbitrators that the use of the particular currency was in the course of normal operations of that company and was reasonably foreseeable."

In practice the majority of GA adjustments are done in US Dollars. Expenditure is converted at the time it is incurred at the applicable exchange rate and some months or years may elapse before the parties to the common maritime adventure are asked for their proportionate contributions. During that time exchange rates can move both for and against those claiming in GA and those contributing. This has, in the past, led, in extreme cases, to situations where underwriters have had to pay more than 100% of the insured value of the contributing interest in GA, particularly in the case of cargo underwriters in countries whose currencies are somewhat volatile. Some cargo underwriters seek counter-security from their assureds in respect of any amount by which the cargo's contribution, converted into the local currency at the time of payment, exceeds the insured value of the cargo; but this is by no means a universal practice.

The nature of the test used to choose the currency of the adjustment means that it is hard to predict, at the time GA security is given, what currency the adjustment will be in and to hedge accordingly. One obvious way of dealing with this sort of situation would be to put up GA security by way of a cash deposit but this is, for understandable reasons, not a popular solution to the problem amongst cargo underwriters.

The uncertain question of the currency of the adjustment causes underwriters difficulty in predicting their exposures to GA contributions. This has led to a suggestion that all adjustments should be stated in one currency unless otherwise agreed. This would go some way towards removing the uncertainty of the current position and allow MPUs (in particular cargo underwriters) to take steps to protect their position in times of exchange rate uncertainty.

A reform along these lines could increase MPUs' exposure (in the event that the currency of the adjustment was fixed in a currency which eventually turned out to be stronger than that of the currency in which it might otherwise have been adjusted). But such a reform would mean that MPUs would at least be able to predict with more certainty what their exposure could be and they might thereby be enabled to take steps (such as hedging or providing GA security by way of a cash deposit) to protect their position. For this reason IUMI recommends a change to the YAR along these lines.

SECTION 2 - INTRODUCTORY RULES

1. RULE OF INTERPRETATION

This Rule makes the lettered rules subservient to the Rule Paramount and the numbered rules. However, in practice although Rules A, C and G are subordinated to the numbered rules, the matters treated in Rules D, E and F are in effect paramount because they deal with matters which are not conflicted by the numbered rules.

Should this Rule be re-worded to reflect the above?

Argentina: No. It should be maintained as it is.

Belgium: An appropriate re-wording reflecting the issues, as evidenced, should be considered, with prudence and paying attention not to conflict with long established applications or interpretations, widely accepted in practice, of the Rules.

Brazil: No.

Canada: No

China: Not necessary.

Croatia: No, because it is self-understandable.

Denmark: No changes recommended.

Finland: Notwithstanding the priorities, there seems to be settled practice on the hierarchy of different rules. A change would perhaps not be strictly necessary, but it would clearly promote uniformity in application of the YAR.

France: No comment.

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: There is no indication of requests for revision.

Japan: There is no need to reword the current Rule of Interpretation.

The Netherlands: No. The Committee is not aware of any practical problems caused by the current wording. The Committee therefore does think there is no need to reword the Rule of Interpretation. On the other hand, the Committee does not have objections against rewording the rule either.

Norway: No proposed amendment.

Slovenia: Yes.

Spain: We deem it could be reasonable to re-word the Rule of Interpretation to reflect the existing practice referred in the explanatory note contained in the questionnaire.

Switzerland: Yes

Ukraine: Not necessary.

United Kingdom: In the opinion of the BMLA no change is needed.

AAA: The Sub - Committee does not favour any rewording of this Rule

AMD: This Rule works well in practice and should therefore be left alone.

ICS/BIMCO: No, this is clear enough.

IUMI: IUMI has received no reports of any problems caused by the wording issue raised in the WG's Questionnaire and in the circumstances can see no real need to reword the Rule of Interpretation.

2. **RULE PARAMOUNT**

The Rule Paramount provides a defence to a claim in general average if the sacrifice or expenditure was unreasonable, even though the claimant was not himself responsible for the unreasonable conduct. Thus, for example, the owners of cargo unreasonably jettisoned by the Master will have no claim for contribution, at the least against those interests who were also not guilty of the unreasonable conduct.

Should this rule be re-worded so that those interests who are innocent of the unreasonable conduct are not denied their right to contribution?

Argentina: No. A change on this issue could be a risk.

Belgium: No need to re-word the Rule in the prospected direction. It is a defense already available in the actual framework.

Brazil: No.

Canada: No

China: No. Even if required, is it to be included in Rule XVI?

Croatia: We think it is not necessary, because the innocent interests will in such a case have a separate claim for damage against the shipowner.

Denmark: No changes recommended.

Finland: The word "reasonable" would obviously be interpreted in casu, but what is unreasonable would possibly itself be connected with a fairly high threshold. No change is necessary.

France: We think such issue is complex and is sorted out by the legal action of the innocent cargo interest against the Carrier according to BL. We do not see the point to raise a question on this matter.

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: The Rule has proven effective as a tool for balancing interests, for example preventing the parties from putting forward unrealistic scenarios and justify provisional repairs in ports of refuge as alternative solution to them, seeking the admission of these costs under Rules F or XIV.

The proposal under the second paragraph is interesting, but the case is extremely rare (usually the only “victim” of a behaviour which turns out unreasonable is the shipowner who so acted) and one should ask whether it could justify the complications which may arise from its application.

Japan: There is no need to amend the current Rule of Paramount. It is appropriate for the party who is innocent of the unreasonable conduct to claim against the party who is liable for the such a conduct as the matter of the compensation for damages.

The Netherlands: No. The Committee is concerned that a rewording in the suggested way would have the result that losses or expenses which are not general average would be considered as general average after all. In addition, it may result in a ‘circuit d’action’. The interests who are innocent of the unreasonable conduct should bring a claim against the guilty party.

If the adjuster considers an action reasonable, he will allow it in GA. Owners will certainly also consider it reasonable and will compensate cargo interests of jettisoned goods with the adjusted loss. Any shortfall in cargo’s contribution from other cargo interests will be picked up by the Club. If the adjuster does not consider the action of jettison reasonable, he will not allow it in GA and cargo owners can then claim the full loss direct from Owners.

Norway: Cases of innocent loss and no allowance in GA should be solved outside of GA by the use of other applicable law.

Slovenia: Yes.

Spain: No, we deem that this rule should not be re-worded, as the aim of YARs is not to rule on liability. This should be an issue to be discussed by the parties under the law governing the contract of carriage.

Switzerland: In principle: yes, whereas owners should be held accountable for acts of other persons in the spirit of the Rotterdam rules (i.e. relatively broadly).

Ukraine: Not necessary.

United Kingdom: The practice described is now well established and, whatever its defects, understood by all interests. It is by no means clear to the BMLA how the provision could be amended to provide a more satisfactory answer.

AAA: The Sub - Committee does not favour any rewording of this Rule which has not been seen to give rise to any difficulties in practice, given that it is consistent with the broad requirements of Rule A. It appears to be generally understood that the test of “reasonableness” should be applied on the basis of circumstances prevailing at the time, and without undue benefit of hindsight.

The problem of the “innocent” cargo interest has not been encountered in practice by any of the members of the Sub Committee.

AMD: This Rule should be left unaltered. Any apparent injustice towards those who are innocent of unreasonable conduct may presumably be remedied by a claim under the contract of carriage.

ICS/BIMCO: No, this is established practice.

IUMI: IUMI sees no reason to amend the Rule Paramount as set out in YAR 1994 and 2004.

3. RULE OF APPLICATION

The draft wordings put forward by CMI at Beijing included for the first time a Rule of Application which was explained as follows:-

“Most of BIMCO’s existing GA clauses provide for the application of YAR 1994 (or 1974) “and any amendments hereof” or words to that effect. The purpose of the proposed Rule is to make YAR 2012 covered by such GA clauses to the extent possible. It is realised that some courts may hesitate to accept that the new Rule of Application can have any effect on the interpretation of older GA clauses. However, other courts may accept this and find the rule useful.

The rule is expected to save the printing of new standard documents, help in solving any uncertainty whether the “new” YAR is covered by terms like “any amendments hereof” and assist in a fast and widespread application of the new amended YAR.

The IWG has proposed that this rule be inserted as the first provision of the YAR before the Rule of Interpretation.”

The proposed rule had the following wording:

These York Antwerp Rules (2012) shall be considered to be an amendment or modification of previous versions of the York Antwerp Rules. Notwithstanding the foregoing, these York Antwerp Rules (2012) shall not apply to contracts of carriage entered into before the formal adoption of the Rules.

Should the 2016 Rules contain a similar provision?

Argentina: No. This should be determined in the relevant contract of carriage.

Belgium: It seems, at the moment, that such hypothesis is not viable and would not produce any relevant improvement, if the final outcome of the Rules will not be balancing in a fair, and economically wise, way the interests of all the major players involved in the matter. As seen with YAR 2004, any abstract formulation could simply lead to a non implementation of the version of the Rules, by some ‘key’ players, rendering the Rules themselves of little avail.

Brazil: Yes.

Canada: No

China: Not support.

Croatia: In our opinion the new revision of the YAR should not contain such a provision. In our jurisdiction, such a provision most probably would have no effect. Moreover, we think that it would cause legal uncertainty for those parties contracting the earlier revisions of the YAR and possibly not being aware of the respective provision in the new revision of the YAR and its potential effect on their contractual choice.

Denmark: No - the York Antwerp Rules 2016 should not contain a rule of application, as it must be up to the parties involved in a contract of carriage to decide which version of the York Antwerp Rules they will agree on.

Finland:

France: We do not see the point of such question.

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: See what mentioned under 2 of Section I.

Japan: We do not consider that it is appropriate to introduce such a rule of application for the following reasons.

- (1) We consider that the effectiveness of such a rule is open to doubt.
- (2) We consider that the construction of the existing GA clause in charter party or bill of lading providing for the application of "YAR1994 or any subsequent modification or amendment thereof" or similar wording have been almost unified. If, as indicated in IWG's report dated June 21, 2012, some courts accept the effectiveness of such a rule of application and other courts reject the same, it may cause a new confusion and hurt the right of parties concerned.

The Netherlands: No. It is the Committee's opinion that parties should have the freedom to choose which version of the YAR is applied and that parties should not be "forced" into using a version of the YAR which they have not intentionally chosen for. In addition, some policies of insurance, finance contracts etc. do refer to specific YAR and may be unintentionally prejudiced.

Norway: The new YAR should not contain such a rule as it must be up to the parties to decide which version of YAR they agree to use.

Slovenia: Yes.

Spain: Yes, it would add certainty.

Switzerland: Yes

Ukraine: No. It would be fair to give the parties the express right to decide with version to include in the contract of affreightment, instead of providing the version by default.

United Kingdom: The BMLA considers it premature to offer an opinion on this question.

AAA: The Sub - Committee noted that the question of inserting such a Rule in the YAR had arisen only as a result of the unpopularity of the 2004 Rules, and hoped the 2016 Rules would attract sufficient mutual agreement between the parties to make such a Rule unnecessary.

AMD: This is viewed as a contract of affreightment problem rather than one which can or should be dealt with in the YAR. If contract drafters intend that the latest version of the YAR should apply it would seem an easy matter to indicate just that without nominating a particular edition and adding wording which is uncertain in its effect.

ICS/BIMCO: ICS and BIMCO consider it premature to respond to this question. However, some shipowners have commented that such a provision would be unreasonable and it should be left to the parties to decide which version of YAR should apply. If revised YAR are seen to represent a fair balance they will, over time, become the standard for incorporation in contracts of affreightment as earlier versions fall out of use.

IUMI: The Questionnaire explains the role of the Rule of Application which, broadly speaking, is to ensure that, wherever possible, the version of the YAR which is under discussion will apply whenever the contract of carriage contains a clause incorporating the YAR of a particular date and “any subsequent amendment or modification thereof” (or similar wording). At present opinion is divided as to whether or not clauses incorporating a particular set of the YAR “or any amendment or modification thereof” (or similar wording) has the effect of incorporating a later set of the Rules. The AAA takes the view that it does not but a substantial number of London lawyers differ on this point. The incorporation of the Rule of Application will avoid arguments like this and IUMI are therefore in favour of the inclusion of a Rule of Application in the 2016 Rules. If the parties to the common maritime adventure wish to incorporate a previous set of YAR into their contract of carriage they can still do so by simply incorporating, for example, the YAR 1994 but omitting words such as “and any subsequent amendment or modification thereof”.

SECTION 3 – LETTERED RULES

1. RULE A

No known issues.

Argentina: No comments.

Belgium:

Brazil:

Canada: None

China:

Croatia: No known issues.

Denmark: No changes.

Finland:

France:

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: There is no indication of requests for revision.

Japan:

The Netherlands: No comments

Norway: No proposed amendment.

Slovenia:

Spain: Not applicable.

Switzerland:

Ukraine: N/A

United Kingdom: Not applicable.

AAA: No change

AMD: No comments

ICS/BIMCO: No comment.

IUMI: No amendment is necessary.

2. **RULE B**

2.1 *Are the provisions relating to common safety situations involving tug and tow satisfactory?*

Argentina: No. This Rule should specify tug and tows.

Belgium: Yes.

Brazil: Yes

Canada: Yes, satisfactory.

China: The issue is rare encountered in China.

Croatia: Yes.

Denmark: No problems noted.

Finland:

France: No comment on such proposed question.

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: The Rule is not frequently applied. One of the criticism put forward by the practice seeks a more precise definition of the common safety situation (or the same degree) of the peril.

Japan: It is not necessary to amend the current provisions. We believe that there has been no practical problem caused under the current provisions.

The Netherlands: Yes. The Committee is not aware of problems that have arisen in practice.

Norway: We find Rule B's wording unclear when determining whether a GA situation arises if a tug casts off a tow in order to save itself, and propose that the drafters of YAR 2016 look to how such cases have been solved in previous years and seek some clarification on this issue.

Slovenia: Yes.

Spain: We consider the current wording satisfactory.

Switzerland: Circular reference: the rule defines the common maritime adventure which is required for a GA act. There is a common maritime adventure if the "disconnection is itself a general average act".
This should be unwound.

Ukraine: Yes.

United Kingdom: The BMLA considers the position in relation to the tug and tow satisfactory. It does not appear to have given rise to any difficulties to date.

AAA: There was no uniform view on the desirability of retaining the current Rule B. Further discussions may be required to determine whether problems have been encountered internationally with the “common safety” aspects of Rule B, and whether express provisions need to be made in Rule B or Rule XI regarding the treatment of detention expenses.

AMD: No known problems with the application of this Rule.

ICS/BIMCO: Yes.

IUMI: Until YAR 1994 no specific Rule dealt with tug and tow situations. In the USA there are conflicting decisions as to whether or not GA applies to tug and tow situations under the YAR 1974 and its predecessors. The 1994 and 2004 YAR make it clear that they do. The middle paragraph of Rule B states:

“When measures are taken to preserve the vessels and their cargoes, if any, from a common peril, these Rules shall apply”.

The words “if any” were inserted to ensure that a GA could arise in a tug and tow situation even though the tow may be carrying no cargo.

IUMI’s members have come upon this problem mostly in relation to circumstances where the tug, fearing for its safety, casts away the tow which then becomes a total loss. In such circumstances it has effectively sacrificed the tow to preserve the tug. Rule B addresses this problem in the following words:

“A vessel is not in common peril with another vessel or vessels if by simply disconnecting from the other vessel or vessels she is in safety; but if the disconnection is itself a general average act the common maritime adventure continues”.

This begs the question: is the tug acting for the common benefit by casting off a tow in order to save itself? IUMI takes the view that this ought to be a General Average situation whereby the tug interests bear a proportion of the cost of the sacrifice of the tow. At present this is not the effect of the Rule however.

Finally it should be pointed out that this is a problem which is infrequently encountered because many towage contracts (e.g. TOWCON and TOWHIRE) do not incorporate the YAR.

2.2 *Are further provisions needed to deal with allowances under Rules X and XI relating to tug and tow at a port of refuge?*

Argentina: Yes. These rules should include “Ship, Tug and Tows”.

Belgium: No.

Brazil: No.

Canada: Yes with regard to integrated tug and barge units where the ITB/ATB are dedicated units.

China: No comments.

Croatia: No.

Denmark: No changes. Problems with tug and tow in relation to port of refuge allowances should be dealt with in Rules X and XI.

Finland:

France: No interest for such question which should not be raised.

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy:

Japan: It is not necessary to amend the current provisions. We believe that there has been no practical problem caused under the current provisions.

The Netherlands: No

Norway: No further suggestions.

Slovenia: No.

Spain: We understand that no further provisions would be needed to deal with allowances under Rules X and XI relating to tug and tow at the port of refuge. The first two paragraphs of Rule B would sufficiently cover the application of Rules X and XI to tug and tow at the port of refuge.

Switzerland: No

Ukraine: No.

United Kingdom: In view of the answer to 2.1 above, the BMLA does not consider any further revisions are required in Rules X and XI.

AAA: Ditto

AMD: The problem is not with this Rule but in applying Rule XI to tug and tow situations. In particular, how should the wages & maintenance of the crew of a tug which has taken its tow to a port of refuge for repairs be dealt with?

ICS/BIMCO: No.

IUMI: IUMI cannot think of any further provisions which are needed to deal with allowances under Rules X and XI relating to tug and tow at a port of refuge.

3. RULE C

3.1 *The general exception of "loss of market" is considered by some commentators to be unfair in that it denies the owner of cargo a claim in general average for financial loss suffered due to loss of his market consequent upon a general average detention during the course of a voyage.*

Is this an issue that should be revisited?

Argentina: No.

Belgium: No.

Brazil: No.

Canada: Loss of market is increasingly important and thus this should be revisited and clarified.

China: No. It would be difficult to calculate.

Croatia: No.

Denmark: No, as any party to an adventure may gain or lose - not only an owner of cargo.

Finland: To cover loss of market is not only a matter of principle, but it is also a matter of practical concern. How would one show "loss of market" in a kind of summary dealing with a great number of issues in a GA adjustment procedure? Loss of market is in general an uncertain concept in liability issues, and it is not any simpler matter in GA. It is not recommended to include loss of market under GA.

France: No we should not review this point as this could create some problem with Particular average approach which does not include the financial losses.

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: As regards point 3.1. the general exception of "loss of market", and in general the limitation set out by Rule C must be absolutely preserved. In practice Rule C is often the best defence to challenge the attempts to enlarge unreasonably to scope of general average, by including costs, expenses and losses not directly arising from the average.

Japan: The current provisions should be retained. "Loss of market" and "loss caused by delay" depend on the conditions of the terms or the contract and they are very difficult to monetarily evaluate. As those losses have been excluded from GA with good reasons for quite a long time, it is not necessary to extend the scope of GA allowance in YAR2016.

The Netherlands: No. The Committee is concerned that if loss of market would be included, it would be quite difficult and very time consuming to establish the market value of each cargo, in particular when many cargoes are involved. In addition, profit of market should then also be included. According to the Committee, the YAR should not be complicated or extended unnecessarily.

Norway: No, "Loss of market" should not be recoverable under GA as this would give rise to payments in circumstances where it otherwise would not be covered. "Loss of market" is not usually covered under cargo policies.

Slovenia: No.

Spain: Yes, it should be considered if and when such "loss of market" has been duly evidenced by the cargo owner.

Switzerland: No

Ukraine: No, because it is difficult to calculate and it will overextend adjustment of GA.

United Kingdom: The BMLA does not favour revisiting the “loss of market” exception. To do so would alter the nature of the risk insured by cargo underwriters. It is not a risk insured under Institute Cargo Clauses.

AAA: No – it has long been agreed that financial losses are too remote and difficult to quantify. The additional costs and room for dispute if such losses were to be considered far outweigh the inequity that may sometimes occur.

AMD: It is considered that the issue of “loss of market” should not be revisited.

ICS/BIMCO: ICS and BIMCO are not in favour of changing this rule. To do so would complicate cargo operations in a GA incident, as cargo interests would press for immediate on-shipment of the cargo to avoid “loss of market”. Shipowners have made the following points:

- No party is allowed to claim a loss of market including the shipowner by for example losing a next voyage charter.
- Loss of market is very difficult to prove (if not impossible) and will no doubt lead to extensive discussions which will again cost time, effort, money and be difficult to resolve.
- How does one measure loss of market or anticipate same?
- Commercial losses can be regarded as consequential damage, also in most cases this is an item which is insurable.

IUMI: “Loss of market” is not usually covered under cargo policies and if it were to be recoverable in GA MPUs would end up paying for it through GA in circumstances when it would not otherwise be covered. IUMI therefore opposes the inclusion of “loss of market” in Rule C.

3.2 *Should the second paragraph of Rule C:-*

- a) *include express reference to the exclusion of liabilities (see Lowndes C.37)*

Argentina: Yes.

Belgium: The Rule is sufficiently clear, even though a punctual and well circumscribed express reference could be inserted.

Brazil: No.

Canada: We believe this needs clarification.

China:

Croatia: No.

Denmark: No, not necessary.

Finland:

France: [IWG: See below]

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy:

Japan: There is no need to reword the current provisions. It is quite clear from the circumstances and the development of the discussion leading to the adoption of YAR1994 at the CMI conference at Sydney in 1994 that the exclusion contained in the wording "losses, damages or expenses" in second paragraph extends not only to physical loss or damage to the environment and to clean-up costs, but also to liabilities incurred to third parties in respect of damage to the environment.

The Netherlands: Yes. In order to prevent uncertainty, the exclusion of liabilities could be expressly included.

Norway: No need for change.

Slovenia: Yes.

Spain: We consider that an express reference to the exclusion of liabilities should be added, and also to make it clear that "in respect of" includes preventive measures.

Switzerland: Yes

Ukraine: Not necessary.

United Kingdom: The BMLA does not consider it necessary to include an express reference to the exclusion of liabilities. Pollution clean-up costs would be captured by the word "expenses".

AAA: Yes

AMD: These amendments would seem to be sensible as clarification.

ICS/BIMCO: It is apparent from Lowndes that this issue was debated at the Sydney Conference in 1994 and a proposed express reference to liabilities was deleted at the instigation of hull and cargo insurers, who while not disputing that in certain circumstances liabilities would be allowable under YAR, were anxious to avoid any express references to liabilities even in a provision excluding liabilities from allowances.

IUMI: IUMI adopts a neutral position concerning the Questionnaire's suggestion that a reference to the exclusion of liabilities in Rule C should be included.

- b) make it clear that "*in respect of*" includes preventative measures

Argentina: Yes.

Belgium: A clarification could be useful, bearing always in mind that the new wording needs not to raise additional problems of interpretations or definitions of terms.

Brazil: Yes.

Canada: No

China:

Croatia: No.

Denmark: No not necessary.

Finland:

France: [IWG: See below]

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy:

Japan: There is no need to amend the current provisions. It is believed to be clear that the wording "losses, damages or expenses in respect of damage to the environment" includes losses, damages or expenses resulting from the taking of preventive measure to avoid damage to the environment.

The Netherlands: No. The Committee does not deem this a necessary amendment.

Norway: No need for change.

Slovenia: Yes.

Spain: We consider that an express reference to the exclusion of liabilities should be added, and also to make it clear that "in respect of" includes preventive measures.

Switzerland: Yes

Ukraine: Not necessary.

United Kingdom: For the reasons given in 3.2(a) above, the BMLA considers the existing wording sufficient to include pollution prevention measures.

AAA: Yes

AMD: These amendments would seem to be sensible as clarification.

ICS/BIMCO: Not necessary

IUMI: IUMI agrees that it should be made clear that the second paragraph of Rule C should make it clear that "in respect of" includes preventative measures.

France: We should keep such question but include a clear connection with Rule VI.

4. **RULE D**

See Section 1 re the Rotterdam Rules.

Argentina: As previously mentioned, the contributing Interests should pay the contribution in every single case. This is the only way to promote Owners to spend their own money for the common safety without doubt on the recovery of each contribution.

Belgium: The YAR rules should deal exclusively with issues strictly related to General Average.

Brazil:

Canada: See the answer to section 1 question 2.

China:

Croatia:

Denmark: It is necessary that Rule D is maintained and should not be changed despite the Rotterdam Rules. ???

Finland:

France:

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: See comments under 2 Section 1: the limit sets out by Rule D is one of the traditional reasons for the success of the YAR and should be preserved.

Japan:

The Netherlands: The Committee considers the wording vague and open for different interpretations. It wonders whether it may be possible to formulate the rule in a clearer way either by deleting the words : “but this shall not prejudice any remedies or defences which may be open against or to that other party in respect of such fault” or in a different way.

Norway: See Section 1 Para. 2 on the Rotterdam Rules above. No need for change.

Slovenia:

Spain:

Switzerland:

Ukraine: Nothing.

United Kingdom: As noted in the answers to Section 1, 2(a), the BMLA considers there will be sufficient time to consider the impact of the Rotterdam Rules if and when they come into force.

AAA: No amendment to the present text.

There was, however, some discussion of whether this might be an appropriate location for a further paragraph aimed at emphasising the requirement for parties to the adventure receiving recoveries – whether from parties inside or outside the common adventure – in respect of items of general average sacrifice or expenditure to report such recoveries to the average adjuster so that they may be apportioned between parties who had paid a contribution.

AMD: See comments under Section 1 item 2.

Before 1994 there was a discussion as to whether a “pay first, sue later” provision could be included in Rule D. This was not met favourably by cargo insurers who were not interested in discussing the idea. However, we see benefits in speeding up settlements under adjustments, among other things.

Consider what the position might be when salvage is involved. It used to be relatively common for shipowners to pay the whole salvage award, ship and other interests’ proportions, confident that they could recover the payment in GA and indeed that they could ask for and would normally receive payments on account from cargo. They won’t do this now because they are afraid that they will not receive payment from cargo either by way of a payment on account or in the final adjustment. With a “pay now, sue later” provision they might start doing so again. The present position also encourages Lloyd’s form salvages rather than towage contracts, which in many cases would be quite suitable and which involve far less costs.

When cargo is delivered damaged the cargo insurer pays the cargo owner for the loss and then commences action to recover from the carrier and his Club. The “pay now, sue later” provision would put the cargo insurer in the same position as with a cargo loss.

It is also worth noting that the “pay first, sue later” concept applies to salvage so why not to GA?

ICS/BIMCO: See Section 1 re the Rotterdam Rules.

IUMI: See comments on Rotterdam Rules in Section 1 Para. 2 above.

5. RULE E

5.1 *Are the present time limits sufficient or could further measures be included to help speed up the adjustment process?*

Argentina: Yes.

Belgium: The actual limit of 12 months is fair and should not be changed.

Brazil: The present time limits are sufficient.

Canada: 12 Months is not too long.

China: It is sometimes the case that the delay in completing the adjustment is as the reasons in the adjusters’ office. Yes.

Croatia: The present time limits are sufficient.

Denmark: The time limits seem to be sufficient.

Finland:

France: We agree to keep such question.

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: In most cases the provisions work well. The only problems known in practice refer to cases where the final repairs of the ship (which must be taken into account for the assessment of her value), are postponed for a long time. The provisions of Rule XVIII should be however sufficient to cope with this problem. In practice, one cannot see how cargo interests may need more than one year to inform about the existence or the extent of damages, or raise claims.

Japan: There is no need to amend the current provisions.

The Netherlands: No. In the Committee's opinion, the time limits of Rule E YAR are insufficient. The average adjustment should be issued within a reasonable time from the general average incident. Delay is quite often caused as a result of the fact that information and documentation is not provided by the parties, or at least not within a reasonable time. The Committee suggests that if information and documentation is not provided upon the adjuster's request, the adjuster shall determine the value of the allowance claim as well as the contributory value.

This result could in the committee's opinion be obtained by amending the wording of paragraph 3 of Rule E for example as follows:

"Failing such notification, or if within 12 months of a request for the same any of the parties shall fail to supply evidence in support of a notified claim, or particulars of value in respect of a contributory interest, the average adjuster shall determine the extent of the allowance or the contributory value on the basis of the information available to him."

The provision that the estimate/determined values could be challenged should be deleted in the Committee's opinion. If the adjustment is unreasonable, it could be challenged with reference to the Rule Paramount.

Norway: Yes, we have not seen evidence that this provision is not working properly.

Slovenia: Yes.

Spain: Yes, we consider that the current 12 months period is long sufficient.

Switzerland: Why not shorten the timeframe to 6 or 3 months?

Ukraine: Time limits are sufficient and at present we see no reason to stipulate additional measures.

United Kingdom: The existing time limits are considered to be sufficient.

AAA: The length of limitation periods is a matter for commercial interests

AMD: It is considered that the time limits are too generous and that the period mentioned in sub-rule 2 ought to be no more than 6 months and that under sub-rule 3 the limit should be 3 months. However, consideration should be given under 3 for the adjusters' estimation to be subject to a requirement that it will be communicated to the contributory interest and be binding unless that interest responds with the required evidence within 2 months.

ICS/BIMCO: The present time limits are sufficient.

IUMI: YAR 1994 introduced a requirement that all parties claiming in GA had to give the average adjuster written notice in respect of the loss or expense for which they claim contribution within 12 months of the date of the termination of the common maritime adventure. Failing such notification or if, within 12 months of a request to supply evidence in support of a notified claim or particulars of a contributory value the request has not been responded to, the average adjuster may estimate the extent of the allowance or the contributory value on the basis of the information available to him.

The purpose of this amendment was to give the adjuster a way of speeding up the publication of adjustments and has been widely welcomed. IUMI therefore opposes any alteration to this provision at this stage unless compelling evidence that it is not working properly is adduced.

5.2 *In the existing wording of paragraph three, does a request for (say) cargo claims by the adjuster re-start the clock for the 12 month period? If so, should the period in all cases be from the date of the casualty?*

Argentina: Yes.

Belgium: No, the rule is working fairly as it is.

Brazil: The period in all cases should be counted from the date of the casualty.

Canada: 3-6 Months to answer any particulars that may be requested

China: Keep not to change.

Croatia: (In the existing wording of paragraph three, does a request for (say) cargo claims by the adjuster re-start the clock for the 12 month period?) Yes.

(If so, should the period in all cases be from the date of the casualty?) No, the current solution is adequate.

Denmark: The wording of paragraph 3 seems to restart the clock which is probably not a perfect solution.

Finland:

France: This question should not be raised as we create a risk of having a further delay to face before reaching the end of GA process.

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy:

Japan: There is no need to amend the current provisions.

The Netherlands: Yes. If the period would in all cases be the event giving rise to the general average there would be more uniformity. However, the adjuster should nevertheless notify the parties and request them to submit documentation.

Norway: Yes.

Slovenia: Yes.

Spain: In our opinion, periods should be calculated as from the date referred to in the first paragraph of the Rule E (termination of the common maritime adventure) but not since the general adjuster's request.

Switzerland: If it is the intention to speed up the process, it should be from the date of the casualty.

Ukraine: Yes, the period should start counting from the date of casualty.

United Kingdom: The view of the BMLA is that no change is necessary.

AAA: Para 3 should be amended so as not to restart the limitation period

AMD: It might be worthwhile clarifying this point.

ICS/BIMCO: The introduction of a reference to "the date of the casualty" in paragraph 3 might conflict with "the date of the termination of the common maritime adventure" in paragraph 2. In some incidents, the date of the termination of the common maritime adventure will be much later than the date of the casualty.

IUMI: This question is slightly misconceived. The wording of the clause was intentional – cargo interests will be more likely to give information relating to claims if they are asked for it rather than if they just have to volunteer it. It is therefore thought reasonable that no estimate of contributory values should be made by an adjuster until 12 months after a request for information about values has remained unresponded to. If a request is made for information about values then the time logically should be extended so that information in respect of both claims and values have to be provided by the same time. IUMI's answer to Question 5.2 is "no".

6. RULE F

6.1 *Since 1974, substituted expenses are allowed wholly to GA "without regard to savings to other interests." Previously, English Rules of Practice dealing with specific types of substantiated expense (cargo sold at a port of refuge, towage and cargo forwarding from a port of refuge) provided for the expense (up to the savings) to be divided in proportion to the saving in expenses thereby occasioned to the parties to the adventure.*

The 1974 change was made in the interest of uniformity and simplicity, however do you consider this issue should be revisited?

Argentina: No.

Belgium: The actual formulation is assuring uniformity and simplicity and does not need to be changed.

Brazil: No.

Canada: No

China: No.

Croatia: No.

Denmark: No changes.

Finland:

France: We should not maintain such question. Present situation is well understood and there is no clear arguments showing that such rule creates problem.

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: There is no indication of requests for revision.

Japan: There is no need to revisit the section referred to in the questionnaire and to amend the current provisions.

The Netherlands: No.

Norway: No change required to this Rule.

Slovenia: No.

Spain: No, it must be maintained the current wording in the interest of uniformity and simplicity.

Switzerland: Yes

Ukraine: No.

United Kingdom: The BMLA does not believe this issue should be revisited. It favours uniformity and simplicity, as is presently reflected in the 1974 wording.

AAA: No

AMD: There were endless arguments about “savings to other interests” before 1974 and they should not be resurrected.

ICS/BIMCO: No.

IUMI: IUMI believes that there is no need to revisit the section of Rule F referred to in the Questionnaire.

6.2 *The wording of Rule F refers only to any extra “expense” and the drafting committee in 1924 rejected the proposal that the words “or loss” should be included, following the English Rule of Practice F17 which states:-*

“That for the purpose of avoiding any misinterpretation of the resolution relating to the apportionment of substituted expenses, it is declared that the saving of expense therein mentioned is limited to a saving or reduction of the actual outlay, including the crew’s wages and provisions, if any, which would have been incurred at the port of refuge, if the vessel has been repaired there, and does not include supposed losses or expenses, such as interest, loss of market, demurrage, or assumed damage by discharging.”

a) *Do you consider this Rule should be amended to include “loss”*

Argentina: No.

Belgium: No.

Brazil: Yes.

Canada: No

China: No.

Croatia: No.

Denmark: No.

Finland:

France: This question should not be raised.

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: There is no indication of requests for revision.

Japan: There is no need to amend the current provisions. Since Rule F was introduced in YAR for the first time in 1924, it has been proposed repeatedly that the substituted loss should be allowed in GA. The proposals have never been approved due to the concerns for abusive use of such provisions and we believe the concerns are still valid today. The substituted loss (especially loss by sale of cargo at a port of refuge) is usually settled among the parties concerned by the special agreement and need not to be allowed in GA.

The Netherlands: No. In the Committee’s opinion, the provision does not cause problems in practice. If the rule would be amended, this would result in extra work for the average adjusters.

Norway: No change required to this Rule.

Slovenia: No.

Spain: Yes, as per our comment to question 3.1 above, we consider that reference to “loss” should be included.

Switzerland: No particular opinion at this time.

Ukraine: No comments.

United Kingdom: This raises a difficult issue. Whereas expenses are concrete, losses may be speculative. The view of the BMLA, therefore, is that, on balance, no change is necessary.

AAA: Having considered the question at some length, the Sub - Committee concluded that the Rule should not be amended to include “loss”, as this might lead to unintended consequences.

AMD: Whilst the inclusion of substituted losses would appear equitable, they would be difficult and time consuming to adjust.

ICS/BIMCO: No.

IUMI: IUMI opposes the proposal to extend Rule F to include “loss” as suggested in 6.2(a) of the Questionnaire.

- b) *If not, do MLA’s consider that additional wording is required to define more clearly (perhaps along the line of the above Rule of Practice) the limits of what constitutes an expense?*

Argentina: Whilst it is considered not necessary, this can be useful for clarification.

Belgium: This is a matter that should be left to the competence and professional skills of the Adjusters, as it is indeed part of the peculiar set of evaluation a good professional should be able to deal with.

Brazil: Not applicable

Canada: No

China:

Croatia: No.

Denmark: No - a more clear definition of expenses may be helpful.

Finland:

France: This question should not be raised.

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: There is no indication of requests for revision.

Japan: There is no need to amend the current provisions. Through the argument mentioned in the above 6.2 a) it is clear enough that "substituted loss" is not included in "substituted expenses".

The Netherlands: In general, according to the Committee, there is no additional wording required. However, it may be useful to explicitly mention bunker consumption as possible expense, since this is normally considered a sacrifice and not an expenditure.

Norway: No change required to this Rule.

Slovenia: No.

Spain: Not applicable.

Switzerland: No particular opinion at this time.

Ukraine: No comments.

United Kingdom: For the reasons given in Section 1, 3(a), the BMLA does not think that the introduction of definitions would be of assistance.

AAA: No

AMD: Whilst not aware of any difficulties in this respect, clarification may be in order.

ICS/BIMCO: No. [NB. Note that loss of market is not included according to the English Rule of Practice F17 – cross reference to Rule C above.]

IUMI: It is not thought that this proposed amendment is vitally important but, in the interests of uniformity, a definition of "expenses" could be a useful addition to the Rules in certain limited circumstances.

6.3 *It has been suggested that the most common Rule F allowances for towage to destination and forwarding of cargo are of such clear general benefit to commercial interests that they should be allowed as General Average (subject always to the Rule Paramount) without having to consider savings, which may often involve difficult or artificial calculations.*

Do you consider this should be looked at further?

Argentina: No. This is part of the Adjuster analysis.

Belgium: No.

Brazil: No.

Canada: We believe rule F should remain as is

China: No.

Croatia: No.

Denmark: No, as it would be of no benefit to the General Average as such.

Finland:

France: We do not feel such option is reasonable as it seems to contradict main GA principle ie savings.

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: As regards the proposal under 6.3, the admission seems attractive in order to simplify the process but it would open the door to the admission of costs of towage at port of destination which are incurred only due to commercial reasons (i.e. the need to speed up delivery). It is a temptation which frequently arises in practice, and losing this dike could be dangerous.

Japan: There is no need to introduce new provisions. Although it is true that towing to destination or forwarding cargo creates benefits to the parties to the common maritime adventure, the matter is properly stipulated in Rule F where the savings do not need to be considered from the view point of the simplicity of GA adjustment.

The Netherlands: No.

Norway: No change required to this Rule.

Slovenia: Yes.

Spain: Yes, it is an important issue that must be considered further.

Switzerland: No particular opinion at this time.

Ukraine: No comments.

United Kingdom: The BMLA has no objection to this subject being considered further. It would note, however, that there are dangers in being prescriptive. Although there are differing views in the BMLA on this subject, the consensus is that there should be a calculation on a case by case basis to determine what mechanisms provide the best outcome in respect of savings.

AAA: The Sub - Committee doubted whether a provision allowing the costs of forwarding or of towage to destination, without regard to savings in GA, would find favour with cargo interests, but that such a provision might perhaps be inserted in individual contracts of carriage, if it was felt to be desirable by the parties and their insurers.

AMD: It seems fundamental that the cost of ordinary voyage expenses saved by reason of the towage or forwarding must be deducted on the basis of equity. General average should avoid providing any party to the adventure with a windfall.

ICS/BIMCO: Subject to further review and consideration of the issues and implications, allowing substituted expenses as GA without having to consider savings could remove uncertainty and help to speed up POR time.

IUMI: IUMI considers that the expenses of towing to destination and forwarding cargo should be allowed as GA without having to consider savings. This means that no change to the wording of Rule F is required.

7. RULE G

7.1 *The Rule sets out “non-separation allowances” and specifies that such allowances (removal to and whilst at a repair port) can only be made “for so long as justifiable under the contract of affreightment and the applicable law”. Whilst frustration by reason of damage may be easy to determine, frustration of a voyage by reason of delay is a much more uncertain matter.*

Is there a better formula to determine a reasonable cut off point for such allowances?

Argentina: The Adjuster should analyze the reasonability of same.

Belgium: It is very difficult to determine a better formula. The actual one is guaranteeing sufficient efficiency, in its application.

Brazil: No

Canada: No

China: Not seen.

Croatia: We have no proposals for a better formula to determine a reasonable cut off point. We do not think it would be justifiable to prescribe any exact time limits for this purpose. In our opinion it is preferable to maintain flexibility depending on the circumstances.

Denmark: Each General Average situation is different, so stating a certain criteria for a frustration could create more difficulties than it could solve. It will be better to leave it to be considered on a case to case basis.

Finland:

France: Such legal issue can only be determined by the law of the transportation contract and/or CP and not the RYA.

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: Points 7.1, 7.4 and 7.5

Sometimes the problem arises in practice and it is a delicate issue due to the discrepancies existing between English law and the position existing in other jurisdictions. The solution under (b) of 7.4 is usually the preferred one. A provision suitable to clarify the matter would be attractive, but it would interfere with doctrines like frustration or abandonment which do not belong to general average.

Japan: This is the issue related to the construction of the contract of carriage and/or governing law, and is not one which should be dealt with in the YAR.

The Netherlands: No. The Committee has discussed whether there would be a better formula, but has concluded that the current wording seems acceptable. It leaves leeway for both the average adjuster and the court to find a reasonable solution in each matter.

Norway: The rules and practice on frustration of voyage varies from jurisdiction to jurisdiction. Hence, this is better left to be considered on a case to case basis, and we suggest no change to this Rule.

Slovenia: No.

Spain: It could be considered to establish a specific period; however, it is our opinion that it should maintain the current wording which refers to the particular contract and/or applicable law any discussion on this matter.

Switzerland: No knowledge of better cut-of point.

Ukraine: No, the Adjuster in each particular case should decide this issue.

United Kingdom: The BMLA recognises that the issue of frustration is a difficult one which introduces uncertainty. In particular the word “justifiable” is opaque as it blurs financial and legal issues. Nevertheless, adjusters advise that this provision does not, in practice, give rise to particular problems.

AAA: The Sub - Committee is in general happy with the present non - separation provisions in this Rule, and cannot identify a better formula to determine the reasonable cut off point for allowances.

AMD: A good point. It would have to be a fairly flexible formula to apply to every type of vessel from a small coaster to a vast container vessel, but perhaps it should be explored.

ICS/BIMCO: There is a risk that any attempt to establish a test or formula would create its own uncertainties.

IUMI: The Questionnaire asks whether a better formula than that already in operation could be devised to determine a reasonable cut-off point for allowances in GA in the event of the frustration of the voyage.

The background to this question needs a little explanation. The classic definition of frustration in English law was stated by Lord Justice Radcliffe as follows: “Frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni – it was not this that I promised to do”. *Davis Contractors Limited –v- Fareham UDC* [1956] AC 696 at 728 to 729.

The effect of the doctrine of frustration is to excuse the parties from performing any further obligations under the contract although the contract is not void ab initio. Thus, in contracts for the carriage of goods by sea, prepaid freight is not returnable when the voyage is frustrated short of the contractual discharge port but freight at risk of the shipowner would not be payable except possibly where the receiver voluntarily takes delivery of the cargo short of destination.

The doctrine of frustration applies when events or circumstances are of such a character that to hold the parties to the contract would be to impose upon them some new and different contract. The test of whether the events or circumstances are of such a character as to produce frustration is objective. Frustration must not result from the fault of either party. The operation of the doctrine of frustration is not excluded merely by a clause in the

contract in which the parties make certain provisions for the subsequent event: Jackson – v- Union Marine Insurance Co. Limited [1874] LR 10 CP 125.

Where a ship is not worth repairing at the port of refuge the shipowner is, in a business sense, prevented from carrying the goods to their destination; and if the preventing causes are excepted he is excused from performing his contract. If, however, the ship can be repaired without unreasonable sacrifice on the part of the shipowner, and funds for the purpose can be procured, then he is bound to repair her; and, having done so, is bound to carry on the goods to their agreed destination. He has not, in that case, been prevented, in a business sense, from performing his contract.

The question then is when is a shipowner bound to repair his ship and carry the cargo on to destination? English jurisprudence on this point is confused: the learned authors of Carver on Carriage by Sea 13th Edition Volume 2 Paragraph 1238 suggest that one test would be whether, when repaired, the vessel's value would exceed the cost of the repairs. A test much along these lines was adopted in Assicurazioni Generali –v- Bessie Morris SS. Co. [1892] 1 Q.B. 571 where Collins J. (upheld by the Court of Appeal) held that a shipowner was bound to repair and complete the voyage unless the ship was a constructive total loss. In Kulukundis –v- Norwich Union Fire Insurance [1937] 1 K.B. 1 the question arose whether the cost of such temporary repairs as were necessary to complete the voyage or the cost of permanent repairs were to be taken into account. The Court of Appeal held by a majority that it was only temporary repair costs that were to be taken into account rather than permanent repair costs (although, in a dissenting judgment, Scott L.J. held that the shipowner was entitled to abandon the voyage only if “a merchant ship employed in his business should be so damaged that as one of his fleet and an asset of his business it would not be worth his while to incur the costs of repair”, and the ship was, therefore, “commercially lost”).

It is also possible that a voyage can be abandoned because of the condition of the cargo (for example see the “Savona” [1900] P. 252).

In practice where a voyage is abandoned and the cargo is removed G.A. expenditure remains recoverable up to the time that ship and cargo part company even though this may be some time after notice of abandonment is given.

A not uncommon example is where a vessel puts into a port of refuge for the common safety to repair damage suffered due to an accident or sacrifice which comes within the ambit of the YAR. Cargo is discharged to enable the vessel to be dry-docked and repairs carried out. The time required for these operations is not such as to frustrate the performance of the contract of carriage nor justify the abandonment of the voyage. The shipowner is therefore entitled to store the cargo ashore in a warehouse while repairs are carried out to the ship and ultimately to reload the cargo and proceed to the contractual destination. These expenses are recoverable under YAR Rules X and XI. However to avoid this delay, the shipowner may decide to tranship the cargo or part of it on another vessel and forward it to the destination port. By taking this course, the shipowner will save time and expense but, if the YAR 1974 or any of its predecessors apply, unless the parties to the adventure agree otherwise, the separation of the ship from the cargo (or part cargo, in these circumstances) could bring the common adventure to an end and thereby prejudice the shipowner's right to recover certain GA allowances particularly under Rules X and XI.

When the shipowner is contemplating transhipping the cargo to a destination in another vessel in circumstances where the YAR 1994 or 2004 do not apply he will probably be advised by his average adjuster to seek Cargo's agreement to a Non-Separation Agreement (“NSA”) which is usually attached to the Average Bond and/or Guarantee for signature by the cargo receiver and insurer respectively. This will not be necessary if the contract of carriage incorporates the YAR 1994 or 2004 because an NSA is automatically incorporated into Rule G. Under an NSA, the cost of forwarding cargo to destination up to the GA expenses avoided are allowed in GA and payable by all parties. If no NSA is used,

the forwarding expenses incurred can also be allowed in GA but only if they come within the scope of Rule F (substituted expenses).

The form of NSA incorporated into the YAR 1994 and 2004 contains a "Bigham Clause". The Bigham Clause appears at the end of Rule G and reads as follows:

"The proportion attaching to cargo of the allowances made in General Average by reason of applying the third paragraph of this Rule shall not exceed the cost which would have been borne by the owners of the cargo if the cargo had been forwarded at their expense".

The Bigham Clause gives those concerned in cargo a guarantee that, come what may, by signing the NSA or agreeing to YAR 1994 or 2004 they will never be called upon to contribute to GA more than the equivalent of a notional second freight plus the costs of taking delivery at the port of refuge. In other words at the very worst, they would be placed in the same position as if they had taken delivery of the cargo at the port of refuge.

This being the state of English law the question sometimes arises, particularly in circumstances where a ship becomes incapacitated relatively close to its final port of discharge, whether or not the cargo interests can collect their cargo upon payment of the full freight without having to contribute to ongoing GA expenses after the cargo has been removed. The question was considered by the Canadian Federal Court of Appeal in *Ellerman Lines Limited –v- Gibbs, Nathaniel (Canada) Limited and Others ("the City of Colombo")* [1986] LMLN 170. Whilst at Montreal "severe" and "extensive" engine damage was discovered requiring repairs which, it was estimated, would last up to eleven months. The appellant shipowners offered to forward the cargo remaining on board to its destination, Toronto, in return for a signed Average Bond incorporating a NSA. The cargo respondents refused to sign an NSA and obtained an interlocutory injunction ordering the shipowners to deliver the Toronto cargo in return for a signed Average Bond only. The dispute centred on two points:

- Whether or not a GA situation existed; and
- If so, whether the cargo respondents were liable to contribute to expenses incurred after the discharge of their cargo since the shipowners had been forced by the injunction to release it.

In a majority decision the Court held that there was a GA detention at Montreal since the repairs were necessary for the safe prosecution of the voyage. The Court was, however, unanimous in deciding that having paid the freight, the cargo respondents were entitled to delivery of the cargo in Montreal and were not liable for GA expenses incurred after the date of discharge. The Court did not address itself explicitly to the question of whether the shipowners could oblige the cargo owners to sign an NSA in the circumstances, but the clear implication of their decision was that they had no right to do so. The result, therefore, was that the Toronto cargo did not have to contribute towards expenditure incurred subsequent to discharge because these expenses were not incurred for the common safety of the ship and the cargo but for the safety of the ship alone.

Now that an NSA has been included in Rule G of the YAR 1994 and 2004, Cargo would have to contribute to such expenses even after they had collected the goods and the question posed by the Questionnaire is really whether this is a desirable situation.

Clearly for cargo insurers the sooner GA expenses stop accruing the better. On the other hand, the longer Cargo contributes in GA to the repairs the better for hull insurers. In these circumstances there cannot be a unified IUMI position.

However it may be worth considering whether a clearer cut off point should be agreed for GA allowances in circumstances where at least the cargo has been removed and the common maritime adventure has come to an end. This is something that would assist MPUs in circumstances where the law on frustration is relatively unclear as it would add a degree of certainty and predictability to the current rather unsatisfactory situation. However the difficulty in formulating a replacement for the current doctrine of frustration is that what may be suitable for one set of circumstances could be rather unjust in relation to another. Accordingly although more certainty would be desirable, its benefits might be outweighed by the potential injustice that might be inflicted by the introduction of, for

example, a rule that the common maritime adventure should be deemed to have terminated if not resumed a fixed number of days after the GA incident.

Finally it must be recognised that many civil systems of law do not recognise the doctrine of frustration and have different tests to English law for the termination of a voyage e.g. force majeure. If any wording were to be included in Rule G to deal with this issue, it would have to recognise that other systems exist and accommodate them in whatever wording was decided upon.

In summary, this is a very difficult issue and probably is not one which should be dealt with in the YAR even though it would be desirable to achieve international uniformity on it.

- 7.2 *With regard to “non-separation allowances” there is variation in practice as to whether allowances can continue after repairs are completed while the vessel regains position, with many adjusters taking the view that, once available for trading, allowances should cease.*

Do you consider this requires express provision in the Rules or can this be left to the discretion of the Adjuster?

Argentina: This should be decided by the Adjuster.

Belgium: We are of the opinion that, except for exceptional circumstances, left to the discretion of the Adjusters, once the vessel is available for trade the allowances should cease.

Brazil: This should be left to the discretion of the Adjuster.

Canada: We believe there should be no change to the rules and that this should be left to the discretion of the adjuster

China: Leave adjuster to determine

Croatia: It might be useful to clarify this point by an express provision, in the interest of uniformity.

Denmark: This should be left to the discretion of the Average Adjuster.

Finland:

France: We believe such issue should be left to the adjusters' discretion.

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: The solution adopted in the Italian practice is already in the sense indicated; the obvious principle that GA cannot result in unfair advantage for owners should be sufficient to confirm it. There is no evidence of disputes on the issue.

Japan: There is no need to amend the current provisions. We believe that the practice among the average adjusters is almost unified.

The Netherlands: This can be left to the average adjuster's discretion.

Norway: The rules and practice on frustration of voyage varies from jurisdiction to jurisdiction. Hence, this is better left to be considered on a case to case basis, and we suggest no change to this Rule.

Slovenia: No.

Spain: It would be convenient an express provision in Rule G on this particular issue.

Switzerland: Yes

Ukraine: We believe that this can be settled by the Adjuster.

United Kingdom: The BMLA is unaware of any significant divergences in practice on the issue of non-separation allowances. If insofar as there are divergences, the general view is that it should be possible to rely on the discretion of the adjusters.

AAA: The Sub - Committee believes that the normal practice of average adjusters is to terminate non-separation allowances when the vessel actually begins to trade following her repairs. They note that the actual wording of the Rule (and of the original non-separation agreement) suggests that such allowances should continue until she would - hypothetically - have returned to her original port of refuge (if she had indeed removed from there to do repairs), reloaded her cargo and regained position, but, being conscious of the fact that, in reality the vessel had actually again begun to trade some while before, decline to grant the shipowner a windfall profit, and therefore normally terminate the allowances at that earlier point. An alternative method of adjustment, short-circuited by the above practice, would be to make the full allowance on the basis of the non-separation wording, and then credit back the earnings of the vessel during the intervening period. The Sub - Committee concluded that there may well be occasions when the circumstances of an individual case call for a different solution and would therefore not wish to suggest any amendment to the existing wording which might deprive them of the necessary discretion in such cases.

AMD: As there appears to be a lack of uniformity of practice on this issue, clarification should be considered.

ICS/BIMCO: This can be left to the discretion of the Adjuster.

IUMI: IUMI believe that it would be desirable that an express statement is included in Rule G saying that once the casualty is available for trading GA allowances should cease.

7.3 *Do you consider that the requirements for notification should be retained, or does it give rise to difficulties in practice?*

Argentina: The notification should be retained.

Belgium: They should be retained, as per latest formulation.

Brazil: This rule does not need to be changed.

Canada: Retain as is.

China: Yes.

Croatia: As a matter of principle, we are of the opinion that the requirements for notification should be retained, and the wording “if practicable” allows for some flexibility.

Denmark: We have experienced no difficulties.

Finland:

France: No doubt that the requirements for information should be maintained as it is.

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: If the GA involves a single cargo, or a few lots, cargo interests, whenever are known, are always informed. There is no indication of particular difficulties in doing so.

Japan: We are aware of practical difficulties especially in casualties of large container ships where a great number of the parties interested in the huge volume of cargoes are involved. Paragraph 3 in the current YARs which requires the notification to cargo interests only “if practicable” should be retained. The rights of cargo's interests are protected by paragraph 4.

The Netherlands: The requirement for notification should be retained. It does not give rise to practical problems as a letter in which parties are notified of the general average event is made up anyways.

Norway: The rules and practice on frustration of voyage varies from jurisdiction to jurisdiction. Hence, this is better left to be considered on a case to case basis, and we suggest no change to this Rule.

Slovenia: Yes.

Spain: It should be maintained the notification's requirement.

Switzerland: No particular opinion at this time.

Ukraine: It should be retained.

United Kingdom: The existing practice in relation to notification is considered satisfactory, as the provision itself allows for different circumstances to be accommodated.

AAA: No problems in practice

AMD: The requirement should be retained if only because it gives the cargo owners the opportunity to take delivery of their cargo at the port of refuge if they have the right to do so.

ICS/BIMCO: ICS and BIMCO note that the requirement to give notification to cargo interests is qualified by “if practicable”.

IUMI: IUMI considers that the requirements for notification in Rule G should be retained and are unaware of any difficulties in practice.

7.4 *Where a voyage is frustrated by reason of delay (e.g. the damage is serious and requiring lengthy repair but is not so costly as to make the vessel a commercial total loss), should non-separation allowances continue:-*

a) *Only up to the point at which it becomes apparent that the voyage is frustrated.*

Argentina: We support option a).

Belgium: It appears difficult to make a decision on the basis of the data given.

Brazil: Yes

Canada: OK

China: a)

Croatia: Only up to the point at which it becomes apparent that the voyage is frustrated.

Denmark: A contract is frustrated when a party in the adventure reasonably claims to be so and this can only be done when it becomes apparent to the party that it is so - the answer must be a).

Finland:

France: We consider that non-separation allowance issue should be treated as per the transportation rules of the contract and in a more general point of view frustration issue should not be considered as per the RYA.

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: Points 7.1, 7.4 and 7.5

Sometimes the problem arises in practice and it is a delicate issue due to the discrepancies existing between English law and the position existing in other jurisdictions. The solution under (b) of 7.4 is usually the preferred one. A provision suitable to clarify the matter would be attractive, but it would interfere with doctrines like frustration or abandonment which do not belong to general average.

Japan: As there is no practical problem caused under the current provisions, it is not necessary to amend the current provisions.

The Netherlands: The Committee supports option "A". When it is clear that the voyage is frustrated, the expenses are no longer made in the interests of the parties to the common maritime adventure.

Norway: The rules and practice on frustration of voyage varies from jurisdiction to jurisdiction. Hence, this is better left to be considered on a case to case basis, and we suggest no change to this Rule.

Slovenia: b)

Spain: In our opinion, it should continue up to the point at which the delay becomes sufficient to frustrate the voyage.

Switzerland: a)

Ukraine: Only up to the point at which it becomes apparent that the voyage is frustrated.

United Kingdom: The BMLA's view is that the current system does not appear to be creating any real practical difficulties. That said the issue could, in its view, be profitably further debated by the IWG. The BMLA's view is that the preferable approach would be for allowances to continue until the point at which the delay became sufficient to frustrate the voyage.

AAA: The Sub - Committee notes that the 13th Edition of Lowndes & Rudolf prefers 7.4.a). They would prefer no change to the wording in this respect

AMD: Whilst it is generally considered that a) is the correct approach, the point should be clarified.

ICS/BIMCO: As noted in 7.1 above, frustration of a voyage by reason of delay is an uncertain matter. To avoid assessments of when frustration has taken place, shipowners have commented that allowances should continue up to the point when the cargo is discharged at destination or, in case of temporary storage, released to the cargo owners.

IUMI: [IWG: See below]

b) *Up to the point at which the delay became sufficient to frustrate the voyage.*

Argentina: We support option a).

Belgium: It seems that the difference between 'apparent' and 'sufficient' is too artificial and theoretical and of difficult application.

Brazil: Not applicable

Canada: No

China:

Croatia: Only up to the point at which it becomes apparent that the voyage is frustrated.

Denmark: No.

Finland:

France: We consider that non-separation allowance issue should be treated as per the transportation rules of the contract and in a more general point of view frustration issue should not be considered as per the RYA.

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: Points 7.1, 7.4 and 7.5

Sometimes the problem arises in practice and it is a delicate issue due to the discrepancies existing between English law and the position existing in other jurisdictions. The solution under (b) of 7.4 is usually the preferred one. A provision suitable to clarify the matter would be attractive, but it would interfere with doctrines like frustration or abandonment which do not belong to general average.

Japan: As there is no practical problem caused under the current provisions, it is not necessary to amend the current provisions.

The Netherlands: The Committee supports option “A”. When it is clear that the voyage is frustrated, the expenses are no longer made in the interests of the parties to the common maritime adventure.

Norway: The rules and practice on frustration of voyage varies from jurisdiction to jurisdiction. Hence, this is better left to be considered on a case to case basis, and we suggest no change to this Rule.

Slovenia: b)

Spain: In our opinion, it should continue up to the point at which the delay becomes sufficient to frustrate the voyage.

Switzerland: a)

Ukraine:

United Kingdom: The BMLA’s view is that the current system does not appear to be creating any real practical difficulties. That said the issue could, in its view, be profitably further debated by the IWG. The BMLA’s view is that the preferable approach would be for allowances to continue until the point at which the delay became sufficient to frustrate the voyage.

AAA: The Sub - Committee notes that the 13th Edition of Lowndes & Rudolf prefers 7.4.a). They would prefer no change to the wording in this respect

AMD: Whilst it is generally considered that a) is the correct approach, the point should be clarified.

ICS/BIMCO: As noted in 7.1 above, frustration of a voyage by reason of delay is an uncertain matter. To avoid assessments of when frustration has taken place, shipowners have commented that allowances should continue up to the point when the cargo is discharged at destination or, in case of temporary storage, released to the cargo owners.

IUMI: [IWG: See below]

IUMI: The Questionnaire asks where a voyage is frustrated by reason of delay until when should Non-Separation allowances continue? IUMI’s view is that they should continue up to the point at which the delay becomes sufficient to frustrate the voyage (assuming no new test of the termination for GA allowances is introduced – see 7.1 above). Frankly the sooner GA allowances stop the better for MPUs. The alternative test of when it “becomes

apparent” that the voyage is frustrated is too subjective to be suitable, especially as only the shipowner will know all the facts.

7.5 *Deciding how long is “justifiable under the contract of affreightment and the applicable law” has proved controversial in some cases. Given that the decision is often “fact sensitive” and subject to differing criteria according to national laws, is there a better way of establishing an equitable cut-off point for such allowances?*

Argentina: No.

Belgium: Not at the present stage.

Brazil: No

Canada: No

China: No. seen.

Croatia: See comment to 7.1. above.

Denmark: Probably not.

Finland:

France: Allowances issue should be handled by the applicable law of the transportation contract and/or CP and not the RYA.

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: Points 7.1, 7.4 and 7.5

Sometimes the problem arises in practice and it is a delicate issue due to the discrepancies existing between English law and the position existing in other jurisdictions. The solution under (b) of 7.4 is usually the preferred one. A provision suitable to clarify the matter would be attractive, but it would interfere with doctrines like frustration or abandonment which do not belong to general average.

Japan: This is the issue related to the construction of the contract of carriage and/or governing law, and is not one which should be dealt with in the YAR.

The Netherlands: No. Reference is also made to Section 3 - 7.1 above.

Norway: The rules and practice on frustration of voyage varies from jurisdiction to jurisdiction. Hence, this is better left to be considered on a case to case basis, and we suggest no change to this Rule.

Slovenia: No.

Spain: See our comment to point 7.1 above.

Switzerland: No knowledge of a better way of establishing an equitable cut-off point.

Ukraine: We propose to let it lie.

United Kingdom: Whilst this might perpetuate the uncertainties, the BMLA's view is that fact sensitive matters should best be dealt with by the courts, reflecting the legal regimes and disciplines applicable.

AAA: The Sub - Committee could identify no "equitable cut off point for such allowances" and therefore suggests that the Rule remain unchanged.

AMD: No obvious solution presents itself.

ICS/BIMCO: As with 7.1, there is a risk that any attempt to establish a test or formula would create its own uncertainties.

IUMI: This question really is a re-statement of the question in 7.1 and the answer is the same: it would be desirable to find an independent and simple set of criteria for establishing an equitable cut-off point for Non-Separation allowances but IUMI cannot think of how this could be made to work.

Further comment on Rule G (not covered by a question in the questionnaire):

AAA: The Sub Committee discussed the proposition that the NSA and Bigham Clause wording in Rule G might better give effect to the decision in the "City of Colombo" by amending the final para of the 1994 Rule as follows:

"The proportion attaching to cargo of the allowances made in general average "by reason of cargo's proportion of the costs of forwarding their merchandise under the terms of Rule F and" by reason of applying the third paragraph of this Rule shall not exceed the cost which would have been borne by the owners of cargo if the cargo had been forwarded at their expense"

Discussion of this suggestion was inconclusive.

SECTION 4. NUMBERED RULES

1. RULE I

No known issues.

Argentina: No comments.

Belgium:

Brazil:

Canada: Agreed

China:

Croatia:

Denmark: The wording "carried in accordance with the recognised customs of the trader" may possibly imply situations involving fault - which may bring decisions by the Average Adjuster into conflict with the provisions of Rule D.

Finland:

France:

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: There is no indication of requests for revision.

Japan:

The Netherlands: According to the Committee, the provision could be deleted as it does not have added value given Rule A and the Rule Paramount. However, as this would mean that the numbering of the rules would change, it may be better to retain the current wording.

Norway: More contemporary wordings should be considered under Rule IV.

Slovenia:

Spain: Not applicable.

Switzerland:

Ukraine: Nothing.

United Kingdom: Not applicable.

AAA: No change

AMD: Prior to 1994 the BMLA disliked this Rule as the proviso “custom of the trade” introduced the question of fault into a numbered Rule. They had a point, but no one else was interested. Should it be raised again?

ICS/BIMCO: Shipowners have commented that there can be differences of opinion regarding “recognised custom of the trade”.

IUMI: No comment.

2. **RULE II**

No known issues.

Argentina: No comments.

Belgium:

Brazil:

Canada: Agreed

China:

Croatia:

Denmark: No issues.

Finland:

France:

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: There is no indication of requests for revision.

Japan:

The Netherlands: No comments

Norway: More contemporary wordings should be considered under Rule IV.

Slovenia:

Spain: Not applicable.

Switzerland:

Ukraine: Nothing.

United Kingdom: Not applicable.

AAA: No change

AMD: No comments.

ICS/BIMCO:

IUMI: No comment.

3. RULE III

No known issues.

Argentina: No comments.

Belgium:

Brazil:

Canada: Agreed

China:

Croatia:

Denmark: No issues.

Finland:

France:

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: There is no indication of requests for revision.

Japan:

The Netherlands: No comments

Norway: More contemporary wordings should be considered under Rule IV.

Slovenia:

Spain: Not applicable.

Switzerland:

Ukraine: Nothing.

United Kingdom: Not applicable.

AAA: No change

AMD: No comments.

ICS/BIMCO:

IUMI: No comment.

4. RULE IV

The use of the terms “wreck” and “carried away” sounds rather archaic and Lowndes (para 4.18/4.19) finds other grounds to criticise the rule.

Assuming the principle needs to be retained, can it be expressed in a clearer and more contemporary way?

Argentina: Yes. An updated wording can be useful for clarification.

Belgium: It is, of course, to be preferred the use of modern and understandable terms, rather than those archaic and of difficult comprehension, in the drafting of the Rules in their entirety. On the other hand, it must be pointed out that any change in the use of terms needs to leave unchanged the ratio and the purpose of the rule it pertains. On the specific point, it is not clear what difficulties the term “wreck” is posing and with which word it could be substituted. “Carried away”, as well, does not constitute a difficult term to understand, contextualize and apply to practical situations.

Brazil: No need to change. This rule is being interpreted without problem.

Canada: No – Not broken, so don’t play with it!

China: Suggested not to retain.

Croatia: We have no proposals for the amendment of this rule.

Denmark: These are well-known expressions and we find no reason to change them.

Finland:

France: We do not see the interest of redefining it; the principle should be maintained.

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: The case is extremely rare. In the very few occasions where the rule has been applied, the formulation was found perhaps old-fashioned, but nonetheless suitable. The principle should be maintained, in order to avoid admitting to contribution the sacrifice of goods which are already devoid of value as consequence of previous damages.

Japan: We consider that there has been no problem under the current wordings, but would be prepared to consider the better proposal if it is offered.

The Netherlands: In the Committee’s opinion, the word wreck should be replaced by “severely damaged parts of the ship”. In addition and in order to include, for example, containers that are severely damaged and may have to be cut off, the Committee suggests that the words “or other property on board the ship” are added after “or parts of the ship”. Rule IV may thus be amended accordingly:

“Loss or damage sustained by cutting away the ship or severely damaged parts of the ship or other property on board which has/have previously been carried away by accident, shall not be made good as general average.”

Norway: More contemporary wordings should be considered under Rule IV.

Slovenia: No.

Spain: In our practice, these words have not created any trouble, but if its replacement by a clearer and more contemporary way is considered and adopted by the majority of the national associations, we would not oppose to such replacement.

Switzerland: Using Lowndes and Rudolf's words: There shall be no sacrifice of what is valueless, or doomed anyway.

Ukraine: No reasons to change the rule.

United Kingdom: The BMLA is not convinced that the existing language is inappropriate

AAA: The Sub - Committee has no objection to the replacement of these picturesque archaisms if suitable wording can be found. The principle seems clear; therefore no need to change wording.

AMD: The principle should be preserved but preferable language does not readily come to hand. It is considered that that the Rule should be extended to include cargo.

ICS/BIMCO: [Primarily a drafting question, though note: “Assuming the principle needs to be retained...”] There should be no change to the underlying principle which must not be lost in any drafting changes.

IUMI: No comment.

5. RULE V

No known issues.

Argentina: No comments.

Belgium:

Brazil:

Canada: Agreed

China:

Croatia:

Denmark: No issues.

Finland:

France:

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: There is no indication of requests for revision.

Japan:

The Netherlands: No comments

Norway: More contemporary wordings should be considered under Rule IV.

Slovenia:

Spain: Not applicable.

Switzerland:

Ukraine: Nothing.

United Kingdom: Not applicable.

AAA: The Sub - Committee felt that, in the campaign against archaism, it might be thought desirable that “run on shore” should become “run aground”, and “driven on shore” should become “ driven aground”. Otherwise, no change.

AMD: No comments.

ICS/BIMCO:

IUMI: No comment.

6. RULE VI

- 6.1. *The debate regarding the inclusion or exclusion of salvage where the law or contract already provides for a means of distribution between the parties (for simplicity we suggest this is referred to as LOF salvage, although other contracts/jurisdictions achieve the same effect) was unresolved after Beijing.*

The arguments for and against were set out in the Report by the CMI International Subcommittee on General Average which can be found in the CMI Yearbook 2003 at pages 290-292.

In 2012 a compromise version of Rule VI was put forward by a CMI WG (which can be found on the CMI website under Work in Progress, York-Antwerp Rules) which provided for exclusion of LOF salvage from GA if it constituted more than a fixed percentage of the total general average.

Some adjusters have commented that it is already their practice to approach the parties if it seems likely that the effect of re-apportioning salvage will be disproportionate to the time and cost involved.

Adjusters have also pointed out that if salvage payments are excluded from GA they still rank as an extra charge incurred in respect of the property subsequent to the GA act and

therefore should be deducted from the Contributory Value (see Rule XVII). The saving in procedural cost of excluding salvage would therefore not necessarily be that significant.

Looking to 2016 the current options would appear to be:-

- i) *Retaining the 1994 position*
- ii) *Adopting the 2004 position*
- iii) *Adopting a compromise position as put forward by CMI in Beijing which would also involve deciding on the percentage figure.*
- iv) *Continuing as in (i) but encouraging adjusters “ad hoc” approach wherever possible.*
- v) *Continuing as in (i) and (iv) but including an express provision obliging the adjuster to consider the possibility of not including salvage, perhaps linked to the Rule Paramount.*

Ukraine: Considering this issue and looking at Ukrainian law we can note the following: On the one hand, one of the criteria for fixing of the salvage reward is “the salvaged value of the vessel and other property” (article 13 of the International Convention on Salvage, 1989, article 333 of the Merchant Shipping Code of Ukraine (hereinafter – “MSC”).

According to the same provisions of the Salvage Convention and the MSC, the fixed reward shall be paid by all of the vessel and other property interests in proportion to their respective salvaged values. And if the payment of a reward has been made by one of these interests, this interest has recourse against the other interests for their respective shares.

On the other hand, under Ukrainian law the general average shall be apportioned between vessel, freight and cargo in proportion to their respective values.

And according to article 279 of the MSC the GA shall include, on top of everything else, “the expenses made with the purpose to receive assistance as according to the salvage agreement so without this agreement, inasmuch as these salvage operations are carried out with the purpose to prevent peril for the ship, the freight and the cargo”.

From the point of view of Ukrainian law, the correct option is to retain the 1994 position. However, from the practical point of view, we incline to an opinion that 2004 wording shall be retained.

Moreover, we believe that sooner or later the Ukrainian maritime law will be reconsidered by the parliament with implementation into national law of the latest trends of international private maritime law.

a) *Which option(s) do you support?*

Argentina: We support option i).

Belgium: It has been a positive progress the decision, in 2004, to separate Salvage from General Average. Different parties are involved in the processes and it is better to keep the situations divided, in order to minimize the “paper work” and speed up both procedures. Thus the 2004 position is the one that should be implemented. It has also to be pointed out that LOF is one of the options available, not the only one, therefore it should not be emphasized excessively the role of this instrument, within the YAR.

Brazil: (i), Retaining the 1994 position.

Canada: We fought long and hard in 2004 for position 2 and we see no reason to change that position now

China: 4, and with opinion that its nature of general average would not be changed.

Croatia: iv) Continuing as in (i) but encouraging adjusters' "ad hoc" approach wherever possible.

Denmark: The Danish MLA supports option i) or option iv).

As regards option iv), we should address that in order to calculate the required percentage, it will be necessary to calculate the General Average Adjustment anyway, including the time and expenses involved in enquiries and adjusting, leaving no or very little saving and failing the aim for excluding salvage from General Average.

Finland: Salvage by nature covers both the ship, the cargo and, indirectly, the freight at risk. Salvage remuneration must be divided one way or another. It would seem natural that salvage, which often represents a significant share of the GA costs, is retained as an integral part of the GA system, like in the 1994 YAR. Attention needs to be given to the distribution between the vessel and other interests, though. Could perhaps a Rule Paramount be considered to prevent the disproportionate re-apportioning of salvage in individual cases?

France: We clearly are in favor of the 2004 approach (ii) as we believe such option was a clear common benefit for all parties and allowed to save time and costs.

Germany: [IWG: See below]

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: The Italian practice was not contrary to limit re-apportionment in General Average only to those cases where the entire salvage remuneration is paid by one of the parties of the adventures, also on behalf of the other parties, and conversely, in case of individual settlements, to lie payments where they fall. It is true that the practice often achieves the same result, but Rule VI of YAR 1994 can offer to those who have reached a bad settlement with the salvors ground hardly disputable, albeit selfish, to ask nonetheless for re-apportioning.

The solution adopted in YAR 2004 remains valid in this perspective. It is unlikely that this change was behind the failure of YAR 2004. One may therefore consider to insist on it (abandoning the extremely complicated mechanism of 'compromise' envisioned in the 2012 project) (proposal (ii) of the Questionnaire).

Japan: We adopt the position of YAR2004, which excludes salvage payments where the law or contract already provides a means of distribution between the parties (such as salvage award under LOF) from GA. However, it is necessary to improve the wording taking into account the following points.

- (1) to make clear the fundamental principle that expenditure in the nature of salvage shall be allowed in GA.
- (2) to include the contents of Association of Average Adjusters' probationary rule of practice "Salvage Payments-Rule VI of the York-Antwerp Rules 2004".
- (3) to include the contents of XXII of rules of practice of The Association of Average Adjusters of the United States "Salvage Settlements under York Antwerp Rules 2004-Allowance for Interest" (Adopted – October 5, 2005).

The Netherlands: The committee supports options "iv" and "v". In the Committee's opinion, the adjuster should consider in each case whether salvage should be included.

Norway: Cefor recommends the adoption of option i), alternatively option iv), as there are cases where it will be uneconomical to redistribute.

Slovenia: (iii)

Spain: We would support option ii), to adopt the 2004 position.

Switzerland: Option iii (but clarification iro the percentage required – double negation to be avoided when stipulating a maximum – hence stipulation of a minimum required percentage would be more straight forward.)

Ukraine: We support (ii).

United Kingdom: The BMLA represents a number of interests. Unfortunately there are widely divergent views on this issue and there is no consensus. The BMLA is therefore unable to offer any comments at this stage but will study any proposals or suggestions made by the IWG with interest.

AAA: The Sub - Committee felt that it had little input in what it regarded as essentially a political debate. However: Option iv)

AMD: Option iv) is favoured as the adjuster is usually in the best position to decide on the point.

ICS/BIMCO: ICS and BIMCO support retaining the 1994 position while encouraging adjusters' ad hoc approach wherever possible.

IUMI: [IWG: See below]

b) *Are there other options that should be considered?*

Argentina: No.

Belgium: No.

Brazil: No

Canada: No

China: Someone from cargo insurers support not to include salvage in g.a. if the various parties settled respectively.

Croatia: /

Denmark: No.

Finland: Salvage by nature covers both the ship, the cargo and, indirectly, the freight at risk. Salvage remuneration must be divided one way or another. It would seem natural that salvage, which often represents a significant share of the GA costs, is retained as an integral part of the GA system, like in the 1994 YAR. Attention needs to be given to the distribution between the vessel and other interests, though. Could perhaps a Rule Paramount be considered to prevent the disproportionate re-apportioning of salvage in individual cases?

France:

Germany: [IWG: See below]

Israel: We have no special comments to Sections 2, 3 and 4.

Italy:

Japan: N/A

The Netherlands: No.

Norway: No.

Slovenia: No.

Spain:

Switzerland: No

Ukraine: No.

United Kingdom:

AAA: The Sub - Committee felt that it had little input in what it regarded as essentially a political debate. However: None identified

AMD: The allowance of Salvage as GA (in instances where each party has discharged its liability directly to the salvor) might only be considered where there have been (i) GA sacrifices, (ii) where there has been damage to the property due to another casualty subsequent to the GA act or (iii) where the values used for the apportionment of the salvage are manifestly wrong.

ICS/BIMCO: No suggestions.

IUMI: [IWG: See below]

- c) *If options (ii) or (iii) are supported should an amendment to Rule XVII be made so that salvage payments are not deducted from contributory values when salvage is not allowed as GA?*

Argentina: No comments.

Belgium: Yes, it is a practical and efficient solution.

Brazil: Not applicable.

Canada: No – As is

China:

Croatia: /

Denmark: The options ii) and iii) are not supported.

Finland:

France:

Germany: [IWG: See below]

Israel: We have no special comments to Sections 2, 3 and 4.

Italy:

Japan: From the view point of the simplicity of GA adjustment, it is appropriate not to deduct salvage payments such as LOF salvage award from the contributory value. Therefore, Rule XVII should be amended accordingly.

The Netherlands: Not applicable.

Norway:

Slovenia: Yes.

Spain:

Switzerland: I am not sure why such a deduction would be required.

Ukraine: N/A

United Kingdom:

AAA: The Sub - Committee felt that it had little input in what it regarded as essentially a political debate. However: Yes

AMD: This would be the sensible course to take.

ICS/BIMCO: -

IUMI: [IWG: See below]

IUMI: This is the single most important issue for IUMI in this review and so a detailed note of the background to it is justified.

In England in the 19th century salvage was not generally readjusted in GA because it was apportioned over values at the time and place where the services ended rather than at the termination of the voyage. In the 20th century this position slowly changed through Rules of Practice in 1926 and 1942 culminating in Rule VI of the 1974 YAR. This required salvage to be reapportioned in GA in all cases. The allowance of salvage remuneration in GA in all cases has been much criticised as being an over complication leading to significantly higher expense for MPUs. Two sets of security are required to cover the same money and the whole adjustment is prolonged, sometimes for years.

Under the YAR 2004 Rule VI was amended so that salvage contributions and associated expenses would not be readjusted in GA unless one party pays another's proportion. YAR 2004 Rule VI (a) reads as follows:

"Rule VI. Salvage remuneration

7.5.1 Salvage payments, including interest thereon and legal fees associated with such payments, shall lie where they fall and shall not be allowed in General Average, save only that if one party to the salvage shall have paid all or any of the proportion of salvage (including interest and legal fees) due from another party (calculated on the basis of salvaged values and not General Average contributory values), the unpaid contribution to salvage due from that other

party shall be credited in the adjustment to the party that has paid it, and debited to the party on whose behalf the payment was made ...”

Opponents of the proposal argued that the inclusion of salvage in GA produced a fairer result in certain types of situation. One example is the case where a second casualty affects the values at the termination of the adventure and thus the apportionment. Although rare in the experience of the IUMI's members it must be acknowledged that a few cases a decade like this do occur and the problem is only partly addressed by GA disbursements insurance. However it is not felt that this occasional event is sufficiently important to justify retaining the Rule in YAR 1974 and 1994.

A few jurisdictions such as Spain and the Netherlands contain laws which entitle a salvor to claim the full amount of the salvage reward from the shipowner allowing him to recover an indemnity in respect of cargo's proportion in GA. However the new Rule recognises this problem and allows the shipowner to recover cargo's proportion in such circumstances.

It was argued in the debate on the YAR 2004 in favour of reapportionment that if one party to the adventure is able to use commercial or other pressures to reach a particularly favourable negotiated settlement with salvors leaving the other parties to pay the full cost of arbitration, the figures are readjusted in GA and some semblance of justice is achieved. Supporters of IUMI's position responded to this by saying that underwriters are content to suffer this occasional loss as it would save them more in incidental adjusting costs.

In some cases the shipowner makes a deal with the salvor and leaves cargo to negotiate a settlement as best he can. The shipowner may then produce no GA adjustment and, even if cargo underwriters are inclined to publish an adjustment of their own in such cases, in practice this very seldom, if ever, happens not least because the adjuster will require the co-operation of the shipowner to do so; so the present system which largely ignores YAR 2004 can produce unfair results from differential salvage settlements too.

The case for reform was put most eloquently by Ian Stevens lately of Lloyd's Claims Office's GA Department shortly after the 1994 YAR were approved:

“For some reason or another, which I cannot readily ascertain, Rule VI – salvage remuneration – never seems 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 and salvage on behalf of all parties to the common adventure, and thereafter seeks to recover the cargo owners' share or shares in General Average.

What really aggravates me ... 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 the 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”.

Even if salvage is not allowed in GA it will still be deducted in calculating contributory values and so the adjustment cannot be completed until the final amount of the salvage charges paid by each interest is known. So, it is argued, this amendment will not radically speed up the production of adjustments (although it will make them cheaper and more

infrequent). This argument can be addressed by an amendment to Rule XVII as to which see below.

At the Plenary Session of the CMI Conference in Vancouver on 4 June 2004 the motion to remove salvage from GA was carried by 23 votes to 3 (the three dissenting MLAs being Greece, Brazil and the Netherlands).

This is by far the most significant change which was made to the YAR by the 2004 Rules: It is estimated to be worth about 10% to 12% of the sums shifted in GA to MPUs which is more than all the other changes made by the YAR 2004 put together.

The payment of salvage in GA is funded entirely by MPUs and so salvors and shipowners should be indifferent to it, as should their representatives such as the ICS and P&I Insurers since it is something in which they have no financial interest.

Some adjusters say it is their practice to "approach the parties" if it seems likely that the effect of reapportioning salvage will be disproportionate to the time and cost involved. As a matter of English law adjusters are the agents of the party by whom they are appointed which is normally the shipowner. So in practice, if the adjusters have misgivings they must first ask the owner (and, in practice, usually his P&I insurer too) whether they wish to have an adjustment and only if the owner's answer is positive do the hull and cargo insurers get approached. It is not uncommon for adjustments to be prepared (despite the practice of some adjusters) which are little more than a restatement of the salvage with interest commission and adjusters' fees added on just increasing the cost of the loss. It is true that because Rule XVII requires contributory values to be reduced by their contributions in salvage that not much will be gained in the speed it takes to publish an adjustment. However, in practice little will be lost if an amendment were made to Rule XVII to change this. An example may assist to illustrate how this could work:

- (a) A salvage award of US\$10 million is made against ship and cargo;
- (b) The salvaged contributory values of ship and cargo are
 - ship salvaged value US\$30 million pays US\$3,750,000 (37.5%);
 - cargo salvaged value US\$50 million pays US\$6,250,000 (62.5%);
- (c) The GA contributory value would be arrived at by deducting the amount paid by ship and cargo in salvage from their values at the termination of the common maritime adventure. However, assuming that no further damage was suffered by ship or cargo between the time the salvage services terminated and the time the common maritime adventure terminated, the percentage contributions of the parties would not change. The ship's contributory value would be (US \$30 million minus US \$3,750,000) US \$26,250,000 or 37.5% of the fund while cargo's value would be (US \$50 million minus US \$6,250,000) US \$43,750,000 or 62.5%.

So if Rule XVII was amended so as to delete the requirement that salvage contributions should not be taken into account in arriving at GA contributory values, adjustments might well often be produced more quickly.

Page 16 of the Questionnaire suggests five ways of dealing with salvage in GA and, having in mind all the foregoing, IUMI is in favour of adopting the 2004 position (Option (ii)) and (c) (an amendment to Rule XVII) so that salvage payments are not deducted from contributory values and salvage is not allowed in GA unless one party pays another's proportion.

6.2 *At present Rule VI makes no reference to legal and other costs incidental to a salvage operation and subsequent award. Such costs are customarily allowed by adjusters under Rule C, as a direct consequence of the GA act of engaging salvors.*

- a) *Should the allowance for legal and other costs be expressly recognised in Rule VI?*

Argentina: Yes.

Belgium: Yes, they must be allowed. The RBSA think this would not appear to be necessary.

Brazil: Yes

Canada: Yes

China: Support/against 50/50.

Croatia: No.

Denmark: This is not found to be necessary as it is clearly understood.

Finland:

France: We think that these questions are premature without any definitions of legal costs and absence of claims arise in this respect.

Germany: [IWG: See below]

Israel: We have no special comments to Sections 2, 3 and 4.

Italy:

Japan: Legal costs related to the salvage are currently allowed in GA not by Rule VI but by Rule C. It is appropriate to amend Rule VI to make clear that those costs shall be allowed in GA under this Rule.

The Netherlands: No. In the Committee's opinion this should be left to the adjuster's discretion.

Norway: Yes.

Slovenia: No.

Spain: We do not see the need of including an express provision on that respect.

Switzerland: Yes

Ukraine: No.

United Kingdom: The BMLA considers that the text of Rule C suffices. The obvious danger associated with expressly recognising certain costs is the Latin maxim "inclusio unius exclusio alterius".

AAA: The Sub - Committee felt that it had little input in what it regarded as essentially a political debate. However: Not necessary

AMD: Yes if only for the avoidance of doubt.

ICS/BIMCO: This would not appear to be necessary.

IUMI: The working parties' questionnaire proceeds upon the assumption that the "present Rule VI makes no reference to legal and other costs incidental to a salvage operation and subsequent award". In fact Rule VI of YAR 2004 does and it is in MPUs' interest that this should remain the position. Accordingly, IUMI's answer to 6.2 (a) is "yes" and the answer to 6.2 (b) is "no".

- b) Would it encourage co-operation amongst salvaged property interests and early negotiated settlements if legal costs were expressly excluded?

Argentina: No.

Belgium: It would be very difficult to see such a proviso really implemented and used. It has, in addition, not a large practical impact. It is a matter that should be dealt by the adjusters, in relation to the specific situation

Brazil: Not applicable

Canada: No

China: Yes, but it would not be more effective.

Croatia: In our opinion not.

Denmark: No, as one could fear that such a situation would lead to increased salvage awards as legal costs are also incurred by the involved properties with the aim of reducing their liabilities to salvors. Some members have supported the proposal as it is believed to speed up the settlement process.

Finland:

France: We think that these questions are premature without any definitions of legal costs and absence of claims arise in this respect.

Germany: [IWG: See below]

Israel: We have no special comments to Sections 2, 3 and 4.

Italy:

Japan: We do not consider that it would encourage co-operation among salvaged property interests and earlier negotiation with the salvors if legal costs are expressly excluded from GA.

The Netherlands: The Committee does not expect that exclusion of legal costs in GA would increase co-operation amongst salvaged interests. In practice, the salvaged interests may co-operate anyway.

Norway: No.

Slovenia: No.

Spain: We do not see the need of including an express provision on that respect.

Switzerland: No, not appropriate – see 6.2 a)

Ukraine: We have some doubts that it would encourage cooperation.

United Kingdom: The BMLA's view is that the exclusion of the right to costs is unlikely materially to promote settlement.

AAA: The Sub - Committee felt that it had little input in what it regarded as essentially a political debate. However: Not clear how this would encourage co-operation.

AMD: It is not entirely clear why this idea would encourage co-operation.

ICS/BIMCO: Such costs are customarily allowed by adjusters under Rule C as a direct consequence of the GA act of engaging salvors; ICS and BIMCO do not support any change to this custom or amendment of Rule VI.

IUMI: The working parties' questionnaire proceeds upon the assumption that the "present Rule VI makes no reference to legal and other costs incidental to a salvage operation and subsequent award". In fact Rule VI of YAR 2004 does and it is in MPUs' interest that this should remain the position. Accordingly, IUMI's answer to 6.2 (a) is "yes" and the answer to 6.2 (b) is "no".

Germany: The German MLA regrets that - so far - it could not find an agreement with regard to the key issues on inclusion or exclusion of salvage remuneration in GA settlements (Rule VI), or on inclusion or exclusion of wages and maintenance of crew in GA at a port of refuge, when the common danger has been overcome (Rule XI).

The adjusters and the shipowners represented in the German MLA are in favour of the inclusion of salvage and of wages and maintenance in ports of refuge – also on grounds of practicability and costs, but moreover in order to achieve an equal treatment of interests. The inclusion of these costs in GA would conform to the "common benefit"-principle and this is regarded as a very important reason to include salvage remuneration and wages and maintenance costs in ports of refuge, as it is the case in YAR 1994.

The insurers represented in the German MLA would favour the YAR 2004 with regard to these questions. In their opinion, the inclusion of salvage remuneration would result in a delay in the procedure of GA settlements and an increase of costs of the insurers. The inclusion of crew costs in ports of refuge would, in their opinion, favour the shipowner because – as they argue, the party interested in the good could also not deduct a financial loss, such as a reduction in value of the good because of a delay of the voyage. They further argue that an inclusion of financial loss of both parties would result in undue delay of GA settlements.

7. RULE VII

Should the word "ashore" be replaced by "aground"?

Argentina: Yes.

Belgium: 'Ashore' is a term widely understood and adopted in practice, there is no need to modify it.

Brazil: No, in our opinion "ashore" includes aground and stranded.

Canada: Yes, and the same change should be made in rule V

China:

Croatia: "Aground" would be a better choice, but the amendment does not seem absolutely necessary.

Denmark: Yes, probably a good idea.

Finland:

France: No need to change.

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: There is no indication of requests for revision, and there is no evidence that the terminology has created problems thus far.

Japan: No. We believe that there has been no problem under the current wordings.

The Netherlands: Yes.

Norway: Yes, we generally favour replacing the word “ashore” with the word “aground”.

Slovenia: No.

Spain: If it adds certainty and avoids misinterpretation, we would not oppose. However, we do not see the relevance of this question.

Switzerland: Yes

Ukraine: In Ukrainian language “ashore” and “aground” can have the same meaning.

United Kingdom: The BMLA agrees that the word “ashore” could usually be replaced by “aground”.

AAA: Yes

AMD: Yes.

ICS/BIMCO: This proposed amendment is not essential but if it is agreed that other amendments should be made to YAR 1994 then ICS and BIMCO would have no objection to this drafting suggestion.

IUMI: IUMI members generally favour replacing the word “ashore” with the word “aground” which means the same. The word ashore is now almost never used to describe ships but is much more frequently used in the context of describing the location of someone who has been on a ship but who has now gone onto the land.

8. RULE VIII

a) *Should the word “ashore” be replaced by “aground”?*

Argentina: Yes.

Belgium: Supra.

Brazil: No

Canada: Yes

China:

Croatia: See the comment to Rule VII.

Denmark: Yes, probably a good idea.

Finland:

France: No need to change.

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: There is no indication of requests for revision, and there is no evidence that the terminology has created problems thus far.

Japan: No. We believe that there has been no problem under the current wordings.

The Netherlands: Yes.

Norway: Yes.

Slovenia: No.

Spain: Same reply as in relation to Rule VII above.

Switzerland: Yes

Ukraine: See comments to the Rule VII.

United Kingdom: See 7 above.

AAA: Yes

AMD: Yes

ICS/BIMCO: This proposed amendment is not essential but if it is agreed that other amendments should be made to YAR 1994 then ICS and BIMCO would have no objection to this drafting suggestion.

IUMI: IUMI members generally favour replacing the word “ashore” with the word “aground” which means the same. The word ashore is now almost never used to describe ships but is much more frequently used in the context of describing the location of someone who has been on a ship but who has now gone onto the land.

- b) The word “reshipping” is capable of mis-interpretation; should it be replaced by “reloading”?

Argentina: Yes.

Belgium: ‘Reloaded’ should be adopted, as in fact, in actual practice, it has a more stringent and sound meaning than the old fashioned ‘reshipping’. The RBSA state that it is possible that the cargo will not be reloaded on the same ship, but on

another ship. Therefore “reshipping” seems to be the correct word. Cargo interest agree, if ‘reloading’ is used, it should be made clear that this can also include transshipment operations unless the voyage is abandoned.

Brazil: No

Canada: Yes

China:

Croatia: “Reloading” would probably be a better choice.

Denmark: We do not really see the difference. If “reshipping” is capable of being misinterpreted, so is “re-loading”.

Finland:

France: No need to change.

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: There is no indication of requests for revision, and there is no evidence that the terminology has created problems thus far.

Japan: No. We believe that there has been no problem under the current wordings.

The Netherlands: Yes.

Norway: Yes, but it will also have to be made clear whether reloading can include loading onto another transshipment vessel or not.

Slovenia: No.

Spain: Same reply as in relation to Rule VII above. In any case, the word “reloading” is already used in Rule XI (d) (iv), rule that was introduced in the YARs 1994, so it could be more consistent to use the same word in Rule VIII.

Switzerland: Yes

Ukraine: Yes.

United Kingdom: The BMLA would be cautious about replacing “reshipping” with “reloading” as the word “reloading” might be open to the construction that it refers only to loading on the original ship and, therefore, exclude loading into lighters or other ships.

AAA: Yes

AMD: Yes.

ICS/BIMCO: No. It is possible that the cargo will not be reloaded on the same ship, but on another ship. Therefore “reshipping” seems to be the correct word.

IUMI: If the word “reshipping” is to be replaced with the word “reloading” it will have to be made clear whether the expression “reloading” can include loading onto another transshipment vessel and is not confined to loading back onto the casualty itself. This is a relatively simple issue with which the working party should have little difficulty.

9. RULE IX

No known issues.

Argentina: No comments.

Belgium:

Brazil:

Canada: Reference to time charterers’ bunkers should be included

China:

Croatia:

Denmark: No issues.

Finland:

France:

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: There is no indication of requests for revision, and there is no evidence that the terminology has created problems thus far.

Japan:

The Netherlands: No comments.

Norway: No comment.

Slovenia:

Spain: Not applicable.

Switzerland:

Ukraine: Nothing.

United Kingdom: Not applicable.

AAA: No issues

AMD: No comments.

ICS/BIMCO:

IUMI: No comment

10. RULE X

10.1 *In the second para of X(a) should the words in italics [IWG: here in roman and underlined] be inserted*

“..... is necessarily removed to another port or place of refuge because repairs necessary to complete the voyage cannot be carried out at the first port of refuge.”

in order to confirm the line taken in the “Bijela”? (see Lowndes para 10.36)

Argentina:

Belgium: We do not consider it a real issue, but we do not find anything against the insertion of the proposed words.

Brazil: We agree that the words in italic should be inserted.

Canada: Yes

China: No unanimous comments

Croatia: Yes, the rule would be clearer then.

Denmark: No, as it could be feared that shipowners would be encouraged to carry out minimum of necessary repairs perhaps endangering the adventure.

Finland: The proposed additions under 10.1 and 10.2 of the Questionnaire are supported.

France: This precision will permit to clearly and better apply the rule and avoid any interpretation and discussion.

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: The practice already considers such a condition necessary, but it could be useful to specify it.

Japan: No. We believe that the word "repairs" is correctly interpreted to mean the permanent repairs or the temporary repairs which are necessary to complete the voyage and there is no problem under the current wordings.

The Netherlands: No.

Norway: We support the proposed insertion of the words in italics in the Questionnaire.

Slovenia: No.

Spain: Yes, we agree with the insertion of such sentence. It may add clarity.

Switzerland: Yes

Ukraine: Yes, agree with the insertion.

United Kingdom: The BMLA takes the view that the second para of Rule X(a) is well enough understood by average adjusters in its present form and does not support the suggested change. It would seem undesirable to introduce yet another category of repair (“necessary to complete the voyage”) in addition to others already mentioned in the Rules (“necessary for the common safety” and “ necessary for the safe prosecution of the voyage”). The introduction of this wording to the Rule might suggest a wish to confine general average allowances to those resulting from a shipowner effecting - with the benefit of 20/20 hindsight - the minimum necessary repairs required to bring the voyage to its conclusion.

AAA: The Sub Committee considered no change was needed

AMD: Yes – it is considered that the addition of the words in italics would clarify the position.

ICS/BIMCO: If the proposed wording was to be included, consideration would also need to be given to prescribing how “necessary” would be determined, and by whom. It is difficult to reconcile the referenced decision in *The Bijela* with the proposed additional wording. In any event, the proposal would create uncertainty and change is not therefore supported.

IUMI: IUMI believes that the amendment suggested in the Questionnaire would be clearer and increase uniformity of practice and should be supported.

10.2 *With regard to X(b) should express wording be introduced to say that the cost of discharge is not GA if the voyage is frustrated or voluntarily terminated, or if repairs are not carried out from some reason?*

Argentina: No

Belgium: We do not consider it a real issue, but we do not find anything against the insertion of the proposed words.

Brazil: Yes

Canada: Yes. Furthermore we suggest that the words “*without any accident or other extraordinary circumstances connected with such damage having taken place during he voyage*” be removed from the end of rule X(b)(i) and from the beginning of rule XI(c)(iii).

China: No.

Croatia: Yes, the rule would be clearer then.

Denmark: The words "some reason" are vague. Do they include the situation where repairs are not carried out but cargo is discharged for the common safety?

Finland: The proposed additions under 10.1 and 10.2 of the Questionnaire are supported.

France: No need.

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: Same as above. Strictly speaking, however, the issue concerns only the extra cost of discharge compared to the ordinary costs which would have been incurred anyway at unloading port.

Japan: No. There is no need to amend the current provisions.

The Netherlands: No.

The Committee would like to suggest that the costs of restowage of the cargo incurred in a port of refuge are admissible in general average. These costs are generally necessarily incurred in order to complete the voyage in a safe way and could therefore be regarded as general average expense. The costs are difficult to insure for shipowners as they are not covered under the standard P&I cover.

Norway: Yes, this also reflects the current legal position.

Slovenia: Yes.

Spain: We would not object to include such wording, although we deem that it is implicitly understood.

Switzerland: Yes

Ukraine: We have no objections on this issue, but it is necessary to discuss the particular wording.

United Kingdom: The BMLA takes the view that this aspect of Rule X(b) is well enough understood by average adjusters in its present form and does not support the suggested change.

AAA: The Sub Committee considered the Rule was well enough understood by average adjusters, but if commercial interests and insurers felt express guidance was necessary or desirable there should be further discussion on this matter.

AMD: It is considered that the timing of the discharge in relation to the point of frustration or termination is important. It appears harsh that the cost of discharging cargo ashore to allow a vessel to be drydocked for repairs necessary for the safe prosecution of the voyage is not allowed purely because it is determined some time later that the voyage is frustrated.

ICS/BIMCO: No, this would be too broad and potentially restrict or exclude recovery otherwise allowable in general average.

IUMI: The statement which the Questionnaire suggests is a reflection of the current legal position in any event. If the voyage is frustrated or voluntarily terminated, the cost of discharging cargo is not allowed in GA so the amendment would change nothing: Cargo usually has to pay discharge costs in full in such circumstances in any event. However, the wording "if repairs are not carried out for some reason" could usefully be included for clarification.

11. **RULE XI**

11.1 *Wages and maintenance of crew are allowed in GA while detained at a port of refuge for the common safety or to effect repairs necessary for the safe prosecution of the voyage, under the YARs 1994 (XI(b)) but not in YARs 2004. Both sets of Rules allow wages during the deviation to a port of refuge, and some have suggested that no crew wages should be allowed in General Average at all. What should be the position under YARs 2016?*

Argentina: The YAR 1994 basis should be maintained.

Belgium: A logical introduction it is necessary. A crew is a prerequisite in order to properly manage a vessel and it is not possible to encounter a vessel without its crew. Thus it would be unfair to eliminate totally any allowance in regard to wages and maintenance of crew. On the other hand, especially in certain situations (i.e. vessel dry-docked) it would be unfair to keep a vessel fully crewed, when a limited amount of personnel would be enough to keep the ship properly manned. Thus, the Adjusters should be able to evaluate, in each case, which is the correct amount of expenses to allow. It could be possible to set a proviso that requires that the expenses allowable are only those for "minimum crew necessary in order to man safely the vessel, in the specific situation". The RBSA support the position of YAR 1994 in this view. Cargo interests prefer the YAR 2004 on this point, but are of the opinion that the compromise under 11.1 first paragraph is fair.

Brazil: Position as per YARS 1994 should be maintained.

Canada: We believe the 2004 rule is clear and should remain. It is never right to re-write history. The matter of crew wages should remain as in 2004.

China: Back to 1994 position

Croatia: In our opinion the position of the YAR 1994 should be followed, i.e. wages and maintenance of crew should be allowed in GA while the ship is detained at a port of refuge for the common safety or to effect repairs necessary for the safe prosecution of the voyage.

Denmark: AS 1994.

Finland: The port of refuge concept in the YAR is an integral part of the GA system, much as salvage is. Covering wages and maintenance of the crew in the port of refuge ensures the proper treatment and handling of both ship and cargo. Here again it is proposed that the logic of the YAR 1994 is retained, but perhaps coupled with a review of acceptable costs. Some principles on accepted costs may be necessary to promote efficiency and avoid undue delays.

France: 2004's version was made in order to avoid difficulties in respect of the adjustment and simplify the calculations rules, but it can still be discussed.

Germany: [IWG: See below]

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: The restrictions introduced in this Rule, along with those introduced in Rule XIV, were the main reason for the failure of the 2004 edition. One should realistically acknowledge that and accept to return to the previous system.

Japan: We support the position in YAR2004.

The Netherlands: In the Committee's opinion, the crew wages should be allowed in general average in both situations. This is an important provision for shipowners. If the crew wages are not included as per YAR 1994, the reference to the YAR 2016 may not be inserted in the contracts of carriage.

Norway: Ideally no crew wages should be allowed either while at or deviating to or from the port of refuge. However, in order to secure the adoption of new Rules we will recommend to reinclude allowance for wages at port of refuge.

Slovenia: That no crew wages should be allowed.

Spain: We deem that YARs 2004 should be followed.

Switzerland: To ensure consistency, wages should be allowed.

Ukraine: We are of the opinion that the position of a new YAR shall be as under the YARs 1994 (XI(b)).

United Kingdom: The BMLA cannot reach a consensus on this issue. It is noted, however, that the conceptual logic would be that all or none of the crew wages would be allowed.

The BMLA would, however suggest the insertion of the word "detention" between the words "that" and "necessary" in Rule XI(b).

AAA: The Sub committee considered the 1994 version of the Rule should be retained but suggested that, for greater clarity the following addition might be made to it:
"When a ship shall have entered or been detained in any port or place in consequence of accident, sacrifice or other extraordinary circumstances which render that entry and/or detention necessary for the common safety, or to enable damage...."

AMD: To allow wages and maintenance as in 1994 Rules.

ICS/BIMCO: ICS and BIMCO support the position in YAR 1994.

IUMI: IUMI's position on crew wages in the run-up to the CMI Conference in Vancouver was that crew wages, while at or deviating to or from a port of refuge, should not be allowed in GA. IUMI argued that crew wages are a loss caused by delay and that to allow them in GA was contrary to Rule C and discriminated in favour of shipowners against cargo who cannot recover other losses caused by delay such as loss of market.

Allowing the crew wages while deviating to and from a Port of Refuge (but not while at a Port of Refuge) was a compromise wrung out of IUMI's representatives when it appeared that no changes to Rule XI might get through unless the concession was made. Although this issue is worth only about 1% of the monies shifted in GA, it is controversial because shipowners themselves would have to pay the wages if they were excluded from GA, whereas pretty well everything else in GA is funded by insurers. Nevertheless the removal of all crew wages at or deviating to or from a place of refuge remains on IUMI's wish list.

11.2 *In the "Trade Green" the judge decided that the term "port charges" relates only to the charges a vessel would ordinarily incur in entering a port, and went on to say:*

"I do not think that r.XI(b) can be construed so as to cover all sums charged by the port authority regardless of the circumstances; in my view it is much more limited in its scope.

It is true that in the present case the services of the tugs and the charges for those services were imposed on the vessel by the port authority, but they were imposed in response to an unusual situation and were not imposed in the common interests of the ship and cargo. In these circumstances, I do not think that they can properly be regarded as port charges within the meaning of r.XI(b)."

Most adjusters would regard this view as being against both principle and practice. For example, the cost of a standby tug if required by the port authority is commonly allowed as a port charge.

Does this point now need to be covered expressly by the Rules either by amendment to Rule XI or by inclusion of a definitions section (see Section I-3 above)?

Argentina: Yes, by amendment to Rule XI.

Belgium: No. It should still be left to the discretion of the Adjusters, and applied to each case, without a general abstract proviso. If other changes are made to YAR 1994, the RBSA agree that the meaning of "port charges" should be clarified so that it accords with principle and practice, and that all of the port charges which the vessel actually incurs on entry into port should be included.

Cargo interests likewise feel a clarification should be made that standard and exceptional port charges are recoverable in GA but only if those are incurred for the common benefit.

Brazil: This point should be left for the discretion of the adjuster, therefore no need to be covered expressly by the rules.

Canada: No definition. No amendment needed but minor tinkering would not be opposed.

China: No, to leave to adjuster to decide

Croatia: In our opinion it would be more appropriate to cover this point expressly by an amendment to Rule XI (similarly, the term wages is defined in Rule XI(c) 1994), which should clarify that all sums imposed on the ship at the port of refuge should be allowed as GA, which is in line with the principle and practice.

Denmark: The "Trade Green" is found to be aberrant on the terms "port charges". We find the rule clear but open for clarification, if practically possible.

Finland: There are special circumstances when entering a port of refuge and all appropriate costs would by presumption have occurred for the common safety of ship, cargo and freight at risk. All port charges that are linked to the incident should be covered by the YAR.

France: We do not see the interest of such question and this should be dealt on a strict case by case basis.

Germany: [IWG: See below]

Israel: We have no special comments to Sections 2, 3 and 4.

Italy:

Japan: No. As we understand the practice among the average adjusters has been established, there is no need to amend the current provisions.

The Netherlands: Yes. In view of the decision in the Trade Green, the Committee deems it sensible to expressly stipulate that also 'extra' port charges should be allowed in general average.

As the Committee does not support a definition section, it suggests that a provision is inserted in Rule XI.

Norway: This could be solved by introducing definitions as already suggested.

Slovenia: No.

Spain: We do not see the need of covering this point expressly. This is an issue that would have to be examined by GA adjusters on a case by case basis.

Switzerland: In light of the fact that the provision was misinterpreted by even English courts it should expressly be covered.

Ukraine: No. It has to be decided by the adjuster in every particular case.

United Kingdom: The BMLA considers that port charges should be recoverable insofar as they arise in connection with matters necessary for the common benefit. Amendments to achieve this can usually be made.

AAA: The Sub Committee considered that, as a result of the decision in the Trade Green, para 3 of the Rule would benefit from amendment to confirm normal adjusting practice. They also thought that consideration might be given to the possibility of amending para 5 of XI (b) to avoid problems experienced in deciding when a "voyage " should be regarded as terminated if the common adventure in a particular case involved only a shipowner and his time charterer.

AMD: In view of the judgement clarification may be desirable.

ICS/BIMCO: If other changes are made to YAR 1994, ICS and BIMCO agree that the meaning of "port charges" should be clarified so that it accords with principle and practice, and that all of the port charges which the vessel actually incurs on entry into port should be included.

IUMI: The decision on the meaning of the expression "port charges" in the Trade Green [2000] 2 Lloyd's Rep 451 should be dealt with either in a definitions section, if one is introduced (see Section 1 paragraph 3(c) above), or in Rule XI. IUMI agrees it would be desirable to clarify what is meant by the term and disagree with the result of the High Court's decision in the Trade Green on the meaning of the expression "port charges". Briefly the facts of the case were:

The "Trade Green" had carried a cargo of rice in bags from Bangkok to Aqaba under bills of lading providing for York-Antwerp Rules 1974, and while discharging alongside, a fire broke out in the engine room. On the instructions of the port authority the vessel was taken by tugs to an anchorage outside the port where the fire was brought under control by the vessel's crew. The vessel was towed "deadship" back to the berth the following day to complete discharge. The tug charges were the largest part of the general average and were allowed by the adjusters on the basis that the services of the tugs were the consequence of an order to leave the berth and were therefore port charges recoverable under Rule XI(b). Cargo interests challenged the adjustment and amongst four preliminary issues that came before Moore-Bick J. was the meaning of "port charges" in YAR Rule XI(b) on which point he said:

"In this context I think that the natural meaning of the expression "port charges" in r.XI(b) is apt to include any charges which the vessel would ordinarily incur as a

necessary consequence of entering or staying at the port in question. That would obviously include standard charges and levies of all kinds and may also extend to charges for standard services such as garbage removal which may or may not be optional but would be regarded as ordinary expenses of being in port. It is unnecessary to decide that point in the present case, but I note that this is the view put forward by the editors of Lowndes & Rudolf at para 11.32. Ordinary tug charges for assisting the vessel into and out of the port might well fall within r.XI(b), therefore, but it is much more difficult to bring the towage charges in the present case within it. They were not ordinary charges which any vessel using the port could expect to incur and apart from the fact they were levied by the port authority bore little similarity to port charges in the accepted sense. I do not think that r.XI(b) can be construed to as to cover all sums charged by the port authority regardless of the circumstances; in my view it is much more limited in its scope. It is true that in the present case the services of the tugs and the charges for those services were imposed on the vessel by the port authority, but they were imposed in response to an unusual situation and were not imposed in the common interests of the ship and cargo. In these circumstances I do not think that they can properly be regarded as port charges within the meaning of r.XI(b).”

Lowndes & Rudolf in *General Average and York-Antwerp Rules* (13th Edition, 2008) comment at paragraph 11.29:

“If, by this passage, Moore-Bick J. meant that any charges beyond the standard ones, which any vessel using the port would incur, cannot qualify as “port charges” it is contrary to established practice and it is submitted that it goes too far.”

IUMI respectfully agrees with the learned authors of Lowndes & Rudolf (one of whom, Richard Cornah, is on the CMI Working Party) and reckon the next edition of the YAR should clarify the position. Any amendment should ensure that such charges have to be incurred in the common interest to come within the Rule; if this is done then in fact the decision in the *Trade Green* would remain the same because in that case it was common ground that the tug charges were only incurred for the benefit of the ship and not the cargo too. This suggestion, if implemented, will ensure that, for example, the cost of a stand-by tug required by a port authority at a place of refuge will be allowed as a port charge.

If this is done, it will, in some cases, increase the burden of G.A. contributions on MPUs and directly benefit shipowners who would otherwise have to bear this expense. This concession is offered in a spirit of compromise in the hope that some other allowance such as that suggested in relation to crew wages (see Section 3, paragraph 11.1 above) will be allowed too.

- 11.3 *With regard to the phrase “until the ship shall or should have been made ready to proceed upon her voyage”, Lowndes (para 11.34-5) refers to examples of delays caused by ice conditions or strikes.*

Is express wording needed to deal with such contingencies and/or to clarify the situation when a delay arises from a second accident or the condition of cargo?

Argentina: No.

Belgium: General Average should terminate at the moment in which the vessel is ready to be put in an equivalent position, as if the casualty would have never occurred. If other accidents or problems will happen, external to the causative chain that stems out of the General average casualty, they need to be considered as a part of the entrepreneurial risk for Shipowners, that would otherwise be “over-protected” in respect to the other interests in the maritime adventure.

Brazil: This also should be left to the discretion of the adjuster, no need to change the rules.

Canada: No

China: Probably could not achieve

Croatia: No, in our opinion this is a matter of interpretation that will depend on the circumstances of each individual case.

Denmark: We think that Rule Paramount and Rule C give enough guidance for the Average Adjuster, but if a wording could clarify these situations with a definition of allowances under certain circumstances without being too narrow, we would support this.

Finland:

France: We do not see the interest of such question and this should be dealt on a strict case by case basis.

Germany: [IWG: See below]

Israel: We have no special comments to Sections 2, 3 and 4.

Italy:

Japan: No. As we understand the practice among the average adjusters has been established, there is no need to amend the current provisions.

The Netherlands: No. The Committee does not consider this to be necessary.

Norway: Foreseeable delay has often been allowed in GA and must be considered on a case by case basis.

Slovenia: Yes.

Spain: We do not see the need of covering this point expressly. This is an issue that would have to be examined by GA adjusters on a case by case basis.

Switzerland: Yes

Ukraine: No. It has to be decided by the adjuster in every particular case.

United Kingdom: For the reasons noted in several places, the BMLA can see no reason to be prescriptive and considers being so undesirable. Its view is that the resolution of the issue as to the causes of delay in proceeding with the voyage are best determined by the appropriate Court. It does not favour any change.

AAA: The Sub committee's view was that no change was needed

AMD: One of the dangers of clarification is that not all circumstances may be covered – in practice this rule seems to work well.

ICS/BIMCO: The preferred option is to maintain the current position. Nevertheless, if new wording is deemed to be appropriate, it must reflect the principles applied by adjusters and not be capable of narrow construction or unexpected results.

IUMI: There is a substantial difference in practice regarding the cost of detention of a vessel and cargo following termination of salvage services at a port of refuge or the cost of detention whilst security is being lodged for any other sort of claim (such as pollution or a cargo claim for example). Some American and European adjusters allow such detention under Rule XI while others, notably in England, tend not to, taking the view that as these issues are not specifically mentioned in Rule XI, they are governed by Rule C which says losses caused by delay are not recoverable in GA.

Clearly uniformity and clarity are desirable and a change in the wording of Rule XI should be made to reflect this.

Since the late provision of security is usually not the responsibility of all parties to the common maritime adventure, but only some, it may be argued that the loss should not fall on all parties equally. How such losses are allocated must be open for discussion: one view is that the owner should secure the cargo then exercise a lien at the discharge port for security for an indemnity; this may however not be possible in some countries. Another view is that the cargo owner who fails to lodge, for example, salvage security, thereby delaying the prosecution of the common maritime adventure, should be responsible to all other parties to the common maritime adventure for such delay unless he was given late notice of such requirement for security and gave security within a reasonable time of learning of the demand. Against this it would be pointed out that this could leave one small cargo interest having to bear the full cost of detaining a large ship and all its cargo which would be disproportionate.

IUMI's view is that all issues caused by delay should be excluded and should not be reintroduced in General Average. This would be consistent with the spirit of ICC "A" clause 4.5 which excludes losses caused by delay.

- 11.4 *Rules X(b) and XI(b) contain the proviso excluding allowances "when damage is discovered at a port or place of loading or call without any accident or other extra-ordinary circumstances connected with such damage having taken place during the voyage."*

Does the wording of this proviso (added in 1974) fulfil its intended purpose?

Argentina: Yes.

Belgium: It does.

Brazil: Yes

Canada: See our comment in regard to rule X, 10.2 above. Yes.

China: Yes

Croatia: In our opinion the wording of this proviso is clear and reasonable, and is in line with the principles of GA.

Denmark: Yes.

Finland:

France: We do not see the interest of such question and this should be dealt on a strict case by case basis.

Germany: [IWG: See below]

Israel: We have no special comments to Sections 2, 3 and 4.

Italy:

Japan: We consider the wordings of the provisos to Rules X(b) and XI(b) fulfill their intended purpose and they should not be changed.

The Netherlands: Yes. In the committee's view it does.

Norway: No change is required to Rules X(b) and XI(b).

Slovenia: Yes.

Spain: Yes.

Switzerland: No – I find the provision superfluous.

Ukraine: Yes.

United Kingdom: The BMLA believes the proviso achieves its intended purpose.

AAA: Ditto

AMD: Yes.

ICS/BIMCO: ICS and BIMCO consider that the wording is clear and that this assessment should be left with the average adjusters.

IUMI: The question asks whether the wording of the proviso to Rules X(b) and XI(b) fulfil their intended purpose: IUMI believes they do and that they should not be changed.

11.5 *The introduction of Rule XI(d) was the most significant feature of the 1994 Rules.*

a) *Is there any need to change the overall basis of the compromise between property/liability insurers reflected in the XI(d)?*

Argentina: No.

Belgium: No.

Brazil: No

Canada: No

China: Complex issue with no comments

Croatia: No.

Denmark: Pollution is outside the scope of the York Antwerp Rules.

Finland: No changes are needed.

France: We do not see the interest of such question and this should be dealt on a strict case by case basis.

Germany: [IWG: See below]

Israel: We have no special comments to Sections 2, 3 and 4.

Italy:

Japan: No. The current Rule XI(d) is the part of the so-called "Sydney compromise" adopted at the 1994 CMI Conference at Sydney based on the carefully negotiated and well-balanced compromise between property underwriters and liability underwriters. It is not appropriate to amend a part of the so-called "Sydney compromise" without the compelling need.

The Netherlands: No.

Norway: No changes are required to the wording of Rule XI(d).

Slovenia: No.

Spain: No.

Switzerland: Yes

Ukraine: No.

United Kingdom: No change is considered to be necessary.

AAA: The Sub Committee thought this was not really a question for average adjusters, given that it reflects a compromise between property and liability insurers.

AMD: No.

ICS/BIMCO: No.

IUMI: [IWG: See below]

b) Have you encountered any difficulties in the application or wording of XI(d)?

Argentina: No.

Belgium: No.

Brazil: No

Canada: No

China: Yes

Croatia: No.

Denmark: No.

Finland: No changes are needed.

France: We do not see the interest of such question and this should be dealt on a strict case by case basis.

Germany: [IWG: See below]

Israel: We have no special comments to Sections 2, 3 and 4.

Italy:

Japan: No.

The Netherlands: No.

Norway: No.

Slovenia: No.

Spain: No.

Switzerland: No known difficulties at this stage.

Ukraine: No.

United Kingdom: See below.

AAA: See d) below. In all other aspects the Sub Committee noted that consideration of Rule XI(d) often involved significant sums and that therefore some disputes were inevitable. However, attempts to amend the wording might prove counter-productive and give rise to fresh differences in interpretation.

AMD: No.

ICS/BIMCO: No.

IUMI: [IWG: See below]

- c) Do the words “actual escape or release” need to be qualified as in Rule C with the words “from the property involved in the common maritime adventure”, or in any other way?

Argentina: Yes. This clarification can help.

Belgium: No. The rule, applied with logic, it is self-explanatory.

Brazil: No

Canada: We do not object to the wording, but it is not necessary.

China:

Croatia: No.

Denmark: No, we do not think so.

Finland: No changes are needed.

France: We do not see the interest of such question and this should be dealt on a strict case by case basis.

Germany: [IWG: See below]

Israel: We have no special comments to Sections 2, 3 and 4.

Italy:

Japan: No. As it is clear that the wordings "an actual escape or release" should be interpreted consistently with the wordings of Rule C, there is no need to include the wordings "from the property involved".

The Netherlands: The suggested qualification seems useful.

Norway: The suggested additional wording of "from the property involved in the common maritime adventure" may lead to the conclusion that if there is escape or release from other property than those involved in the maritime adventure, then allowance must be given in GA. An example would be if a vessel hits and damages a pipeline with the result of escaping oil. Hence, we recommend keeping the current wording.

Slovenia: No.

Spain: We would not oppose to it, although this provision and Rule C should be read jointly, and it could be implicitly understood that the words "actual escape or release" are referring to "the property involved in the common maritime adventure".

Switzerland: Yes, for the sake of clarity.

Ukraine: It's possible.

United Kingdom: No change is necessary.

AAA: Agree

AMD: This might be a wise clarification.

ICS/BIMCO: No.

IUMI: [IWG: See below]

d) *Should sub-paragraph (iv) include reference to bunkers as well as cargo?*

Argentina: Yes.

Belgium: It should.

Brazil: Yes

Canada: Yes

China: No

Croatia: Yes.

Denmark: Yes, in order to avoid doubt.

Finland: No changes are needed.

France: Such question should have a further analysis, notably in respect of the Bunker Convention (International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001) and the mandatory insurance to be taken by the Owner.

Germany: [IWG: See below]

Israel: We have no special comments to Sections 2, 3 and 4.

Italy:

Japan: No. It is not appropriate to amend the only one section of so-called "Pollution compromise" between property underwriters and liability underwriters as mentioned in 11.5 a) above.

The Netherlands: Yes. The Committee suggests that the same wording is applied as in Rule Xb, so "cargo, fuel and stores".

Norway: We find it logical to also include bunkers in this rule.

Slovenia: No.

Spain: We would not oppose to it.

Switzerland: Yes

Ukraine: No need.

United Kingdom: The BMLA does not consider a reference to bunkers is necessary, the issue in each case being safely left to the interpretation and implementation of Rule A. The Rule could, however, be usefully clarified by inserting words such as "handling on board" to cover the situation where cargo may be moved on board but not discharged.

AAA: Sub Rule XI(d)(iv) should be amended to read:
"necessarily in connection with the handling, discharging, storing or reloading of cargo or bunkers whenever the cost of those operations is admissible as general average".

AMD: Yes.

ICS/BIMCO: Yes (if it is agreed that other amendments should be made to YAR 1994).

IUMI: [IWG: See below]

IUMI: The 1994 Pollution Compromise made in Sydney between MPUs and P&I insurers is important. Rule C YAR 1994 & 2004 states:

"In no case shall there be any allowance in general average for losses, damages or expenses incurred in respect of damage to the environment or in consequence of the escape or release of pollutant substances from the property involved in the common maritime adventure".

Rule XI(d) acts as a kind of buy-back for the types of pollution loss listed specifically therein. MPUs who cover GA liabilities adjusted under YAR 1974 may find that they cover a portion of pollution liabilities if they fall within Rule A, but under YAR 1994 and 2004 this is not possible except in the very limited circumstances that Rule XI(d) describes. It is important for MPUs that the balance that was achieved in Sydney is not disturbed and for this reason IUMI believes no change is required to Rule XI(d). The wording is largely trouble free and there is no need to include any reference to bunkers in it.

Germany: The German MLA regrets that - so far - it could not find an agreement with regard to the key issues on inclusion or exclusion of salvage remuneration in GA settlements (Rule VI), or on inclusion or exclusion of wages and maintenance of crew in GA at a port of refuge, when the common danger has been overcome (Rule XI).

The adjusters and the shipowners represented in the German MLA are in favour of the inclusion of salvage and of wages and maintenance in ports of refuge – also on grounds of practicability and costs, but moreover in order to achieve an equal treatment of interests. The inclusion of these costs in GA would conform to the “common benefit”-principle and this is regarded as a very important reason to include salvage remuneration and wages and maintenance costs in ports of refuge, as it is the case in YAR 1994.

The insurers represented in the German MLA would favour the YAR 2004 with regard to these questions. In their opinion, the inclusion of salvage remuneration would result in a delay in the procedure of GA settlements and an increase of costs of the insurers. The inclusion of crew costs in ports of refuge would, in their opinion, favour the shipowner because – as they argue, the party interested in the good could also not deduct a financial loss, such as a reduction in value of the good because of a delay of the voyage. They further argue that an inclusion of financial loss of both parties would result in undue delay of GA settlements.

12. RULE XII

No known issues

Argentina: No comments.

Belgium:

Brazil:

Canada: OK

China:

Croatia:

Denmark: No issues.

Finland:

France:

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: There is no indication of requests for revision.

Japan:

The Netherlands: No comments.

Norway: No comment.

Slovenia:

Spain: Not applicable.

Switzerland:

Ukraine: Nothing.

United Kingdom: Not applicable.

AAA: No change

AMD: No comments.

ICS/BIMCO:

IUMI: No comment

13. RULE XIII

No known issues

Argentina: No comments.

Belgium:

Brazil:

Canada: We believe there is an issue with regard to rule XIII (c) as it relates to blasting and painting the bottom. We believe that this rule is redundant.

China:

Croatia:

Denmark: No issues.

Finland:

France:

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: There is no indication of requests for revision.

Japan:

The Netherlands: No.

Norway: No comment.

Slovenia:

Spain: Not applicable.

Switzerland:

Ukraine: Nothing.

United Kingdom: Not applicable.

AAA: No change

AMD: In the interests of modernization and simplification, consideration might be given to the abolition of this rule. In any event it is considered that the final part relating to cleaning and painting is technically out of date.

ICS/BIMCO:

IUMI: No comment

14. RULE XIV

14.1 *The 1994 and 2004 Rules deal with temporary repairs for the common safety and for sacrificial damage in the same way. The 2004 adopted a different approach which gives priority to Particular Average savings as illustrated by these figures:-*

<i>Actual temporary repair cost.....</i>	<i>US\$100,000</i>
<i>Actual permanent repair cost.....</i>	<i>500,000</i>
	<hr/>
	<i>US\$600,000</i>
	<hr/>

Estimated permanent repair cost at the port of refuge:-

- a) *US\$600,000 – no allowance.*
- b) *US\$550,000 – this is less than the combined actual costs so that US\$50,000 can be considered for allowance in General Average, subject as before to savings. On the basis of the figures used above, the US\$50,000 could be allowed in full, given savings of say US\$75,000 in port charges and other detention expenses.*

Any reduction in General Average allowances under this wording would be met as part of the Particular Average claim, subject to the deductible and assuming the vessel to be insured.

Do you consider the 2004 version should be retained?

Argentina: No. This is part of the Adjuster`s analysis.

Belgium: As a general rule, according with the ratio of General Average, no temporary repairs that form part of subsequent permanent repairs should be allowed. On the other hand, every temporary repair that permits the prosecution of the voyage, without indirectly 'helping' the eventual permanent repair, should be allowed under YAR rules. So the answer is 'yes', cargo interests emphasize, i.e. the amendment to this Rule as per YAR 2004 should be retained for them.

Brazil: Yes

Canada: Yes

China: Not to retain the 2004 version

Croatia: Yes.

Denmark: Yes, retain the 2004 version.

Finland:

France: We think 2004 version should be retained but we have no problem with such question.

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: Same comment as per paragraph 11 above. It should be noted that Rule Paramount is already limiting many borderline cases of admission for temporary repairs at a port of refuge (this has no consequences for the owners, and there is therefore no objection on their part, because it shifts the admission on the particular average).

Japan: As the saving of costs of the permanent repairs are purely shipowners' benefit, such a saving should be dealt as particular average (namely hull underwriters should pay such a saving). We consider that it is appropriate to retain the position in YAR2004.

The Netherlands: No. In the opinion of the Committee, the YAR 1994 provision is clearer and causes less difficulties in the calculation.

Norway: This is against the principle in Rule F that no savings are to be taken into account. We therefore recommend to use the 1994 solution.

Slovenia: Yes.

Spain: Yes, we think that the 2004 should be retained.

Switzerland: No particular opinion at this time.

Ukraine: 2004 should be retained.

United Kingdom: The BMLA supports the retention of the 2004 Rule.

AAA: The 2004 amendment should be retained since this was felt to produce a more equitable result when the cost of particular average repairs can differ so widely according to location.

AMD: No objection to the 2004 change.

ICS/BIMCO: ICS and BIMCO support the YAR 1994 version.

IUMI: Under the YAR 1994 the cost of temporary repairs of a ship at a port of refuge relating to damage suffered for the common safety or caused by a GA sacrifice is allowed in GA. Under the 2004 YAR this does not change. However the position in relation to temporary repairs of accidental damage is treated differently. Under the 1994 YAR they are allowed “without regard to the saving, if any, to other interests, but only up to the saving in expense which would have been incurred and allowed in GA if such repairs had not been effected there”. To this, YAR 2004 added the following proviso:

“Provided that for the purposes of this paragraph only, the cost of temporary repairs falling for consideration shall be limited to the extent that the cost of temporary repairs effected at the port of loading, call or refuge, together with either the cost of permanent repairs eventually effected or, if unrepaired at the time of the adjustment, the reasonable depreciation in the value of the vessel at the completion of the voyage, exceeds the cost of permanent repairs had they been effected at the port of loading, call or refuge”.

The effect of this amendment is that the recovery of the cost of temporary repairs of accidental damage (but not repairs for the common safety or of damage caused by a GA sacrifice) at a port of refuge is limited to the amount by which the cost of the permanent repairs at the port of refuge exceeds the sum of the temporary repairs plus the permanent repairs actually carried out (or, if none, the depreciation in the vessel’s value at the completion of the voyage).

The capping of the amount allowed as temporary repairs in this manner is sometimes called the “Baily” method. The clause is supposed to address the complaints sometimes voiced by cargo interests that although they have contributed to the cost of temporary repairs at a port of refuge thus enabling the shipowner to repair at a much cheaper repair port than the port of refuge, the cargo interests get no benefit from the saving to hull interests in the reduction of the GA claim.

There will not be very many cases when the proviso will come into operation but in the few cases each year when it will, there will be a significant redistribution of money. It is hard to put an average value on the amount that this amendment gives to MPUs but it will probably be no more than 1%.

IUMI does not believe that any change is justified in the wording of Rule XIV YAR 2004.

- 14.2 *The House of Lords judgement in the “Bijela” was handed down only shortly before the Sydney Conference on 1994. Have you encountered any practical difficulties regarding the application of Rule XIV, there having been no reported litigation since 1994?*

Argentina: No.

Belgium: No.

Brazil: No

Canada: No

China:

Croatia: No.

Denmark: No.

Finland:

France: We have no problem with such question.

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy:

Japan: We have not encountered any practical difficulties regarding the application of Rule XIV in the aftermath of the House of Lord's decision in the "Bijela"[1992]1 Lloyd's Rep 636.

The Netherlands: No. The Committee has not encountered practical difficulties.

Norway: We have not encountered any practical difficulties regarding the application of Rule XIV after the Bijela.

Slovenia: No.

Spain: No.

Switzerland: No

Ukraine: No.

United Kingdom: The BMLA notes that average adjusters report no particular difficulties with interpretation of Rule XIV since the decision in the "Bijela".

AAA: No difficulties in practice noted

AMD: No practical difficulties encountered.

ICS/BIMCO: Not to our knowledge.

IUMI: IUMI's members have not encountered any practical difficulties regarding the application of Rule XIV in the aftermath of the House of Lords' decision in the "Bijela" [1992] 1 Lloyd's Rep 636.

15. RULE XV

No known issues.

Argentina: No comments.

Belgium:

Brazil:

Canada: OK

China:

Croatia:

Denmark: No issues.

Finland:

France:

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: There is no indication of requests for revision.

Japan:

The Netherlands: No.

Norway: No comment.

Slovenia:

Spain: Not applicable.

Switzerland:

Ukraine: Nothing.

United Kingdom: Not applicable.

AAA: No issues

AMD: No comments.

ICS/BIMCO:

IUMI: No comment.

16. RULE XVI

This Rule provides for cargo sacrifices to be determined “at the time of discharge”. Modern transportation involves cargo being carried under one contract of carriage from the port of shipment by sea to a port of discharge and thence by road or rail to an inland destination for delivery to the consignee under a through Bill of Lading. The commercial invoice referred to in the Rule and Rule XVII will include the freight and insurance cost of the whole journey and will not normally be shown broken down between the different sea and land transits. For practical reasons average adjusters have normally, since such multimodal transport became common, adopted CIF values at the time and place of delivery in terms of the invoice; this is frequently the inland destination. They acknowledge that this practice is not strictly in accordance with the wording of the Rules. The practical reasons for its adoption are the great difficulty and consequent cost of determining in these circumstances what the value “at that time of discharge” is.

Should the relevant wording be changed to “at the time of delivery under the contract of carriage”, or should both phrases be included, allowing the adjuster to decide the most equitable basis?

(The point also arises with regard to the same wording found in Rule XVII.)

Argentina: No.

Belgium: Yes, both phrases should be included and it is advisable to allow Adjusters to assess and apply the most equitable solutions.

The RBSA favour the retention of the present wording, though no firm position at this stage.

Brazil: Yes, phrases should be included, allowing the adjuster to decide the most equitable basis.

Canada: No

China: Not to change.

Croatia: Both phrases should be included, allowing the adjuster to decide the most equitable basis.

Denmark: No change of the wording.

Finland: The proposed clarification is supported. The main thing is that there is a clear rule that also covers multimodal transport and the practical relation to the invoice referring to the respective cargo. The wording “at the time of delivery under the contract of carriage” is as such sufficient and it is understood in this case to cover both liner and comparable trade as well as voyage chartering. It thus covers both single mode sea carriage and multimodal carriage. No equitable addition is necessary, even if there might at times be a slight inappropriate basis for the value.

France: This suggestion should permit to simplify the discussion on GA.

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: In practice, reference is made to the invoice CIF value of the goods, i.e. almost invariably the value at destination (except of course, for goods in bulk, the separation in various lots and the sale in domestic market). There is no indication of objections to this approach. An amendment which takes into account the current practice could be nonetheless useful.

Japan: We understand that the amount to be allowed as general average for damage to or loss of cargo sacrificed has been practically based on the value at the time of the delivery under the contract of carriage without exception. Therefore, it would be appropriate to change the relevant wordings (“at the time of discharge”) to “at the time of delivery under the contract of carriage” in Rules XVI and XVII.

The Netherlands: In the Committee’s opinion, the wording should not be changed. The condition of the cargo upon discharge from the vessel after the sea carriage should be taken into account.

Norway: No proposed amendment.

Slovenia: No.

Spain: We deem that both phrases should be included, allowing the adjuster to decide the most equitable basis on a strict case by case basis.

Switzerland: This should be changed to "the time of delivery under the contract of carriage" only.

Ukraine: We agree with the proposal only if it relates to multimodal transportation of goods.

United Kingdom: The amendment suggested it seems appropriate to the BMLA. The BMLA is also aware of a suggestion by the AAA that a further amendment be made to the effect that the commercial invoice shall be deemed to reflect the value of the cargo at the time of discharge irrespective of the place of final delivery under the contract of carriage. The BMLA considers this a sensible proposal.

AAA: The Sub Committee suggests the insertion of the following sentence after the words, "shipped value" in para 1:
"Such commercial invoice shall be deemed to reflect the value at the time of discharge irrespective of the place of final delivery under the contract of carriage"

AMD: This amendment is supported as it gives effect to general practice.

ICS/BIMCO: If it is agreed that other amendments should be made to YAR 1994, this amendment could be supported.

IUMI: The questionnaire raises an important point about the calculation of cargo values on the basis of invoices which increasingly often now cover the cost of carriage before and/or after the sea voyage. The effect of multimodal transport invoices will be that a proportion of cargo values and sums made good are overestimated in some adjustments. However, there seems little that can be done about this in practice as there is no easy way of separating the non-sea voyage carriage costs from the costs of the sea voyage in most invoices. In the circumstances IUMI cannot really see how an improvement can be made to Rule XVI in practice.

17. RULE XVII

AAA: The Sub Committee further suggests the insertion of the following sentence after the words, "shipped value" in para 1:
"Such commercial invoice shall be deemed to reflect the value at the time of discharge irrespective of the place of final delivery under the contract of carriage"

17.1 *Clause 15 of LOF 2011 LSSA Clauses expressly allows the Arbitrator to disregard low value cargo when "the cost of including such cargo in the process is likely to be disproportionate to its liability for salvage."*

Adjusters have similarly excluded low value cargo when appropriate as a matter of good practice, but would it be useful to have an express sanction for doing so in the Rules?

Argentina: No. This should be part of the Adjuster practice.

Belgium: It could be useful to have an express proviso, on this regard, without expressly stating a minimum threshold or quantity, rather pointing out the necessity to make a decision that would be money-wise and time saving.
The RBSA think this is a practical approach which is best left to the average adjuster.

Brazil: The allowance to exclude low value cargo should be expressly authorized.

Canada: No

China: Not necessary. This could leave the adjuster to decide basing on situation of different cases. Express wording in the Rule might have made confusion in collecting the security.

Croatia: Yes.

Denmark: As it is difficult to define low value cargo, it should be left to the discretion of the Average Adjuster.

Finland: It is true that low value cargo might be a problem. One example is sample cargo for receivers that might have a nominal value, but should not contribute. In principle it might be useful to have a specific provision in the YAR on disregarding low value cargo, but how would this be defined. "Low value cargo" as wording might provide a flexible rule to be decided in casu.

France: We should have a more practical approach based on a case by case analysis on this subject.

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: There is no indication in the Italian practice of exclusions of low value cargo just because it would be too complex or expensive to find out the value. If anything, reference is made to estimates or average values based on experience (for instance the value of the container boxes). The only known examples concerns cargo actually deprived of commercial value on account of their final destination (es. 'charity goods').

Japan: If low value cargoes shall be excluded from contributory value in casualties of large container ships where a great number of parties interested in the huge volume of cargoes are involved, time and costs necessary for the adjustment including those to be taken for collecting GA securities will be reduced considerably. Therefore, we support the suggestion in the questionnaire. However, it is necessary to consider how to provide for in details.

The Netherlands: No. In the Committee's opinion, it is preferred to leave it up to the adjuster's discretion.

Norway: We recommend using the same wording as that included in LOF 2011.

Slovenia: Yes.

Spain: Yes.

Switzerland: Yes

Ukraine: No. We propose to leave it at the discretion of the adjuster.

United Kingdom: Not applicable.

AAA: The Sub Committee felt that it was not necessary to enshrine the discretion they now exercise in a specific provision in the Rules.

AMD: Yes – It would deal with a divergence of international practice.

ICS/BIMCO: No, this is a practical approach which is best left to the average adjuster.

IUMI: IUMI is in favour of the removal of the allowance for amounts paid in salvage from the calculation of contributory values of ship and cargo in general average for the reasons described in relation into Rule VI above.

17.2 *Claims for deductions from contributory values of cargo may be made because of loss of a seasonal market or (for example) losses caused by the need to purchase a replacement item for a time sensitive contract. Rules C refers to losses by delay but only in the context of making allowances, not the calculation of contributory values.*

Is this an area where clarification is required?

Argentina: No.

Belgium: It is not requiring further clarifications.

Brazil: Yes

Canada: See our comment to rule C question 3.1 above.

China: The change in 1974 to use the CIF invoice value was for simplicity. Any amendment which would have increase the adjuster's works might be considered to be contrary to the original intention.

Croatia: No.

Denmark: No, not necessary as it seems uncertain how such a deduction can be made, unless it is a result of a damage or a special charge.

Finland:

France: This question arises some difficulties in respect of the carriage contract and the cargo insurer.

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy:

Japan: "Loss of market" and "loss caused by delay" depend on the conditions of the terms or the contract and they are very difficult to monetarily evaluate. Provisions in YAR1994 and YAR2004 should be retained.

The Netherlands: No.

Norway: No need for change.

Slovenia: Yes.

Spain: Yes.

Switzerland: Yes

Ukraine: No.

United Kingdom: Not applicable.

AAA: Having considered various scenarios capable of giving rise to possible inequities (eg Christmas trees arriving in January), the Sub Committee took the view that the introductory words of the Rule (enjoining the average adjuster to adopt the “actual net values of the property”) may be employed to justify the exercise of discretion in cases in which a strict adherence to the invoice value is considered to result in inequity. The Sub Committee noted that the introduction of the invoice value as the yardstick in 1974 was intended as a measure to reduce time and costs rather than a departure from the general principle of property contributing on the basis of its arrived value. They considered that this discretion should remain in place but that any attempt to codify individual possible exceptions might prove to be unnecessarily prescriptive.

AMD: Whilst it is generally considered that no clarification is required there has been a suggestion that an express exclusion might be of practical assistance in dealing with parties less familiar with the Rules.

Members of the WG have not encountered the specific difficulty in practice but recognize that clarification could be desirable, in which case we would propose the following wording:

“The value of the cargo shall include the cost of insurance and freight unless and insofar as such freight is at the risk of interests other than the cargo, deducting therefrom any physical loss or damage suffered by the cargo prior to or at the time of discharge; *no deduction shall be made for loss of market, and any loss or damage sustained or expense incurred by reason of delay, whether on the voyage or subsequently, or any indirect loss whatsoever.*”

ICS/BIMCO: No.

IUMI: IUMI is in favour of the removal of the allowance for amounts paid in salvage from the calculation of contributory values of ship and cargo in general average for the reasons described in relation into Rule VI above.

18. RULE XVIII

No known issues.

Argentina: No comments.

Belgium:

Brazil:

Canada: OK

China:

Croatia:

Denmark: No issues.

Finland:

France:

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: There is no indication of requests for revision.

Japan:

The Netherlands: No comments.

Norway: No comment.

Slovenia:

Spain: Not applicable.

Switzerland:

Ukraine: Nothing.

United Kingdom: Not applicable.

AAA: No issues

AMD: Prior to 1994 it was discovered and debated at length by the AIDE committee that the apportionment of drydock dues etc varied from country to country – is this an issue that should be dealt with in the Rules?

ICS/BIMCO:

IUMI: No comment.

19. RULE XIX

No known issues.

Argentina: No comments.

Belgium:

Brazil:

Canada: OK

China:

Croatia:

Denmark: No issues.

Finland:

France:

Germany:

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: There is no indication of requests for revision.

Japan:

The Netherlands: No comments.

Norway: No comment.

Slovenia:

Spain: Not applicable.

Switzerland:

Ukraine: Nothing.

United Kingdom: Not applicable.

AAA: No issues

AMD: No comments.

ICS/BIMCO:

IUMI: No comment.

20. RULE XX

In the discussions at the Vancouver Conference (2004) it was argued strongly that payment of commission could no longer be justified under modern banking practices, and the 2004 Rules no longer provide for such allowances.

Do you consider that the 2004 position should be maintained in 2016?

Argentina: No. The Commission is an incentive for the Shipowner to spend his own money for the common safety, even if the vessel is seriously damaged.

Belgium: It would be reasonable and equitable to take the payment of such commissions out of the frame of General average. YAR 2004 abolished commission on GA

disbursements, thereby removing the incentive for the shipowner to initially fund GA cases. Shipowners have commented that the position under YAR 1994 should be maintained.

Cargo interests underline that whereas interests (at high percentage – see also 21 Rule XXI)) and costs are already allowed in GA, such commissions form an unjustified duplication of costs and a reason for time consuming disputes.

Brazil: Yes

Canada: Yes

China: Yes. Delete the allowance for commission.

Croatia: Yes.

Denmark: Yes, ok to leave commissions out of the York Antwerp Rules.

Finland: The commission rule included in the YAR 1994, but not in the YAR 2004, should be retained. There is additional commitment to deal with general average disbursements entitling to commission coverage, in turn, to be considered in GA.

France: Yes, we think this should be maintained and that commission should not be allowed under GA.

Germany: The German MLA has discussed if the Commission should be maintained. Arguments in favor of maintenance and of non-maintenance were exchanged. If the majority of stakeholders favours to no longer provide for such allowances, the working group of the German MLA has so far not regarded this issue to be crucial for rejection or acceptance of amended YAR but welcomes further discussions on this issue.

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: In terms of financial logic and fairness the proposed deletion is indeed justified. One should however realistically acknowledge that such a provision, along with the fixed interests rate under the Rule XXI of the YAR 1994 is one of the reasons why YAR 1994 are favored by owners who usually anticipate the costs of general average, and is conversely one of the reasons for the failure of YAR 2004.

Japan: The position of YAR2004 should be retained.

The Netherlands: Yes. In the Committee's opinion, commission is out dated.

Norway: This rule must be considered in connection with Rule XXI. Commission could be excluded if the interest level is high enough to act as an incentive for parties to pay the costs and not suffer economically if for instance a bank loan is necessary to fund the expenses.

Alternatively the commission could be kept at 1% if interest is kept at a low level.

Slovenia: Yes.

Spain: Yes, we think that the 2004 position should be maintained.

Switzerland: Yes

Ukraine: Yes.

United Kingdom: The BMLA's view is that the issue of commission on disbursements and interest could be usefully merged, the objective being to provide fair compensation for the funding GA expenditure. Although there are differing views, the BMLA agrees, on balance that a fixed rate of interest may be too inflexible. However, if there is to be a variable rate set annually, the BMLA considers that the criteria to be applied in determining any composite rate and the body charged with the task of so doing, are matters which need to be reviewed and debated.

AAA: The Sub Committee considered that this was a question for commercial interests

AMD: Whilst it is generally considered that the allowance of commission is outmoded, it is recognized that it may act as an incentive to a shipowner to assume small salvage costs.

ICS/BIMCO: The position under YAR 1994 should be maintained. Commission on GA disbursements is necessary if parties wish to avoid delay, as it provides an incentive for the shipowner to initially fund GA cases.

IUMI: Rule XX(a) YAR 1994 entitles parties to a commission of 2% on disbursements except crew wages and maintenance and fuel and stores not replaced during the voyage. Commission on GA disbursements was abolished in the YAR 2004.

At the CMI's Conference in Vancouver IUMI argued that commission merely duplicated interest and that most administrative costs such as communications, travel, bank charges etc. are already included in adjustments in practice quite often based on an adjuster's estimate. Originally commission was supposed to act as an incentive to the shipowner to put up money for GA disbursements. Then the 1924 YAR introduced interest on GA disbursements for the first time. With the emergence of the practice of allowing administrative costs in addition to interest it was felt that commission was a duplication and had no part to play. This argument met with very little opposition at Vancouver and accordingly Rule XX(a) YAR 1994 was omitted from the YAR 2004.

IUMI believes that the requirement to pay commission should not be included in the next set of YAR.

21. RULE XXI

21.1 *It appeared to be common ground at Vancouver that a fixed rate of interest was too inflexible over the life of a version of the YARs and that a variable rate, set annually by CMI, should be preferred.*

Do you remain of this view?

Argentina: Yes.

Belgium: Indeed a fixed rate it is not reflecting the reality of the interests trend, making the rate itself very often disproportioned and unfair.

Brazil: The guidelines of the CMI should be maintained.

Canada: Yes

China: Agree to use floating rate.

Croatia: Yes.

Denmark: Yes, we do.

Finland: Interest rates are very important economic factors. A reasonable system should be found, but it is uncertain whether the factual rates indicated in the Questionnaire reflect this. A further study of options to improve this aspect of the YAR would seem necessary.

France: We think such question should be maintained.

Germany: The German MLA supports a flexible handling of the interest rate in Rule XXI. In our opinion, a base interest rate, for instance LIBOR, and additionally a flexible interest rate seem to be preferable.

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: In terms of financial logic and fairness the proposed deletion is indeed justified. One should however realistically acknowledge that such a provision, along with the fixed interests rate under the Rule XXI of the YAR 1994 is one of the reasons why YAR 1994 are favored by owners who usually anticipate the costs of general average, and is conversely one of the reasons for the failure of YAR 2004.

Japan: We still consider that a fixed rate of interest is too inflexible and a variable rate should be preferred.

The Netherlands: Yes. In the Committee's opinion the rate of interest should reflect the costs incurred in a commercial basis and should not be of extraordinary detriment or benefit to either of the parties.

Norway: Yes, a variable interest rate system as introduced by the YAR 2004 should be maintained.

Slovenia: Yes.

Spain: Yes, we support such view. Maintaining a fixed rate would only create unnecessary inflexibility.

Switzerland: Yes

Ukraine: Yes.

United Kingdom: The BMLA's view is that the issue of commission on disbursements and interest could be usefully merged, the objective being to provide fair compensation for the funding GA expenditure. Although there are differing views, the BMLA agrees, on balance that a fixed rate of interest may be too inflexible. However, if there is to be a variable rate set annually, the BMLA considers that the criteria to be applied in determining any composite rate and the body charged with the task of so doing, are matters which need to be reviewed and debated.

AAA: [IWG: See below]

AMD: It is agreed that a fixed rate of interest is inappropriate. However, we are not convinced that the CMI setting the rate annually in the way that they do is appropriate; see below.

ICS/BIMCO: If there is agreement to have a variable interest rate, determined each year by the CMI Assembly, consideration should be given to amending the Guidelines for the

CMI Assembly for fixing the rate of interest to ensure that the commercial rate of borrowing money and the availability of funds are taken into account.

IUMI: Interest under YAR 1974 and 1994 is charged on GA expenditure, sacrifices and allowances at the rate of 7% per annum. Under the YAR 2004 the interest rate is fixed each year by the Assembly of the CMI and published on their website at www.comitemaritime.org. Between January 2005 and December 2013 the rate has varied between 2.75% (2013) and 6% (2009) averaging 4.3125%. Accordingly this represents an average saving of 2.6875% each year between 2005 and 2013 on sums moved in GA. For this reason it is clearly in the MPUs' best interests to maintain the variable interest rate system introduced by the YAR 2004. Clearly this benefit will disappear should interest rates climb above 7%. IUMI nevertheless wishes to maintain the treatment of interest introduced by the YAR 2004.

21.2 *The Vancouver conference agreed guidelines for the CMI Working Group responsible, essentially that the rate should be "interest applicable to moneys lent by a first class commercial bank to a shipowner of good credit rating." Since then the rates have been set out as follows:-*

2005.....	4.50%
2006.....	4.50%
2007.....	5.50%
2008.....	5.75%
2009.....	6.00%
2010.....	4.00%
2011.....	3.00%
2012.....	3.00%
2013.....	2.75%

While agreeing with the principle of flexible rates, some shipowners have expressed concern that the rates adopted are unrealistic in the current climate when bank lending is extremely tight and sentiment is against the credit-worthiness of the shipping industry, however reputable individual owners may be.

Do you have any proposals to assist with the setting of annual interest rates?

Argentina: No.

Belgium: As it happens in other commercial branches, it should be found a system of indexation, that could dynamically follow the trends in the credit market. The interest rate, applied to General average, cannot become an undeserved method of enrichment for the beneficiary party (normally Shipowners). The interest rate determination, cargo interests state, should take into account the currency of the Adjustment and the set standard interest rates such as LIBOR etc...

The RBSA are of the view that if there is an agreement to have a variable interest rate, determined each year by the CMI Assembly, consideration should be given to amending the Guidelines for the CMI Assembly for fixing the rate of interest to ensure that the real cost of borrowing money and the availability of funds are taken into account.

Brazil: No, maintain the CMI rates.

Canada: No

China: Leave CMI to consider the complex factors in publishing the rate for the year.

Croatia: No.

Denmark: The rate could be "... to a shipowner of a good average credit rating".

Finland: Interest rates are very important economic factors. A reasonable system should be found, but it is uncertain whether the factual rates indicated in the Questionnaire reflect this. A further study of options to improve this aspect of the YAR would seem necessary.

France: We think such question should be maintained.

Germany: The German MLA supports a flexible handling of the interest rate in Rule XXI. In our opinion, a base interest rate, for instance LIBOR, and additionally a flexible interest rate seem to be preferable.

Israel: We have no special comments to Sections 2, 3 and 4.

Italy:

Japan: We have no proposal to assist with the setting of annual interest rates, but would be prepared to consider the better proposal if it is offered.

The Netherlands: The rate of interest should be set at a percentage which reflects a fair balance between debit and credit interest in order to reflect the actual costs. The Committee doubts that the interest percentage applied to 'a shipowner of a good credit rating' reflects the actual situation.

Norway: We propose to maintain the guidelines issued with YAR 2004.

Slovenia: No.

Spain: No, we agree with the principle of flexible rates and with the above guidelines agreed at the Vancouver conference.

Switzerland: Adoption of interest rate as determined by CMI General Assembly to represent a meaningful average of a basket of long term borrower interest rate of main global financial centres (e.g. Frankfurt, Singapore, London, New York and Zurich).

Ukraine: No.

United Kingdom: The BMLA's view is that the issue of commission on disbursements and interest could be usefully merged, the objective being to provide fair compensation for the funding GA expenditure. Although there are differing views, the BMLA agrees, on balance that a fixed rate of interest may be too inflexible. However, if there is to be a variable rate set annually, the BMLA considers that the criteria to be applied in determining any composite rate and the body charged with the task of so doing, are matters which need to be reviewed and debated.

AAA: [IWG: See below]

AMD: There are two concerns regarding the method adopted by the CMI to establish the annual rate. Firstly, the rate is based on interest charged by first class commercial banks to shipowners with a good credit rating. As noted in the questionnaire this results in a rate which is not realistic for many shipowners or indeed cargo owners.

Secondly, the CMI establishes the rate some months in advance of the date from which it runs which is unsatisfactory.

It is recognized that there is no easy solution to the problem of establishing interest rates particularly now that LIBOR has been tarnished. However, the utilization of SDRS as the currency of adjustment has an inbuilt advantage that SDRS have their own interest rate which could be adopted in some form for the purpose of this Rule.

ICS/BIMCO: If there is agreement to have a variable interest rate, determined each year by the CMI Assembly, consideration should be given to amending the Guidelines for the CMI Assembly for fixing the rate of interest to ensure that the commercial rate of borrowing money and the availability of funds are taken into account.

IUMI: There is pressure to increase the rate of interest on GA disbursements by calculating it in another way on the grounds that shipowners often pay more to borrow money than borrowers in other lines of business. The Assembly of the CMI is obliged to fix the rate in accordance with guidelines. Briefly they should start from one year US Dollar loans but if the rate of interest for one year loans in Sterling, Euros or Japanese Yen differs substantially from the interest rate applying to one year loans in US Dollars this should be "taken into account". IUMI believes the present Guidelines are both logical and fair and wishes to maintain them as they are. Accordingly the answer to Question 21.2 is "no". However if the amendment described in Section 1, paragraph 11(b) (that all G.A. adjustments should be done in one currency) were to be adopted then regard could be had to that currency's interest rates exclusively.

AAA: The Sub Committee was content that the interest rate to be applied by YAR should be fixed annually by a working group of CMI but felt the following changes were necessary:

- a. The criteria for arriving at the rate should aim not at what might be available to a "shipowner of good credit rating" but to the shipping industry in general, and ought, in equity, to also take into account additional costs of raising money, such as arrangement fees etc.
- b. The commercial realism of the working group should be encouraged by including in its membership members of the ship owning, cargo owning and banking professions

The Sub Committee further considered the possibility of using SDRs as the currency of adjustment but concluded that the choice of an adjustment currency might better be left to the insertion of such a provision in the currency clause in the contract documents.

22. RULE XXII

Due to the difficulty in setting up joint accounts, sometimes in a foreign currency, it has become the practice of adjusters to hold deposits in trust accounts in their own name. Should this practice be recognised by the YARs?

Argentina: Yes. This situation should be regularized.

Belgium: The rule as such is outdated and not practically applied. Nowadays, holding deposits in trust accounts in the name of Adjusters it is widely accepted in practice and nobody advances particular complaints about it, even though a margin of risk exists, in case of fraudulent adjusters. It is therefore possible to formalize this commercial custom and find a correct formulation, in order to sanction formally this practice within the framework of the YAR.

In order to limit the risk described above, cargo interests believe that the use of trust accounts should be limited to Sworn Adjusters accepted by and member of the International Adjusters Association (and why not guaranteed and/or insured by them).

Brazil: Yes, sole trust account in the name of the adjuster should be recognized by YARs.

Canada: Yes

China: Yes.

Croatia: Yes.

Denmark: Yes.

Finland: Average adjusters holding deposits in trust accounts in their own name is not totally unproblematic. It leads in practice to a number of contacts from the cargo side, many of who do not understand the concept of GA and certainly do not understand the long time it might take to reach a GA adjustment. This practical view should be taken into consideration before having a one-way rule on deposits in trust in the adjuster's name. This should in any case not be given as the only solution in the YAR.

France: No need to handle such issue within the YAR as it is an accounting matter which can vary to one country to another.

Germany: The adjusters represented in the German MLA proposed to follow the proposals for simplification, as outlined in the Questionnaire, with regard to Rule XXII and to allow for adjusters to hold deposits in trust accounts in their own name in the YAR.

Israel: We have no special comments to Sections 2, 3 and 4.

Italy: This is the solution already invariably adopted in international practice. There are no objections, but a ratification would be no doubt appropriate.

Japan: As it is related to very detailed practical issue of procedural aspect, there is no need to amend the current provisions of YAR.

The Netherlands: Yes. In the Committee's opinion, adjusters should be allowed to maintain trust accounts in their own name, provided that it is prevented that in case of the adjuster's liquidation, the monies fall within the liquidation fund. In addition, the Committee is of the opinion that it may be useful to allow the practice up to a specified limited amount only.

Norway: Rule XXII is outdated and needs to be replaced with a more practical solution. We agree that the new YAR should recognise that cash deposits may be kept in trust accounts in the name of the adjuster. This is also the current practice adopted by adjusters due to the difficulty with joint accounts.

Slovenia: No.

Spain: We do not think this is a matter to be treated or included in the YARs, as the practice on this regard varies from one jurisdiction to another.

Switzerland: Yes, advantageous from inter alia a compliance perspective.

Ukraine: Yes.

United Kingdom: The BMLA agrees this practice should be reflected within the Rules.

AAA: The Sub Committee agreed that the reference to joint accounts had become an anachronism. They suggested that the first sentence of the Rule should conclude as follows:

"...such deposits shall be paid without any delay into a special account to be held by the average adjuster on behalf of general average interests. The sum so deposited..."

AMD: It is, in practice, impracticable for adjusters to comply with the terms of this rule with regard to the retention of cash deposits. This is primarily due to banks being reluctant to offer reasonable interest rates for joint accounts and due to the impact of money laundering regulations. Thus in practice in the UK, USA, Canada, France, Denmark and Germany the adjuster alone retains the deposits in a special bank account. This position should be regularized.

ICS/BIMCO: The issue could be considered if it represents a problem for practitioners.

IUMI: Rule XXII YAR requires cash deposits collected in respect of cargo's liability for GA etc. to be paid into a special account *"in the joint names of a representative nominated on behalf of the shipowner and a representative nominated on behalf of the depositors in a bank to be approved by both..."*.

Most UK banks will now not permit joint accounts to be held or make it so difficult that it is impracticable. In the circumstances Rule XXII is outdated and needs to be replaced. The Questionnaire suggests that the current practice adopted by adjusters of holding deposits in trust accounts in their own name should be expressly recognised in the new YAR. It is unsatisfactory that in order to make the YAR operate in practice adjusters have to adopt a method of holding cash security which is not sanctioned by the Rules and could therefore, in certain circumstances, expose them to liability. IUMI accordingly agrees the next edition of YAR should expressly recognise the current practice of holding money in trust accounts but the new rule should expressly state the terms upon which the cash is to be held and released.

23. **RULE XXIII**

The 2004 Rules introduced the time bar provisions for the first time. While recognising possible difficulties in certain jurisdictions, do you consider these provisions should be retained and, if so, are there any areas needing improvement?

Argentina: No. A time bar could cause legal conflicts.

Belgium: These provisions should be retained, without further expanding the scope of their effects.

Brazil: Yes, the time bar provisions of 2004 Rules should be retained. No need for improvement.

Canada: Yes

China: Should not be retained.

According to Article 263 of MARITIME CODE OF P.R.C."The limitation period for claims with regard to contribution in general average is one years, counting from the day on which the adjustment was finished."

Croatia: The time bar provisions introduced by the YAR 2004 should be retained.

Denmark: Ok to keep the time bar provisions, although a contractual time bar is not recognised in certain jurisdictions - which can be a difficulty.

Finland:

France: We think such question should be maintained.

Germany: The German MLA discussed the question if the time of limitation for GA settlements should possibly be prolonged, such a view in favour of prolongation could however not find a majority in the German MLA.

In addition, the German MLA would welcome it if the YAR include a binding wording for GA securities, possibly by way of attachment(s) to the Rules.

The German MLA regrets that it could not yet reach a consensus on decisive issues identified and therefore welcomes to keep the discussion of these major issues on the CMI agenda and to continue the work of the International Sub-Committee with the aim of finding a generally acceptable consensus before voting on new YAR.

Israel: We have no special comments to Sections 2, 3 and 4.

Italy:

Japan: We do not consider that it is appropriate to introduce the time bar provision in YAR, because of the following reasons. The second and third paragraphs of Rule E which were introduced in YAR1994 and YAR2004 are suffice to expedite general average adjustments.

- (1) Since YAR is a part of the private contract, the issue of time bar should be left to national laws.
- (2) Since applicable law or jurisdiction is not clear under the current wording in YAR2004, it will be necessary to specify the jurisdiction and the applicable law and to investigate whether the time bar provision in YAR is compatible with a mandatory statute in each jurisdiction. The time-bar provision simply creates new problem and leads unnecessary "forum shopping".

The Netherlands: No. In the Committee's opinion the insertion of a time bar in the YAR creates uncertainty and a pretence of safety, as the provisions of the applicable national law may not recognize the time bar of the YAR and in fact provide for shorter time limits.

Norway: The time bars introduced by Rule XXIII YAR 2004 should be retained and be incorporated into the 2016 Rules. The difficulty pointed out by some jurisdictions due to their law time limits being a matter of public order that cannot be altered by contract, could possibly be solved by a minor amendment. Regardless, it will be important to insert time bars that are enforceable in common law countries and some civil law countries and possibly could assist others, in order to produce adjustments more quickly and ensure that claims are not left open indefinitely.

Slovenia: Yes; it should be retained. However, we think no improvement is necessary.

Spain: We think that these provisions should be retained.

Switzerland: The one year timeline is fine whereas the six year absolute time limit should be re-discussed in a greater context with regards to the future of General Average in the context of large and complex General Average.

Ukraine: We are of the opinion that these provisions should not be retained, because this issue shall be regulated by applicable national law.

United Kingdom: The BMLA has no objections to the time limits presently specified in the 2004 Rules.

AAA: The Sub Committee, while not unduly enthusiastic about this provision, felt it might result in a greater degree of certainty, and could be retained.

AMD: No known problems.

ICS/BIMCO: If it is agreed that other amendments should be made to YAR 1994, ICS and BIMCO would have no objection to the inclusion of the 2004 time bar provisions, which are intended to achieve greater certainty regarding applicable time bar periods. However, it is noted that a contractual time bar might not be recognised in some jurisdictions.

IUMI: IUMI pressed for a time bar in respect of contributions to GA for many years prior to the introduction of the YAR 2004. Hull and cargo insurance is a short tail business and insurers are anxious to speed up the closure of cases whenever possible. Accordingly a new Rule XXIII was introduced into the YAR 2004 as follows:

- “(a) Subject always to any mandatory rule on time limitation contained in any applicable law,*
- (i) Any rights to general average contribution including any rights to claim under general average bonds and guarantees, shall be extinguished unless an action is brought by the party claiming such contribution within a period of one year after the date upon which the general average adjustment is issued. However, in no case shall such an action be brought after six years after the date of termination of the common maritime adventure.*
 - (ii) These periods may be extended if the parties so agree after the termination of the common maritime adventure.*
- (b) This Rule shall not apply as between the parties to the general average and their respective insurers.”*

At Vancouver the representatives of several countries, particularly in South America (but also some provinces in Canada) pointed out that this time bar would be ineffective in their jurisdictions because in their law time limits are a matter of public order and cannot be altered by contract. The German representatives had difficulty with the clause because under their law, a right of action to claim GA contributions does not arise until the adjustment is published. Theoretically therefore if the adjustment was published more than 6 years after the termination of the common maritime adventure the claim would be time barred before the right to sue for GA contributions had even accrued. One suggestion to resolve this problem might be to delete the last sentence of Rule XXIII(a)(i) and insert, after the word “issued”, the following:

“...or after six years after the date of termination of the common maritime adventure whichever is the later.”

IUMI has not sought German legal advice to check whether this amendment would produce the desired result in Germany.

Despite these objections IUMI feels that the clause should be inserted while recognising that in some countries it would not be enforceable. Generally the clause is enforceable in common law countries and in some of the civil law countries; where it is not, the time limit will be of assistance to those countries which are formulating or reviewing their maritime codes.

However the most important functions of the provision are to encourage adjusters to produce their adjustments more quickly and to ensure that claims are not left open indefinitely. Accordingly IUMI's view is that the time bars introduced by Rule XXIII YAR 2004 should be retained and be incorporated into the 2016 Rules (but possibly with the minor amendment described above).

Belgium: Final considerations:

It is without a doubt an important job the one conducted by the IWG, in the perspective of revising YAR. This questionnaire, as a part of it, represents a good instrument to have a direct feedback from the operative players.

However, a more 'hands-on' approach, trying to tackle the main issues that have arisen in practice, limiting the revision to the major points, could be probably more productive and time saving.

The idea of revising all the rules en bloc, including in this process also changes related to terminology or other minor aspects, may somehow lead to a dispersion of energies and time, without producing relevant and incisive improvements of YAR. It should therefore never be forgotten the goal of the rules, that are in fact extremely practical and that deal with a specific, and rather peculiar, branch of the commercial world, in which the final result must be always 'money oriented' and time is of the essence.

12 August 2013 (final update 13 September 2013)

Bent Nielsen, Chairman

Taco van der Valk, Co-rapporteur