

**CMI INTERNATIONAL WORKING GROUP ON GENERAL AVERAGE**

**WORKING PAPERS FOR THE MEETING OF THE**

**CMI INTERNATIONAL SUBCOMMITTEE ON GENERAL AVERAGE**

**ON 6-7 JUNE 2015 IN ISTANBUL**

**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 (IWG) 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 and details of subsequent meetings have been posted on the CMI website.

The current members of the IWG are as follows:

**Chairman**

Bent Nielsen

**Members**

Richard Cornah (UK) (AAA) (Co-Rapporteur)

Taco van der Valk (Netherlands) (Co-Rapporteur)

Andrew Bardot ((UK) Int. Group

Ben Browne (UK) IUMI

Frédéric Denèfle (France)

Jürgen Hahn (Germany)

Michael Harvey (UK) AMD

Kiran Khosla (UK) ICS

## **INTRODUCTION**

Jirou Kubo (Japan)

Sveinung Måkestad (Norway)

John O'Connor (Canada)

Peter Sandell (Finland)

Jonathan Spencer (USA)

Esteban Vivanco (Argentina)

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Section A of the working papers consists of suggested drafts prepared by the IWG to add to or amend the existing rules. Only those rules which remain under consideration are included.

Draft wordings have been provided by the IWG in all cases except in relation to Rule B where further research and consideration is still required.

Section B includes two important items (the currency of adjustment and role of the average adjusters) that remain under discussion and are not at a stage at which detailed drafting, if any is found to be required, is possible.

Section C sets out the idea of "CMI Guidelines". These will be entirely separate from the YARs and not binding on contractual parties but the IWG consider that CMI can perform a valuable service in setting out guidance and agreed best practice on various matters.

Further documents and comments may be circulated prior to the Istanbul meetings.

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### SECTION A – DRAFT RULES

The following items are recommended for consideration at Istanbul by the IWG:

- 1) Rule B – Tug and tow
- 2) Rule E – Provision of information.
- 3) Rule E – Recoveries.
- 4) Rule G – Treatment of “Bigham” cap.
- 5) Rule VI – Re-apportionment of salvage.
- 6) Rule X – Detention during re-stowage.
- 7) Rule XI – Clarification of wording.
- 8) Rule XI – Wages at a port of refuge.
- 9) Rule XI – Definition of port charges.
- 10) Rule XI - Amendment to XI(d) (iv).
- 11) Rule XIII – Bottom painting.
- 12) Rule XIV – Temporary repairs.
- 13) Rule XVII - Value at inland destinations.
- 14) Rule XVII – Treatment of low wage value cargo.
- 15) Rule XVII – Deductions in respect of salvage.
- 19) Rule XVII – Personal effects.
- 20) Rule XX – Commission.
- 21) Rule XXI – Interest.
- 22) Rule XXII – Cash deposits.

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### SECTION B – OTHER MATTERS

1. *Currency of adjustment*

Extensive consideration has been given to this important topic, without reaching a stage where draft wording can be proposed or confirmed as practicable. Various options are set out for further discussion.

2. *Role of adjusters*

IUMI have submitted a paper regarding the role of the Average Adjuster in general average cases.

### SECTION C – CMI GUIDELINES

In the 2011 CMI Questionnaire consideration was given to including a “Definitions” section in the Rules and to expanding the Rules to cover matters that presently require reference to text books or other sources to understand fully.

It was agreed by the IWG that “Definitions” would simply extend the scope for arguments on the various definitions. Additionally, while making the Rules more self-contained had some merits, it would be at the expense of the brevity and flexibility of the present format and these were considered to be essential features that must be retained.

Other areas such as maintaining liens and forms of security were seen as being too dependent on local jurisdictions to make the drafting of useful new Rules possible. However, against this background it was considered that CMI could play a useful role by providing a set of guidelines that, while not binding, would reflect existing best practice and provide a source of information and guidance for commercial interests.

A Preliminary draft / format for such Guidelines is given in this section for discussion purposes covering the following topics:

- A) Application of Rule VI
- B) Interest rates under Rule XXI
- C) Treatment of cash deposits (Rule XXII)
- D) General Average security documents
- E) Role of the Adjuster
- F) Mediation of disputes
- G) Role of General Interest surveyor

## **SECTION A – DRAFT RULES**

### **DRAFT TEMPLATE OF YORK-ANTWERP RULES 2016**

#### **FOR DISCUSSION PURPOSES ONLY**

#### **INTRODUCTION**

Following the meeting of the CMI International Subcommittee in Hamburg in June 2014 ([the report of which appears on the CMI website](#)) two further meetings were held involving the IWG Chairman and co-rapporteurs and the representatives of ICS and IUMI. The objective of the meetings was to review areas of common ground following their internal discussions and meetings after Hamburg, to enable more detailed drafting to take place. A further full meeting of the IWG took place in London on 25 February 2015 and useful progress was made in discussing alternative draft wordings. It was also concluded that a number of proposed changes or discussion points would not be taken forward.

For present purposes this paper therefore shows in plain black type a version of the 1994 Rules that incorporates the 2004 approach to paragraph numbering and arrangement and adopts the minor changes made for the sake of consistency. The 2004 Rule regarding Time Bars is also included. Drafting Notes (DN), comments and alternative wordings are shown in blue type. The Drafting Notes are numbered sequentially.

For the sake of brevity we have only included the Rules that continue to be under discussion and are now up for consideration by the International Sub Committee at Istanbul.

#### **RULE B**

1. There is a common maritime adventure when one or more vessels are towing or pushing another vessel or vessels, provided that they are all involved in commercial activities and not in a salvage operation.

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

2. 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.

#### **Drafting Note 1**

The intention behind the introduction of Rule B remains widely supported but many commentators have noted the difficulty in interpretation of the final part of sub-paragraph 2 which is an extension of the Rhine Rules wording on which the new Rule B was modelled in 1994.

During IWG discussions in February 2015, it was noted that, in addition to concerns over clarity, the present Rule B does not provide any guidance as to the treatment of costs at a port of refuge, once initial safety has been achieved. To achieve this might require lengthy

## **SECTION A – DRAFT RULES**

additions to the existing Rules that would be disproportionate to the number of such cases. It was noted that this aspect could be dealt with by appropriate guidelines (assuming this concept was accepted).

Further research is being carried out in various jurisdictions to consider other possible models and it is hoped that this can be presented prior to or at Istanbul.

### **RULE E**

1. The onus of proof is upon the party claiming in general average to show that the loss or expense claimed is properly allowable as general average.
2. All parties claiming in general average shall give notice in writing to the average adjuster of the loss or expense in respect of which they claim contribution within 12 months of the date of the termination of the common maritime adventure.
3. 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 be at liberty to estimate the extent of the allowance or the contributory value on the basis of the information available to him, which estimate may be challenged only on the ground that it is manifestly incorrect.

### **DN 2**

#### **2.1 Provision of information**

All parties appear to remain of the view that the intentions behind Rule E are to be applauded if the process was not to be held back by parties unable or unwilling to provide proper documentation.

- 2.2 Various concerns have been noted; while sub-paragraph 2 requires parties to give notice within 12 months, there is general agreement that under a strict construction of the 1994/2004 wording (para 3) an inquiry from the average adjuster “restarts” the clock and that it is preferable that it should not. The sub-group offered possible amendments to the second part of Rule E, which are designed to accelerate the receipt by the average adjuster of full details of contributory values.

Amendment A:

2. *All parties claiming in general average shall give notice in writing to the average adjuster of the loss or expense in respect of which they claim contribution within 12 months of the date of the termination of the common maritime adventure and supply evidence in support of a notified claim.*

## **SECTION A – DRAFT RULES**

Amendment B, for greater clarity and rigor:

2. *All parties to the adventure shall, within 12 months of the date of the termination of the common maritime adventure, supply particulars of value in respect of their contributory interest and, if claiming in general average, shall give notice in writing to the average adjuster of the loss or expense in respect of which they claim contribution, and supply evidence in support of a notified claim.*

- 2.3 If either amendment is adopted, the existing third paragraph would require modification:

The sub-group offered an alternative version of the third paragraph, designed to streamline how contributory values are established:

3. *Failing such notification, or if 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 be at liberty to estimate the extent of the allowance or the contributory value on the basis of the information available to him, which estimate shall be communicated to the party in question, and will be binding if not challenged within 2 months of the communication.*

- 2.4 It was suggested within the context of Amendments A and B in 2.2 above that the words “*All parties to the adventure...*” should be replaced with “*All those concerned in property involved in the common maritime adventure...*”

- 2.5 It was suggested that with regard to the amended paragraph 3 set out in 2.3 above that the words “*without prejudice for any party to challenge the adjustment.*” should be inserted.

### DN 3 – Treatment of recoveries

- 3.1 The IWG noted concerns that recoveries of GA losses were sometimes made from third parties and not reported to the adjuster

The following, additional, final paragraph of Rule E is submitted for discussion at Istanbul:

- Any party to the adventure achieving a recovery from a third party in respect of sacrifice or expenditure claimed in general average, shall supply to the average adjuster full particulars of the recovery within 2 months of receipt of settlement of the recovery.*

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3.2 The following variations in the introductory words of the draft set out in 3.1 above have been suggested:

- a) *“Any party to the adventure or their insurer...”*
- b) *“Any person concerned in property involved in the common maritime adventure...”*

### **RULE G**

1. General average shall be adjusted as regards both loss and contribution upon the basis of values at the time and place when and where the adventure ends.
2. This rule shall not affect the determination of the place at which the average statement is to be made up.
3. When a ship is at any port or place in circumstances which would give rise to an allowance in general average under the provisions of Rules X and XI, and the cargo or part thereof is forwarded to destination by other means, rights and liabilities in general average shall, subject to cargo interests being notified if practicable, remain as nearly as possible the same as they would have been in the absence of such forwarding, as if the adventure had continued in the original ship for so long as justifiable under the contract of affreightment and the applicable law.
4. 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 cargo if the cargo had been forwarded at their expense.

### **DN 4 – “Bigham” cap**

- 4.1 The incorporation of the Non-Separation Agreement into the YARs in 1994 appears to remain uncontroversial but there is uncertainty as to both the actual and intended effect of sub-paragraph 4.
- 4.2 Shipowners have submitted that the cap on Rule G expenses incurred under a Non-Separation Agreement, can operate unfairly.

*This cap, also known as the “Bigham” clause, makes allowances under the non-separation agreement subject to a cap of the amount that it would have cost cargo interests to take delivery of their cargo at the port of refuge and to forward it to destination. Under some hull market insurance terms, the shipowner is able to recover from the insurance policy the difference in the amount of expenditure incurred between the cap and the actual expenditure. However, this is not allowed in all insurance markets and where full recovery is not available, the shipowner has to bear the excess cost alone. This is inherently unfair, not least because the basis of the cap*

## **SECTION A – DRAFT RULES**

*appears to have been decided on the facts of one particular case but the effect of incorporating into Rule G is for it to apply universally irrespective of the facts of the case in question. Shipowners submit therefore that the cap be removed in the interests of achieving equity and uniformity of application.”*

They therefore consider that para G(4) should be deleted entirely.

- 4.3 It is uncertain whether the “Bigham” cap should apply only to expenses allowable exclusively by reason of the NSA wording (e.g. wages etc. during repairs, removal under Rule X(a) second para see para 6.2 below), which is how Rule G now appears to read, or whether it should apply to both these expenses AND allowances such as costs of forwarding allowed under Rule F (and therefore not dependant on the NSA wording) as suggested by some US lawyers (see 4.3 below). The following examples illustrate the working of the “cap”.

### 4.4 **At Port A**

### **General Average**

General Average expenses allowed per Rules A, X and XI (GA “proper”)

US\$500,000

In order to do repairs necessary for the safe prosecution of the voyage, it would be necessary to discharge, store and reload cargo. Instead cargo is discharged and then transhipped to destination

Transshipment costs (net of voyage savings) allowed per Rule F.

300,000

### **At Port B**

The vessel is towed to port B (where there are the necessary repair facilities) and effects permanent repairs. The removal to Port B (Xa) and detention expenses (XI) are allowed, (even though ship and cargo have parted company) under the “Non Separation” parts of Rule G – para 3

500,000

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US\$1,300,000

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Ship and cargo are 20/80% respectively of total values. For the purposes of applying Rule G para 4, it is estimated that it would have cost cargo US\$350,000 to have arranged for its own carriage to destination.

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G.A. “proper”	US\$500,000
Transshipment per Rule F	300,000
	<hr/> US\$800,000 <hr/>

Rule G para 3	<u>US\$500,000</u>
Of which 80%	<u>US\$400,000</u>
Limited to	<u>US\$350,000</u>

Cargo’s GA contribution is, 80% of US\$800,000 US\$640,000

Rule G allowances per para 3 limited per para 4	350,000
	<hr/> US\$990,000 <hr/>

The unrecoverable part of Rule G para 3, (i.e. US\$400,000 – US\$350,000 = US\$50,000) is recoverable under English law (per “ABT Rasha”) from H&M insurers. The position in other jurisdictions is less clear.

### General Average

- 4.5 It is sometimes suggested that the original intention of the Bigham Clause (supported by the Canadian “City of Colombo” decision) was to apply the cap to all GA allowances after ship and cargo had separated:-

G.A. “proper”	<hr/> <hr/> US\$500,000
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Transshipment per Rule F	US\$300,000
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Rule G para 3	500,000
	<hr/> US\$800,000 <hr/>

Of which 80%	<u>US\$640,000</u>
Limited to	<u>US\$350,000</u>

Cargo’s G.A contribution is then

80% of US\$500,000 G.A. “proper”	US\$400,000
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## **SECTION A – DRAFT RULES**

Rule G & F allowances limited to

350,000

US\$750,000

- 4.6 If the Bigham cap provision is retained it was considered by the IWG that the possible ambiguity referred to in 4.3 - 4.5 above needed to be resolved to ensure consistency of practice amongst adjusters.
- 4.7 If it is agreed that the cap should apply only to allowances that are made by reason of the non-separation agreement (NSA) element of Rule and not the Rule F allowances, a possible re-drafting of paragraph 4 is suggested as follows to put the matter beyond doubt:

*“4. 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 that would have been borne by the owners of cargo if the cargo had been forwarded at their expense. This limit shall not apply to any allowances made under Rule F.”*

- 4.8 If it is agreed that the limit should apply to both the NSA element and Rule F allowances, the wording could be amended to:

*“4. The proportion attaching to cargo of the total of allowances made in general average by reason of applying the third paragraph of this Rule and under Rule F shall not exceed the cost which would have been borne by the owners of cargo if the cargo had been forwarded at their expense.”*

### **RULE VI. SALVAGE REMUNERATION**

- a. Expenditure incurred by the parties to the adventure in the nature of salvage, whether under contract or otherwise, shall be allowed in general average provided that the salvage operations were carried out for the purpose of preserving from peril the property involved in the common maritime adventure.

Expenditure allowed in general average shall include any salvage remuneration in which the skill and efforts of the salvors in preventing or minimising damage to the environment such as is referred to in Art. 13 paragraph 1(b) of the International Convention on Salvage, 1989 have been taken into account.

- b. Special compensation payable to a salvor by the shipowner under Art. 14 of the said Convention to the extent specified in paragraph 4 of that Article or under any other provision similar in substance shall not be allowed in general average.

[DN 5 – Re-apportionment of salvage](#)

## **SECTION A – DRAFT RULES**

5.1 To recap, the arguments for and against the exclusion of salvage were set out by the 2003 IWG as follows:

*“6.2.1 Arguments **for exclusion** of salvage from General Average:*

- *Inclusion of salvage involves unnecessary duplication of the apportionment of the salvage remuneration between contributing interests.*
- *In most cases the proportions are not changed significantly but the cost of readjustment may be relatively high.*
- *It requires collection of two sets of security to cover basically the same moneys.*
- *It prolongs the whole operation, sometimes for years.*
- *It involves additional hassle for cargo underwriters.*

*6.2.2 Arguments **for inclusion** of salvage in General Average:*

- *It produces a fairer result at the end of the case.*
- *In some cases to leave salvage where it falls after salvage settlement or arbitration can cause serious injustice; e.g. sacrifices made good in General Average are added back in computing the values under Rule G.*
- *A second casualty can also materially affect the values at the end of the adventure and thus the apportionment.*
- *In some cases the salvage remuneration can be assessed on the basis of rough figures, leaving the fine tuning of the apportionment to be done later in General Average. This can expedite salvage settlements and save costs.*
- *Some jurisdictions e.g. Netherlands contain laws, which require the ship owner to pay salvage in full and collect from cargo in General Average – this is recognised by the IUMI proposals.*
- *In many serious casualties General Average security will still be collected because the ship owner's likely financial exposure may not be fully known and the possible extent of cargo sacrifices cannot be determined without delaying the release of cargo.*
- *It redresses the balance if one party to the adventure is able to use commercial or other pressures to reach a particularly favourable negotiated settlement with salvors leaving other parties to pay the full cost at arbitration.*
- *Even if salvage is not allowed in General Average, it will still be treated as a special charge (which will be deducted in calculating contributory values) therefore the adjustment cannot be completed until the final amount of the salvage charges paid by each interest is available.*

The exclusion of “LOF-type” salvage under the 2004 Rules was seen as one of the main reasons for ICS and other bodies resisting the use of the 2004 Rules. ICS continues to take the view that the 1994 Rules version of Rule VI should not be disturbed and that adjusters should use their discretion in the limited number of cases where re-apportionment was not appropriate. They have expressed concern that any

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changes to the current 1994 position may create new difficulties in interpretation and application.

IUMI for their part continue to support the 2004 position. However both parties have expressed a willingness to explore any compromises that might be put forward. Of the possible compromises considered, ICS and IUMI have agreed, without prejudice to their original positions, that a draft should be considered whereby salvage is generally included in General Average, as before, but will not be re-apportioned in specific circumstances.

5.2 The following draft was agreed for discussion purposes to reflect the “included unless” approach with regard to re-apportionment:

- “(a) Expenditure incurred by the parties to the adventure in the nature of salvage, whether under contract or otherwise, shall be allowed in general average provided that the salvage operations were carried out for the purpose of preserving from peril the property involved in the common maritime adventure, and subject to the provisions of paragraph (b), (c) and (d) (regarding Articles 13 & 14).*
  
- (b) Where the parties to the adventure have a separate contractual or legal liability to salvors there shall be no allowance or re-apportionment of salvage and associated expenses as general average unless:*
  - (i) there is a subsequent accident or other circumstances resulting in loss or damage to goods during the voyage that results in significant differences between salvaged and contributory values.*
  
  - (ii) there are significant general average sacrifices involving salvaged property.*
  
  - (iii) salvaged values were manifestly incorrect and this resulted in a significantly incorrect apportionment of salvage expenses.*
  
  - (iv) [differential salvage – to be drafted]”*

5.3 At the February IWG meeting a further draft was considered. This was proposed by ICS/IG with the same objectives in mind but avoiding the unsatisfactory “exclusions to an exclusion” structure of the first draft.

### **RULE VI**

- (a) Expenditure incurred by the parties to the adventure in the nature of salvage, whether under contract or otherwise, shall be allowed in general average provided that the salvage operations were carried out for the purpose of preserving from peril the property involved in*

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*the common maritime adventure, and subject to the provisions of paragraph (b), [(c) and (d).*

- (b) Notwithstanding (a) above, where the parties to the adventure have a separate contractual or legal liability to salvors and have settled that liability there shall be no allowance or re-apportionment of salvage and associated expenses as general average if:
  - (i) there is no subsequent accident or other circumstances resulting in loss or damage to goods during the voyage that results in significant differences between salvaged and contributory values, or*
  - (ii) there are no significant general average sacrifices involving salvaged property, or*
  - (iii) salvaged values are not manifestly incorrect and there is no significantly incorrect apportionment of salvage expenses, or*
  - (iv) none of the parties to the salvage shall have paid all or any of the proportion of salvage due from another party, or*
  - (v) [there are no significant differential salvage settlements]**
- (c) Salvage payments referred to in paragraph (a) above shall include any salvage remuneration in which the skill and efforts of the salvors in preventing or minimising damage to the environment such as is referred to in Art. 13 paragraph 1(b) of the International Convention on Salvage 1989 have been taken into account.*
- (d) Special compensation payable to a salvor by the shipowner under Art. 14 of the said Convention to the extent of the specified in paragraph 4 of the Article or under any other provision similar in substance (such as SCOPIC) shall not be allowed in General Average and shall not be considered a salvage payment as referred to in paragraph (a) of this Rule.*

5.4 The question of whether a “differential” salvage settlement (item v) should be grounds for re-apportioning an “LOF” type salvage remains open for discussion.

A differential salvage settlement is one where one of the parties to the adventure makes a quick settlement with advantageous terms (say at 10%) but no settlement is reached by other parties who pay under an award fixed at 20%. Prior to YARs 2004, both settlements would be included in the General Average contributory values so that the differential settlement is equalised; under YARs 2004, which excluded such salvages entirely, this would not happen.

## **SECTION A – DRAFT RULES**

### **RULE X. EXPENSES AT PORT OF REFUGE, ETC.**

- a. (i) When a ship shall have entered a port or place of refuge or shall have returned to her port or place of loading in consequence of accident, sacrifice or other extraordinary circumstances which render that necessary for the common safety, the expenses of entering such port or place shall be allowed as general average; and when she shall have sailed thence with her original cargo, or a part of it, the corresponding expenses of leaving such port or place consequent upon such entry or return shall likewise be allowed as general average.
- (ii) When a ship is at any port or place of refuge and is necessarily removed to another port or place of refuge because repairs cannot be carried out in the first port or place, the provisions of this Rule shall be applied to the second port or place of refuge as if it were a port or place of refuge and the cost of such removal including temporary repairs and towage shall be allowed as general average. The provisions of Rule XI shall be applied to the prolongation of the voyage occasioned by such removal.
- b. (i) The cost of handling on board or discharging cargo, fuel or stores whether at a port or place of loading, call or refuge, shall be allowed as general average, when the handling or discharge was necessary for the common safety or to enable damage to the ship caused by sacrifice or accident to be repaired, if the repairs were necessary for the safe prosecution of the voyage, except in cases where the damage to the ship is discovered at a port or place of loading or call without any accident or other extraordinary circumstances connected with such damage having taken place during the voyage.
- (ii) The cost of handling on board or discharging cargo, fuel or stores shall not be allowable as general average when incurred solely for the purpose of restowage due to shifting during the voyage, unless such restowage is necessary for the common safety.

#### DN 6 – Re-stowage

- 6.1 When the wording in b.(ii) was introduced in 1974 it appears to have been common ground that wages, fuel and other detention expenses would continue to be allowed as GA even if the cost of restowage was not. See Lowndes para 10.43:

*“Although there were no words in the York-Antwerp Rules 1950 to permit the allowance in general average of the cost of discharging or handling cargo except when necessary for the common safety, or to enable damage to the ship caused by sacrifice or accident to be repaired, if the repairs were necessary for the safe prosecution of the voyage, it is believed that in certain parts of the world, and notably on the West Coast of the United States, the Rule was construed on a less than strict basis and that the cost of restowing shifted cargoes was treated as general average.*”

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*To make the matter clear beyond doubt, express wording, as above, was introduced in 1974.*

*It may here be remarked that wages and maintenance of crew etc. during detention of a vessel to re-stow cargo which has shifted were customarily allowed as general average under the 1950 Rules and the framers of the 1974 Rules accordingly felt that no special provision on this subject was needed in r.XI(b) of the 1974 Rules. The matter was again raised in 1994 and reference may be made to para. 10.66.”*

- 6.2 It is understood that adjusters generally continue to make such allowances and it might be considered desirable to provide express sanction for this approach in the Rules. This could be achieved (as in sub-para (c)) by adding to para b(ii) the underlined words:

*“..... unless such stowage is necessary for the common safety. However the provisions of Rule XI shall be applied to the extra period of detention occasioned by such restowage.”*

The suggested amendment was supported by ICS and the adjusters on the IWG in the interests of achieving consistency.

- c. Whenever the cost of handling or discharging cargo, fuel or stores is allowable as general average, the costs of storage, including insurance if reasonably incurred, reloading and stowing of such cargo, fuel or stores shall likewise be allowed as general average. The provisions of Rule XI shall be applied to the extra period of detention occasioned by such reloading or restowing.
- d. When the ship is condemned or does not proceed on her original voyage, storage expenses shall be allowed as general average only up to the date of the ship's condemnation or of the abandonment of the voyage or up to the date of completion of discharge of cargo if the condemnation or abandonment takes place before that date.

### **RULE XI. WAGES AND MAINTENANCE OF CREW AND OTHER EXPENSES PUTTING IN TO AND AT A PORT OF REFUGE, ETC.**

- a. Wages and maintenance of master, officers and crew reasonably incurred and fuel and stores consumed during the prolongation of the voyage occasioned by a ship entering a port or place of refuge or returning to her port or place of loading shall be allowed as general average when the expenses of entering such port or place are allowable in general average in accordance with Rule X(a).

## **SECTION A – DRAFT RULES**

- b. (i) When a ship shall have entered or been detained in any port or place in consequence of accident, sacrifice or other extra-ordinary circumstances (*which render that necessary for the common safety*), or to enable damage to the ship caused by sacrifice or accident to be repaired, if the repairs were necessary for the safe prosecution of the voyage, the wages and maintenance of the master, officers and crew reasonably incurred during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage, shall be admitted in general average.

### DN 7 – Detention for common safety

As a matter of clarification it has been suggested that the Rule should make it clearer that the initial entry or detention for the common safety does not itself mandate the allowance of detention expenses for an indefinite period. For example a vessel might enter a port of refuge following a collision for the common safety. Minor temporary repairs make the vessel safe and ready to proceed but she is detained for a further two weeks while a Coastguard investigation conducted. The following alternatives have been suggested for insertion in place of the words shown in brackets in XI b(i) above:

*“which render that entry and detention necessary for the common safety or to enable damage.....”*

*“which render that detention necessary for the common safety or to enable damage.....”*

*“which render additional detention necessary for the common safety or to enable damage.....”*

### DN 8 – Wages at port of refuge

The 2004 Rules continued to allow wages and maintenance deviating to a port of refuge and regaining position but excluded any allowance while detained at the port of refuge. The equivalent Rule therefore read (after re-numbering):

*“(c) (i) 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 necessary for the common safety, or to enable damage to the ship caused by sacrifice or accident to be repaired, if the repairs were necessary for the safe prosecution of the voyage, fuel and stores consumed during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage, shall be allowed in general average, except such fuel and stores as are consumed in effecting repairs not allowable in general average.”*

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ICS resisted this change in the 2004 discussions and it has played a significant part in shipowning interests declining to adopt those Rules. They do not see any reason in practice or principle as to why the 1994 Rule should be departed from. It should be noted that, with the almost universal adoption of GA absorption clauses the smaller cases, where crew wages at a port of refuge might be a large proportion of the GA, no longer involve cargo interests.

- (ii) Fuel and stores consumed during the extra period of detention shall be admitted as general average, except such fuel and stores as are consumed in effecting repairs not allowable in general average.
- (iii) Port charges incurred during the extra period of detention shall likewise be admitted as general average except such charges as are incurred solely by reason of repairs not allowable in general average.

### DN 9 – Port charges

9.1 In the “Trade Green” [2000] 2 LR 451 Moore-Bick J was invited to consider the meaning of the term “port charges” in Rule XI(b).

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 & Rudolph 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 the circumstances I do not think that they can properly be regarded as port charges within the meaning of r.XI(b)”*



## **SECTION A – DRAFT RULES**

- d. The cost of measures undertaken to prevent or minimise damage to the environment shall be allowed in general average when incurred in any or all of the following circumstances:
- (i) as part of an operation performed for the common safety which, had it been undertaken by a party outside the common maritime adventure, would have entitled such party to a salvage reward;
  - (ii) as a condition of entry into or departure from any port or place in the circumstances prescribed in Rule X(a);
  - (iii) as a condition of remaining at any port or place in the circumstances prescribed in Rule XI(b), provided that when there is an actual escape or release of pollutant substances (\*) the cost of any additional measures required on that account to prevent or minimise pollution or environmental damage shall not be allowed as general average;
  - (iv) necessarily in connection with the discharging, storing or reloading of cargo whenever the cost of those operations is allowable as general average.

### DN 10 – Consistency with X(b)

The wording of XI(d)(iv) departs from the similar wording in Rule X(b) by omitting reference to:

- handling on board
- fuel or stores

Research has indicated nothing in the various papers leading up to 1994 that suggests these omissions were deliberate. It has therefore been suggested that the wording of XI(d)(iv) should be brought into line by reading:

*"(iv) necessarily in connection with the handling on board, discharging, storing or reloading of cargo, fuel or stores whenever the cost of these operations is allowable as general average."*

### **RULE XIII. DEDUCTIONS FROM COST OF REPAIRS**

- a. Repairs to be allowed in general average shall not be subject to deductions in respect of "new for old" where old material or parts are replaced by new unless the ship is over fifteen years old in which case there shall be a deduction of one third. The deductions shall be regulated by the age of the ship from the 31st December of the year of completion of construction to the date of the general average act, except for insulation, life and similar boats, communications and navigational apparatus and equipment, machinery and boilers for which the deductions shall be regulated by the age of the particular parts to which they apply.

## **SECTION A – DRAFT RULES**

- b. The deductions shall be made only from the cost of the new material or parts when finished and ready to be installed in the ship. No deduction shall be made in respect of provisions, stores, anchors and chain cables. Drydock and slipway dues and costs of shifting the ship shall be allowed in full.
- c. The costs of cleaning, painting or coating of bottom shall not be allowed in general average unless the bottom has been painted or coated within the twelve months preceding the date of the general average act in which case one half of such costs shall be allowed.

### DN 11 – Bottom painting

It is understood that it is widely agreed that the general principle regarding deductions in respect of vessels over 15 years old should be retained. However, a question has arisen with regard to the last paragraph: is the 12 month period (in place since 1974) equitable in the context of modern bottom coatings that may last four years or more? A simple solution supported by ICS might be, on the basis that routine dry-dock periods have at least doubled, to amend the period from 12 to 18 or 24 months.

## **RULE XIV. TEMPORARY REPAIRS**

- a. Where temporary repairs are effected to a ship at a port of loading, call or refuge, for the common safety, or of damage caused by general average sacrifice, the cost of such repairs shall be admitted as general average.
- b. Where temporary repairs of accidental damage are effected in order to enable the adventure to be completed, the cost of such repairs shall be admitted as general average 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 general average if such repairs had not been effected there.
- c. No deductions "new for old" shall be made from the cost of temporary repairs allowable as general average.

### DN 12 – Temporary repairs GA / PA

12.1 The above 1994 wording of Rule XIV has been in place in a similar form since 1924. As with Rule F, any allowance is a first charge on general average "without regard to savings to other interests" such as H&M insurers. It was suggested that in many cases H&M insurers may enjoy a very significant benefit (for example temporary repairs enabling a vessel to repair in China rather than the USA) and that the costs should be a first charge on P.A. with only the balance being considered as GA, subject to savings.

12.2 Paragraph (b) of Rule XIV of the 2004 therefore stated as follows:

## **SECTION A – DRAFT RULES**

- b) *Where temporary repairs of accidental damage are effected in order to enable the adventure to be completed, the cost of such repairs shall be allowed as general average 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 general average if such repairs had not been effected there. 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.*

12.3 However, the wording is considered to be somewhat convoluted and attempts have been made to provide a simpler expression of the equitable principle.

The AAA put forward the following for consideration:

- a. *Where temporary repairs are effected to a ship at a port of loading, call or refuge, for the common safety, or of damage caused by general average sacrifice, the cost of such repairs shall be allowed as general average.*
- b. *Where temporary repairs of accidental damage are effected in order to enable the adventure to be completed, the cost of such repairs shall be allowed as general average 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 general average if such repairs had not been effected there.*
- c. *No allowance shall be made under paragraph (b) except to the extent that the sum of the costs of temporary and permanent repairs actually effected exceeds the estimated cost of effecting permanent repairs at the port of refuge.*

*To the extent that permanent repairs have not been completed at the time of the adjustment, the reasonable depreciation in the value of the vessel resulting therefrom (as at the time of completing the voyage) shall be added to, or substituted for, the actual costs of permanent repairs included in the above calculation.*

- d. *No deductions “new for old” shall be made from the cost of temporary repairs allowable as general average.”*

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### **RULE XVI. AMOUNT TO BE ALLOWED FOR CARGO LOST OR DAMAGED BY SACRIFICE.**

- a. The amount to be allowed as general average for damage to or loss of cargo sacrificed shall be the loss which has been sustained thereby based on the value at the time of discharge, ascertained from the commercial invoice rendered to the receiver or if there is no such invoice from the shipped value. The value at the time of discharge shall include the cost of insurance and freight except insofar as such freight is at the risk of interests other than the cargo.
- b. When cargo so damaged is sold and the amount of the damage has not been otherwise agreed, the loss to be allowed in general average shall be the difference between the net proceeds of sale and the net sound value as computed in the first paragraph of this Rule.

[Comment:](#) No suggested changes but see comments under Rule XVII (DN 13) regarding the commercial invoice as the basis of valuation.

### **RULE XVII. CONTRIBUTORY VALUES**

- a. (i) The contribution to a general average shall be made upon the actual net values of the property at the termination of the adventure except that the value of cargo shall be the value at the time of discharge, ascertained from the commercial invoice rendered to the receiver or if there is no such invoice from the shipped value.

#### [DN 13 – Inland destinations](#)

The AAA sub-committee highlighted again the problems of inland destinations that are typical with intermodal transport, and suggested the following addition in Rules XVI and XVII:

*“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.”*

- (ii) 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 loss or damage suffered by the cargo prior to or at the time of discharge.

#### [DN 14 – Low value cargo](#)

14.1 The relevant IWG subgroup had observed some support for the proposition that the York-Antwerp Rules should specifically endorse a procedure already adopted by many average adjusters of excluding from contribution low-value cargoes, when the cost of administering the collection of security, computation of the contributory value and collection of the claim is disproportionate to the contribution at stake. They noted that

## **SECTION A – DRAFT RULES**

a similar procedure is already provided for in Lloyd's Standard Salvage and Arbitration Clauses where Clause 15 states: "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."

- 14.2 If the Rules are to be appropriately amended, this can be achieved by inserting the following language after the second paragraph of Rule G or in Rule XVII:

*"Any cargo with an estimated contributory value below a figure determined by the average adjuster may be excluded from contribution when the average adjuster considers that the cost of including it in the adjustment would be likely to be disproportionate to its eventual contribution."*

- (iii) The value of the ship shall be assessed without taking into account the beneficial or detrimental effect of any demise or time charterparty to which the ship may be committed.
- b. To these values shall be added the amount allowed as general average for property sacrificed, if not already included, deduction being made from the freight and passage money at risk of such charges and crew's wages as would not have been incurred in earning the freight had the ship and cargo been totally lost at the date of the general average act and have not been allowed as general average; deduction being also made from the value of the property of all extra charges incurred in respect thereof subsequently to the general average act, except such charges as are allowed in general average or fall upon the ship by virtue of an award for special compensation under Art. 14 of the International Convention on Salvage, 1989 or under any other provision similar in substance.

### DN 15 – Deductions for salvage

- 15.1 Further amendments may need to be considered if a version of Rule VI is adopted that excludes salvage from G.A. in certain circumstances.

If LOF salvage is not allowed as GA, it remains an expense that diminishes the effective value of the property at destination. In order to maintain equitable contribution that is proportionate to the benefit received, the current 1994 and 2004 versions of Rule XVII call for "*deduction being also made from the value of the property of all extra charges incurred in respect thereof subsequently to the general average act, except such charges as are allowed in general average*". If LOF salvage is not allowed as GA, it remains an expense that diminishes the effective value of the property at destination.

The requirement to ascertain and deduct LOF salvage payments from the CV of property has given rise to the concern that, in cases involving multiple interests, the hoped for savings in time and cost might not materialise if salvage is excluded from GA, because of the need to calculate the necessary deductions under XVII (b).

## **SECTION A – DRAFT RULES**

15.2 One solution would be to amend Rule XVII to provide that no deduction is made in respect of salvage payments if these are excluded from G.A. However, this could result in cargo interests paying a combined total of GA and salvage that exceeded 100% of their cargo value. Even before that point is reached, not taking account of substantial salvage payments would constitute a severe distortion of the equitable principle of contributions being made on the basis of net arrived values, and might also prompt the abandonment of cargo at ports of refuge.

15.3 At present when salvage is allowable as G.A. the adjuster must obtain from each cargo interest:

- a) the amounts actually paid for salvage and salvors costs
- b) details of costs of security and representation
- c) the dates of payment of a) and b) in order to calculate interest.

This apparently simple information can be frustratingly difficult to obtain from cargo insurers and/or their representatives. If the adjusters are faced with obdurate silence and are tempted to make estimates or assumptions to complete the adjustment, they risk protracted post-issue arguments about what should have been allowed or credited to that insurer.

15.4 However, it is suggested that if salvage is not allowed as GA in a particular case, obtaining adequate figures to make a reasonable adjustment to the contributory value of cargo need not be such a time consuming task – dates of payments would not be required and the ancillary costs could be ignored.

In order to generate appropriate deductions from CVs, the adjuster would still need individual salvaged values but these are invariably submitted at the arbitration; division of the award on a percentage basis is again a simple spreadsheet exercise. Even in the case of negotiated settlements there will invariably be lists of individual cargo interests so that the lump sum settlement can be divided up and settled.

Making deductions for salvage in a simplified form would permit an adjustment of GA contributory values that might not be quite as accurate as the present system but it would be sufficient to ensure an equitable reflection of salvage payments and the real “benefit” of getting property to destination.

It is true that this would mean that the GA adjustment would have to await the agreement of the salvage, but the additional year or more that it often takes for actual settlements to be made, particularly in container ship cases, would be avoided.

15.5 This approach has been agreed in principle by the ICS and IUMI participants in the IWG (subject first to any amendment to the existing Rule VI per YARs 1994 being agreed) as being worthy of further serious consideration. A limited amendment to Rule XVII could therefore be made:

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*“Deduction being also made from the value of the property of all extra charges incurred in respect therefore subsequently to the general average act, except such charges as are allowed in general average. Where payment for salvage services has not been allowed as General Average by reason of Rule VI sub-paragraph b, deductions shall be limited to the amount paid to salvors including interest and salvors’ costs.”*

- c. In the circumstances envisaged in the third paragraph of Rule G, the cargo and other property shall contribute on the basis of its value upon delivery at original destination unless sold or otherwise disposed of short of that destination, and the ship shall contribute upon its actual net value at the time of completion of discharge of cargo.
- d. Where cargo is sold short of destination, however, it shall contribute upon the actual net proceeds of sale, with the addition of any amount allowed as general average.
- e. Mails, passengers' luggage, personal effects and accompanied private motor vehicles shall not contribute to general average.

### DN 16

With regard to sub-paragraph (e), Lowndes para 17.74 notes the following:

*“If the doctrine that only goods put on board as merchandise are liable to contribute is accepted as the rule of English law, it follows that all the effects of a passenger are exempt, and the general practice in this country seems to have been to exempt them. If passengers’ effects were to be held liable to contribution, the liability would be restricted to such effects as are stowed in the baggage hold, thus exempting the property which the passenger retains in his own care for use on the voyage, and which, in this sense, is attached to his person. Yet there are practical objections even to this limited responsibility. It must often be difficult, if not impossible, at the time of disembarkation to obtain a proper valuation of the effects of each passenger to fix the amount of his contribution, and to enforce payment or exact security for the claim; and after the passengers have left the ship and dispersed, a right of action only enforceable by a number of separate law-suits, most of them for trifling amounts, would be an illusory remedy. Thus the right to contribution from passengers would in most cases probably resolve itself into a claim for damages against the shipowner, for failing to enforce the right on behalf of the party whose property has been sacrificed.*

*It is submitted that the best solution is to ascertain whether the articles are: (1) carried as “goods” under a contract of affreightment; or (2) carried as incidental to a contract for the carriage of a passenger. In (1) the goods contribute and receive in the ordinary way; in (2) the articles do not contribute, but probably receive contribution if damaged by a general average act.”*

## **SECTION A – DRAFT RULES**

LOF 2011 (box 2) exempts “the personal effects or baggage of passengers, master or crew”. This is further defined in Lloyds Standard Salvage and Arbitration Clauses paragraph 3.2 as follows:

*“personal effects or baggage” as referred to in Box 2 of the Agreement means those which the passenger, Master and crew member have in their cabin or are otherwise in their possession, custody or control and shall include any private motor vehicle accompanying a passenger and any personal effects or baggage in or on such vehicle.”*

Lowndes para 17.09 simply notes that the exception in the 1974 Rules regarding “passengers luggage not shipped under a bill of lading” was changed to exclude reference to bills of lading on “practical grounds”. It is assumed this is a reference to the difficulty of valuing a container of ordinary household goods belonging to a family that is emigrating. However, it is perhaps unhelpful to have LOF and GA somewhat out of step on this issue. Whilst salvors will generally ignore low value household possessions, they see no reason why a container of valuable antiques should escape contribution.

Rule XVII could be amended as follows:

*“e. Mails, passengers’ luggage, and accompanied personal effects and accompanied private motor vehicles shall not contribute to general average.”*

### **RULE XX. PROVISION OF FUNDS**

- a. A commission of 2 per cent. on general average disbursements, other than the wages and maintenance of master, officers and crew and fuel and stores not replaced during the voyage, shall be allowed in general average
- b. The capital loss sustained by the owners of goods sold for the purpose of raising funds to defray general average disbursements shall be allowed in general average.
- c. The cost of insuring general average disbursements shall also be admitted in general average.

#### DN 20 - Commission

20.1 The provisions of Rules XX and XXI are the subject of extensive review, and the allowance of commission under Rule XX may be dispensed with. If para (a) is deleted, paras (b) and (c) would remain.

## **SECTION A – DRAFT RULES**

### **RULE XXI. INTEREST ON LOSSES ALLOWED IN GENERAL AVERAGE**

Interest shall be allowed on expenditure, sacrifices and allowances in general average at the rate of 7 per cent. per annum, until three months after the date of issue of the general average adjustment, due allowance being made for any payment on account by the contributory interests or from the general average deposit fund.

#### DN 21 - Interest

21.1 There appeared to be a broad consensus in favour of more flexible provisions for interest rates along the lines of the 2004 Rule:

- “a. Interest shall be allowed on expenditure, sacrifices and allowances in general average until three months after the date of issue of the general average adjustment, due allowance being made for any payment on account by the contributory interests or from the general average deposit fund.*
- b. Each year the Assembly of the Comité Maritime International shall decide the rate of interest which shall apply. This rate shall be used for calculating interest accruing during the following calendar year.”*

21.2 ICS and others have expressed the view that, if the concept of a variable (annually) interest rate is adopted, the current system for setting annual interest rates used under the 2004 rules needs to be reviewed.

21.3 It is understood that since February 2015, further meetings have place between ICS/BIMCO and IUMI to discuss the mechanism for setting the rate in more detail. Reports on this may be circulated before the Istanbul-meeting.

22.4 When consideration was being given to the possible use of SDRs as the currency of adjustment, if the currency was not otherwise designated by the contract of carriage, one of the supposed attractions of using SDRs was that it brought with it the possibility of using SDR interest rates. The SDR interest rate is set weekly and is based on a weighted average of representative interest rates for short-term debt in the money markets of the SDR basket currencies (USD, GBP, JPY and EUR).

The working group has considered the suitability of the utilisation of the SDR interest rate as the GA interest rate and has concluded that it should not be used for the following reasons:

- SDR interest rates are intended for use by governments in relation to SDR loans and not for commercial purposes.
- The rate is established not only based on interest rates but also what appears to be a currency correction factor.

## **SECTION A – DRAFT RULES**

- The SDR interest rates show an volatility which cannot easily be explained. For example, the rate as at 15 April 2015 was 0.05%, on 13 April 2014 it was 0.13% and on 14 April 2013 0.08%. During the same period 6-month LIBOR rates varied from 0.32% to 0.44%.
- Clearly SDR interest rates bear no relationship to commercial rates available to shipowners.
- It is not entirely clear whether SDR interest rates are weekly or annual rates - the latter seems most likely. However, the International Monetary Fund who administer the SDR 'system' are not at all co-operative in providing information.
- The use of interest rates set weekly would make the calculation of GA interest more complex.

### **RULE XXII. TREATMENT OF CASH DEPOSITS**

Where cash deposits have been collected in respect of cargo's liability for general average, salvage or special charges, such deposits shall be paid without any delay 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. The sum so deposited together with accrued interest, if any, shall be held as security for payment to the parties entitled thereto of the general average, salvage or special charges payable by cargo in respect of which the deposits have been collected. Payments on account or refunds of deposits may be made if certified to in writing by the average adjuster. Such deposits and payments or refunds shall be without prejudice to the ultimate liability of the parties.

#### DN 22 – Cash deposits

22.1 The re-formulation of this Rule to reflect modern banking realities was reviewed by the IWG financial issues group, which considered that placing the sole responsibility for holding the deposits on the average adjuster is a natural solution to the problem of joint accounts no longer being generally available. However, it was considered that this responsibility should be backed by a code of conduct. Thus the general view was that this liberty should only be granted to Sworn Adjusters or members of adjusting associations that impose strict standards of conduct on their members. However, it was recognised that this would be difficult to apply in practice.

It is obviously desirable that all deposits are ring-fenced so that they are not affected in the event of winding-up, bankruptcy or fraud of the adjuster. Measures necessary to achieve this will vary from country to country and therefore cannot easily be regulated in the Rules. Other ways to achieve the objective have been considered including an insurance solution, but this was not found to be practicable. Additionally CMI indicated that they were not in a position to act as guarantors or “policemen” with regard to deposits held by adjusters around the world.

## **SECTION A – DRAFT RULES**

22.2 In the circumstances it is accepted that the only practicable course of action is to amend the existing Rule XXII in as effective a manner as possible.

The following draft is put forward which is a modified version of the draft originally proposed by the sub-group:

- “1) Where cash deposits have been collected in respect of cargo’s liability for general average, salvage or special charges, such deposits shall be paid without any delay into a special account, earning interest where possible, in the name of the appointed average adjuster.*
- 2) The special account shall be constituted in accordance with the legislation regarding client or third party funds that applies in the domicile of the appointed adjuster.*
- 3) The sum so deposited, together with accrued interest, if any, shall be held as security for payment to the parties entitled thereto of the general average, salvage or special charges payable by cargo in respect of which the deposits have been collected. Payments on account or refunds of deposits may only be made when such payments are certified to in writing by the average adjuster and advised to the depositor requesting their approval. Upon the receipt of the depositor’s approval, or in the absence of such approval within a period of 60 days, the average adjuster may deduct the amount of the payment on account or the final contribution from the deposit. Where refunds are due to the depositor, these may only be made once the original deposit receipt has been surrendered.*
- 4) All deposits and payments or refunds shall be without prejudice to the ultimate liability of the parties.”*

22.3 It should be noted that the final sentence of para 3 regarding deposit receipts does not appear in YARs 1994, but similar wording does appear in the approved Lloyd’s Deposit Receipt form which remains widely in use, albeit with amendments made by adjusters.

It was reported by some adjusters that they did not issue deposit receipts in multi-bill cases on the grounds of saving cost and they rarely received requests for any kind of receipt from depositors. On the other hand, the IWG financial issues sub-group considered that the issuing of deposits was an important element in the greater transparency that was the objective of amending the Rule.

22.4 It has been suggested wording should be added to paragraph 1 to make it obligatory for the adjuster to issue some form of receipt.

22.5 It has been suggested that the following words should be added to paragraph 2:

## **SECTION A – DRAFT RULES**

*“....to the effect that the cash deposits are not affected in the case of winding up bankruptcy or fraud of any person.”*

## **SECTION B – OTHER MATTERS**

### **1. CURRENCY OF ADJUSTMENT**

- 1.1 During all discussions to date it has been emphasised that the preferred solution to all the currency issues is to have clear provision in the contract of affreightment.
- 1.2 In the absence of such provision, the use of the SDRs as the currency of adjustment has been discussed on two possible models, both dating from similar debates at the time of the 1994 Rules.

a) The BMLA “Mandatory” Model:

*“Unless the parties have agreed that the adjustment shall be prepared in a specific currency the adjustment shall be prepared in Special Drawing Rights (SDRs). For this purpose the contributory values and the amounts made good for general average sacrifice (other than disbursements) shall be converted into SDRs or the specified currency at the rate of exchange prevailing at the termination of the adventure, and disbursements shall be so converted at the rate of exchange prevailing on the dates when payment was made. The final balances so calculated shall be paid to the creditors in the currency of their choice at the rate of exchange prevailing on the date of settlement. Where no official SDR exchange rate is quoted for any currency, conversion to and from SDRs shall be made by reference to United States dollars.”*

b) The AIDE “Optional” model:

*“Unless the parties have agreed that the adjustment shall be prepared in a specific currency, the adjustment shall be prepared in such currency or currencies as may be equitable in the interests of the parties, having regard to the currencies in which the major claimants in general average have sustained financial loss.*

*For this purpose the contributory values and the amounts made good for general average sacrifice (other than disbursements) shall be converted into the currency of the adjustment at the rate of exchange prevailing on the last day of discharge at the final port of destination, or at the termination of the adventure when this occurs at a port of place other than the final port of destination, and disbursements shall be converted at the rate of exchange prevailing on the dates when payment was made.”*

Although not referred to specifically it was envisaged that SDRs might be one of the “currencies” chosen to achieve an equitable result. The wording could easily be changed:

“such currency or currencies, including SDRs...” to make this clear.

## **SECTION B – OTHER MATTERS**

- 1.3 One of the initial attractions of the SDR was that it would be used to settle the question of variable interest rates. However it was subsequently established that this would not be practical so that objections regarding unnecessary complexity in many cases and unfamiliarity / dislike in many locations were seen to weigh more heavily against the use of SDRs under the “mandatory” model.
- 1.4 In meetings after Hamburg, the IUMI representative has emphasised that the main objective from the insurers side was to achieve certainty as to the applicable currency as early as possible in the case. This was essential for reserving / hedging purposes and was considered to be more important than striving for perfect equity in each case.
- 1.5 It was suggested that the possibility could be explored with BIMCO of adding brief currency provisions in their standard documents (e.g. “at owners option” or “currency in which freight is payable”) when amending these to include reference to the YARs 2016. (It was recognised that this would not deal with bespoke voyage charter wordings although such cases tend to involve bulk cargo and less complex financial issues).
- 1.6 It was also suggested that the currency of adjustment could be specified in the G.A guarantees and bonds. The time of sending security out might be rather early for the adjuster to have a full appreciation of all currency issues that might arise in the case, but the objective of certainty would be achieved.
- 1.7 It would appear that considerable discussion is still required and no draft wording was possible. The options for the future would appear to include:
  - a) Maintain the status quo where adjusters choose what appears to be the most practical and equitable currency.
  - b) Specify a basis for selecting the currency in YARs.
  - c) Specify in YAR that US\$ are to be used in all cases.
  - d) Specify in YAR that US\$ are to be used unless otherwise agreed.

## **2. ROLE OF ADJUSTERS**

IUMI have submitted the following paper on this topic:

*“In a paper written in October 2014 Jolien Kruit suggested, for various reasons, that a paragraph should be inserted in the proposed York-Antwerp Rules 2016 (“YAR”) in which it is expressly provided that the average adjuster has to act impartially and independently and/or owes a duty of care towards all parties to the maritime adventure.*

## **SECTION B – OTHER MATTERS**

*Having taken soundings the following list of things Adjusters should do has emerged; Adjusters should:*

- 1. Genuinely act in the interests of all parties to the Common Maritime Adventure (“CMA”);*
- 2. Publish all evidence about causation in the Adjustment or publish an independent expert’s view of causation in the Adjustment;*
- 3. Make available copies of vouchers and relevant contracts (e.g. for repair) relating to expenses allowed in the Adjustment;*
- 4. Where appropriate Adjusters should collect G.A. security from all those interested in the CMA (including the ship and time charterers’ bunkers) as well as the cargo so that no party to the CMA is left unsecured should it turn out they are creditors in the Adjustment;*
- 5. Explain in appropriate detail the reason for the currency of the Adjustment;*
- 6. Investigate (and state in the Adjustment ) the steps which the parties to the CMA have taken and, if applicable, are taking to effect a recovery which might result in a re-adjustment;*
- 7. State upon the basis of which YAR rule each expense or sacrifice is allowed in the Adjustment (this is the subject of an AAA provisional Rule of Practice);*
- 8. Explain and justify the basis upon which GA contributions are claimed: this will usually (but not always) be a contract of carriage and, if it is, then the Adjuster should explain in the Adjustment if necessary pursuant to which contract of carriage the Adjustment is done and the reason why other contracts are not being relied upon (e.g. why is the G.A. clause in the Voyage C/P being adopted rather than the B/L?);*
- 9. Do not seek payments on account before the CMA has been completed;*
- 10. If the adjuster is aware that there has been a substantial cargo sacrifice, the cargo parties interested should be offered the opportunity to check the wording of security given by the other main contributing parties to the CMA;*
- 11. The adjuster should accept security wording which provides that payment is only made when properly and reasonably due;*

## **SECTION B – OTHER MATTERS**

12. *The adjuster should not obtain the shipowners' approval of the adjustment before it is distributed;*
13. *Collection of the contributions should be arranged on behalf of all parties to the maritime adventure.*

*It is thought that most of these requirements are already adopted as good practice and are therefore uncontroversial. However it is anticipated that items 2 and 4 might require some further explanation.*

*The reason that IUMI feels it would be helpful to have available all evidence about causation in the adjustment or that an independent expert's view of causation should be published is that the ship owner is in the special position of holding all the evidence. He seeks to recover contributions from innocent cargo interests on the principle that equity demands that sacrifices made for the benefit of all should be compensated by all. However as the equitable maxim has it "He who comes to equity must come with clean hands" and it is not appropriate that such demands should be made if, at the same time, attempts are being made to conceal evidence of the true cause of the GA incident. In his role as a truly independent adjuster all such evidence which he comes across should be disclosed to all parties to the CMA to make what they can of.*

*The reason that GA security should be collected from all those interested in the CMA, including the ship and time charterers' bunkers as well as the cargo, is that occasionally the right of cargo interests to collect contributions in GA are illusory because they are unsecured. While it is unusual for cargo to be creditors in GA it is by no means unheard of. Given the very considerable amount of time effort and expense which adjusters go to in collecting security from cargo interests the small amount of extra effort required to secure the ship's contribution would seem to be negligible in comparison given that the ship is just one, usually substantial, interest. Ships are frequently owned by one-ship companies who have no assets apart from the ship itself. Adjustments frequently take many years to produce by which time the ship may well have been sold and the former owning company left without assets or even dissolved. For this reason it seems quite reasonable to require ship interests to give proper security for GA contributions to cargo interests in just the same way that cargo interests secure their own GA contributions in favour of ship interests.*

*The other issues listed are not thought to be controversial and therefore no further comment is made about them.*

*The other issue for consideration is whether the Rule proposed by Ms Kruit should best appear as a new Rule in the YAR, a Rule of Practice to be adopted by each national Association of Average Adjusters or as Guidelines annexed to the next version of the YAR. The main role of the YAR is to govern the practice of actually performing the adjustment.*

## **SECTION B – OTHER MATTERS**

*However Rule XXII (Treatment of Cash Deposits) and Rule E (time limits for claims in GA) the Rules now address matters outside the adjustment itself.*

*The role of Adjusters in the adjustment process is increasingly coming to be specifically recognised in the YAR and they are increasingly being asked to exercise their discretion in making allowances. Under YAR 1994 and 2004 Average Adjusters appear specifically in Rule E which requires them to be notice of claims in GA. Under the proposed new YAR 2016 Adjusters are to be specifically given greatly increased roles: for example an amendment is proposed to Rule E requiring parties to give notice of recoveries to Adjusters (para. 5.2 of the Working Paper for the IWG meeting on 25/02/2015 (“the Working Paper”)); In para 8.1 of the Working Paper it is proposed that Adjusters should use their discretion to a limited extent when apportioning salvage in GA; in para 9.2 of the Working Paper it is acknowledged that Adjusters exercise discretion when making allowances under Rule X; Para 18.1 and 18.2 of the Working Paper propose a new Rule G or an amendment to Rule XVII giving Adjusters greater discretion in the calculation of contributory values and importantly under the proposals for the new Rule XXII (Treatment of cash deposits addressed in para. 23 of the Working Paper) Adjusters are to hold cash deposits in accounts in their own sole name rather than in the manner described in Rule XXII of the 1994 and 2004 YAR. Adjusters are now specifically given roles in the YAR which were not mentioned in previous versions. Average Adjusters are not generally (but with a few exceptions) regulated but their role requires (and usually gets) the highest standards of professional integrity and impartiality. It is therefore the view of IUMI that a YAR Rule should be included in the next YAR briefly stating the Adjuster’s role is to act impartially and independently and refer to Guidelines for examples of how this requirement might operate in practice (these would include points 1 to 13 above). The Guidelines to be appended to the YAR would constitute an expression of best practice and national courts worldwide should take judicial notice of them even though they would not be directly legally binding on adjusters.*

*In IUMI’s view a Rule of Practice would not be an appropriate method of clarifying the Adjusters’ role because it would require the various national associations of average adjusters to separately introduce appropriate resolutions: This would be a process over which the CMI would have no control and which would, inevitably, produce different rules at different times in different countries - the very lack of uniformity which the YAR are designed to avoid. IUMI’s preference is therefore the next YAR should append Guidelines dealing with the issues raised in Ms. Kruit’s paper and herein.”*

It is understood that IUMI will shortly provide a draft wording for a brief addition to the YARs for further discussion at Istanbul, with further points being dealt with under the CMI Guidelines.

## **SECTION B – OTHER MATTERS**

In advance of a specific draft wording the IUMI paper has been submitted to the adjuster members of the IWG and their preliminary comments can be summarised as follows:

- While it is pleasing to see the generous comments in the paper about the role of reputable adjusters, it should also be noted that IUMI's hull insurers have a significant part to play in discouraging the use of adjusters who are not as professional in their approach. As the party paying ship's proportion of adjusters' fees in general average cases and 100% of such fees in relation to particular average losses, the hull insurer is in an influential position. While the difficulties inherent in the current soft market are acknowledged, many H&M policies do specify the name of an adjuster or a panel of adjusters that has been agreed at the time of placing.
- As noted in the paper, the legal regimes under which adjusters operate vary enormously with regard to the extent of statutory controls and supervision by professional bodies. Legal concepts such as "impartiality" and "duty of care" are equally diverse and would impact in different ways, making the application of a general rule governing the conduct of adjusters as difficult as, for example, one governing the exercise of liens.
- In addition to potential legal action being taken in their working domicile, adjusters also face more frequent actual or threatened legal action in countries where they are offering professional services, particularly when collecting general average and / or salvage security. There would be serious concerns that any express terms such as suggested would be used to draw adjusters into disputes that actually relate more to commercial or P&I issues than to General Average.

Notwithstanding these concerns, it was considered that reputable adjusters would welcome any support for existing best practice and suggested that the correct vehicle for this would be within the CMI Guidelines.

## **SECTION C – CMI GUIDELINES**

### **INTRODUCTION**

In the 2011 CMI Questionnaire consideration was given to:

- including a “Definitions” section in the Rules in line with many international conventions
- expanding the Rules to cover matters that presently require reference to text books or other sources to understand fully.

It was agreed by the IWG that “Definitions” would simply extend the scope for arguments on the various definitions. Additionally, while making the Rules more self-contained had some merits, it would be at the expense of the brevity and flexibility of the present Rules format which were considered to be essential features that must be retained.

Other areas such as maintaining liens and forms of security were seen as being too dependent on local jurisdictions to make the drafting of useful new Rules possible.

However, against this background it was considered that CMI could play a useful role by providing a set of Guidelines that, while not binding, would reflect existing best practice and provide a source of information and guidance for commercial interests.

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The following pages do not provide any detailed drafting (with the exception of section G) but are intended to give the ISC an indication of the areas that might be covered. If there is agreement in principle to the idea of the CMI Guidelines, more detailed drafting can be assigned by the Chairman to sub-groups.

The draft shown in section G is taken from an existing document and is intended merely to illustrate the kind of general guidance that might be offered.

The list is not intended to be exhaustive and there may be other suitable topics that can be considered.

If adopted, any set of Guidelines would need to include:

- A suitable pre-amble to make it clear they are separate from the YARs and not contractually binding;
- A mechanism for updating the Guidelines when required.

## **SECTION C – CMI GUIDELINES**

### **CONTENTS**

- A) APPLICATION OF RULE VI
  
  - B) INTEREST RATES UNDER RULE XXI
  
  - C) TREATMENT OF CASH DEPOSITS (RULE XXII)
  
  - D) GENERAL AVERAGE SECURITY DOCUMENTS
  
  - E) ROLE OF THE ADJUSTER
  
  - F) MEDIATION OF DISPUTES
  
  - G) ROLE OF GENERAL INTEREST SURVEYOR
- (topics a-c are shown in the order that they appear in the YARs).

## **SECTION C – CMI GUIDELINES**

### **A) APPLICATION OF RULE VI**

#### Drafting Note:

The decision as to the future form of Rule VI is still a matter of discussion.

One option being considered is that of salvage being included as GA (as in YARs 1994) but with various exceptions when the parties have settled or are liable for salvage independently.

The application of these exceptions might involve the adjuster making judgements as to what is (for example) a “significant” difference in contributory values.

If this route is followed a subsidiary question arises as to whether CMI should provide guidelines to assist the adjuster in arriving at such decisions and to help the parties understand the criteria being applied.

Further drafting work on this point is therefore deferred at present.

### **B) INTEREST RATES UNDER RULE XXI**

#### Drafting Note:

The question of changes under Rules XX and XXI is still a matter of discussion but if the YARs 2004 position on interest is accepted (a flexible rate set annually by CMI), ICS have indicated that they consider the current guidelines for this process need to be amended:

- to include representatives of shipowners in the CMI panel
- to ensure a more realistic rate that will reflect the likely cost to the shipowner or any other party advancing funds.

For information, the current (2004) guidelines are shown below:

*“The Plenary Session of the Vancouver Conference adopted the following guidelines for fixing the rate of interest:*

*“Guidelines for the Assembly of the Comit Maritime International when deciding the annual interest rate provided for in YAR Rule XXI.*

*The Assembly is empowered to decide the rate of interest based upon any information or consideration, which in the discretion of the Assembly are considered relevant, but may take the following matters into account:*

## **SECTION C – CMI GUIDELINES**

*The rate shall be based upon a reasonable estimate of what is the rate of interest charged by a first class commercial bank to a ship owner of good credit rating.*

*Due regard shall be had to the following:*

- *That the majority of all G.A. adjustments are drawn up in USD.*
- *That therefore the level of interest for one-year USD loans shall be given particular consideration*
- *that most adjustments, which are not drawn up in USD, are drawn up in GBP, EUR or JPY.*
- *That, if the level of interest for one year loans in GBP, EUR or JPY differs substantially from the level of interest for one year loans in USD, this shall be taken into account.*
- *That readily available information about the level of interest such as USD – prime rate and LIBOR shall be collected and used.*
- *Any amendment of these guidelines shall be made by a decision of a conference of the CMI.”*

### **C) TREATMENT OF CASH DEPOSITS**

Drafting Note:

If the amended version of Rule XXII is accepted (see Section A paragraph 22.2) this already specifies to some extent the way in which deposits are to be handled. However, it may be desirable to provide some additional guidance, perhaps along the following lines:

*Under Rule XXII(2) the adjuster is required to hold deposits in a special account constituted in accordance with the legislation regarding holding client or third party funds that applies in the domicile of the appointed adjuster.*

*In the absence of such legislation, or where it is incomplete, CMI recommends that any special account should have the following features:*

- *Funds should be held separately from the normal operating accounts of the adjuster.*
- *Funds should be ‘ring-fenced’ in the event of liquidation or the cessation of the adjuster’s business.*
- *The holding bank should provide regular statements that show all transactions clearly.*

## **SECTION C – CMI GUIDELINES**

In addition, the question of deposit receipts remains to be decided (see DN 23) and depending on the outcome, it may be appropriate to include an item on deposit receipts in the above draft guidelines.

### **D) GENERAL AVERAGE SECURITY DOCUMENTS**

Drafting Note:

The general objectives might be set out as follows:

#### *1. Introduction*

*A variety of forms are used to provide security for the liability of the cargo owner (Average Bonds) and the undertakings given by their insurers (Average Guarantees).*

*Variations in the wordings of such forms have arisen largely as a result of market practices and the CMI offer the following forms as providing recommended wordings that have been agreed by the international representatives of shipping interests (International Chamber of Shipping, ICS) and insurers (International Union of Marine Insurers, IUMI). It is recognised that the wording adopted in practice may vary in some cases due to circumstances or legal issues, however the following recommended wordings are offered with the following objectives in mind.*

- To provide an acceptable level of security to the shipowner and other parties to the adventure that may be GA creditors.*
- To preserve the position under Rule D in respect of defences.*
- To encourage the timely provision of information and evidence to ensure the adjustment process is not delayed.*

*In addition it was considered that it would assist the parties to provide options to include:*

- Jurisdiction clauses*
- Provisions regarding currency of adjustment*

## **SECTION C – CMI GUIDELINES**

### 2. Recommended wordings

[TBC]

#### **E) ROLE OF THE ADJUSTER**

##### Drafting Note:

The question of whether and to what extent the role of the adjuster should be expressly set out in the YARs is a matter for discussion.

Subject to the outcome of such discussion it was considered that CMI might in any event set out what was considered to be best practice with regard to the activities of the average adjuster. While significant differences in national legislation regarding such activities do exist, and many professional associations publish their own rules of practice, it was considered that some practices and principles were universal and could be offered by CMI as reflecting best practice.

#### **F) MEDIATION OF DISPUTES**

Due to the nature of the York Antwerp Rules and General Average cases, which may involve several jurisdictions in any one casualty, it is not possible to include express arbitration or mediation clauses in the YARs. However mediation and dispute resolution services are offered by the following average adjusters' associations:

[Names to be listed]

#### **G) ROLE OF GENERAL INTEREST SURVEYOR**

This item is included as an example of information that might help commercial interests who are unfamiliar with major GA cases.

*The General Interest or "G.A. Surveyor" is appointed by the Shipowners on behalf of all parties involved in the common maritime adventure. The Shipowner is responsible for settlement of the Surveyor's charges, which are allowed as General Average.*

*The G.A. Surveyor is not required to investigate the circumstances leading up to a G.A. situation (i.e. the cause of a fire) but once the situation exists, his role is as follows:*

- 1) *To advise all parties on the steps necessary to ensure the common safety of ship and cargo.*

## **SECTION C – CMI GUIDELINES**

- 2) *To monitor the steps actually taken by the parties to ensure that proper regard is taken of the General Interest.*
- 3) *To review General Average expenditure incurred and advise the Adjusters as to whether the costs are fair and reasonable.*
- 4) *To identify and quantify any General Average sacrifice of ship or cargo.*
- 5) *To ensure that General Average damage is minimized wherever possible i.e. by reconditioning or sale of damaged cargo. Except in cases of extreme urgency or where communications are difficult, any significant action with regard to cargo (i.e. arranging for its sale at a Port of Refuge) must be taken in consultation with the concerned in cargo.*

*The authority and funds to make disbursements will generally come from the Shipowner, usually via the Master or the Local Agents. The G.A. Surveyor therefore has no authority to order any particular course of action and his role is an advisory one. However, the Surveyor's impartial position and his influence on the eventual treatment of the expenditure will give his advice considerable weight with the other parties involved.*

*The Surveyor should also be aware that several other Surveyors may be in attendance on behalf of particular interests and that, for reasons of economy, duplication of reporting should be avoided. In the event of any doubt arising as to the depth of investigation required from the G.A. Surveyor, the Adjuster should be contacted for guidance. The Surveyor is effectively appointed to act on behalf of the whole General Average community, any of whom are generally entitled to view all his exchanges of correspondence and reports.*