

CMI INTERNATIONAL WORKING GROUP ON GENERAL AVERAGE

AMD Response to Questionnaire

SECTION 1 - GENERAL

1 THE BIG PICTURE

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

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

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

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

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

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

1.2 a) None come immediately to mind.

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

2. ROTTERDAM RULES

- a) It is not considered that the YAR should be amended to reflect the changes in approach proposed by the Rotterdam Rules. In fact, like all other earlier conventions concerning Carriage of Goods by Sea they do not have any impact on GA and the YAR. They concern the ability of creditors under an adjustment to recover a contribution or otherwise.
- b) The text refers to “difficult decisions” about collecting GA and Salvage security. This is nothing new. But however obvious it may appear that cargo have a defence to payment of their GA contribution, in practice P&I clubs insist in the great majority of cases that security be collected.

3. DEFINITIONS

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

4. SCOPE

To turn the YAR into “a more self-contained and complete code” would be a massive task. The idea has been raised before and rejected.

How one deals with “inexperienced courts” is not a problem that can be dealt with and unless the Code was of great length it must be doubtful that it would help. Those drawing up contracts of affreightment should be encouraged to insert clauses providing for jurisdiction in countries with courts which do understand GA and the YAR.

5. FORMAT

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

6. DISPUTE RESOLUTION

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

7. ENFORCEMENT

- a) This idea has been debated before in the discussions before the 94 Rules, but rejected. With regard to liens in particular, it is foreseeable that provisions in the YAR may conflict with local laws at the place of discharge. However it is considered that there would be a significant benefit in including an express provision providing a lien enforceable at the time and place of discharge, particularly in relation to large container carriers.
- c) The use of a standard form of security document would be beneficial but unless it were included as an appendix to the YAR it is likely that it would fall by the wayside as have other attempts to produce standard documentation.

The use of a single standardized document would simplify the collection of security and thus reduce cost. However, it is recognized that the use of a standard form has some challenges; particularly in relation to jurisdiction.

8. ABSORPTION CLAUSES

The best course of action would be for Hull Underwriters to offer much larger absorption figures and of course offer them to those less fortunate owners who at present do not get them.

It is not considered that there is anything that could be done in the YAR to further assist the reduction in the number of small GAs which get adjusted.

9. PIRACY

- a) It is considered unnecessary to include specific provisions in the YAR with regard to piracy as allowances will flow from the application of Rule A. However, if it was felt necessary to include provisions it might be preferable for them to be set out in a subset of rules to avoid any possibility that the principles might taint the rules as a whole. This subset of rules might only apply when specifically referenced in the contract of affreightment to create GA by agreement.
- b) It is understood that the only restriction according to English law is that the payment of a ransom is not permitted if it is to be used to finance terrorism. The situation is similar in USA, France and Canada. However, in Denmark it is illegal to pay a ransom to pirates on the basis that it is funding an illegal activity although it is understood that the point has so far not been taken by the authorities. In Germany the payment of a ransom is not illegal as it is considered an “excusatory emergency” when life and property is at risk.

10. COSTS

- a) People have probably been complaining about adjusters' fees since Pontius was a pilot. Requiring adjusters to justify their fees by recording hours and work accomplished is not unreasonable but this issue has little to do with the YAR. Also a tariff system, under which fees are expressed as a percentage of the claim, prevails in some adjusting centres.
- b) A single standard security document (which might usefully encompass salvage security) would reduce the cost of collecting security as might be the establishment of market bodies to provide GA security on behalf of all insurers in that market.
- c) Even if adjustments were to be reduced to one page of A4 the underlying work would have to be done and charged for. Attempts have been made on a sporadic basis to produce so-called "short form" adjustments. These have not always met with acceptance from claims examiners.
- d) Such persons usually extend the time and consequent cost of preparing adjustments and should ideally not be employed until after the adjustment has been issued.

11. OTHER MATTERS

a) SDRS

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

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

This is what it says about them on Wikipedia:

“Special drawing rights (SDRs) are supplementary foreign exchange reserve assets defined and maintained by the International Monetary Fund (IMF). Not a currency, SDRs instead represent a claim to currency held by IMF member countries for which they may be exchanged. As they can only be exchanged for euros, Japanese yen, pounds sterling, or US dollars, SDRs may actually represent a potential claim on IMF member countries' non-gold foreign exchange reserve assets, which are usually held in those currencies. While they may appear to have a far more important part to play, or, perhaps, an important future role, being the unit of account for the IMF has long been

the main function of the SDR.

Created in 1969 to supplement a shortfall of preferred foreign exchange reserve assets, namely gold and the US dollar, the value of a SDR is defined by a weighted currency basket of four major currencies: the US dollar, the euro, the British pound, and the Japanese yen. SDRs are denoted with the ISO 4217 currency code XDR.

SDRs are allocated to countries by the IMF. Private parties do not hold or use them. As of March 2011, the amount of SDRs in existence is around XDR 238.3 billion, but this figure is expected to rise to XDR 476.8 billion by 2013”

b) EXCLUDE SACRIFICES.

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

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

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

SECTION 2 – INTRODUCTORY RULES

1. RULE OF INTERPRETATION

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

2. RULE PARAMOUNT

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

3. RULE OF APPLICATION

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

SECTION 3 – LETTERED RULES

1. RULE A.

No comments.

2. RULE B.

- 2.1 No known problems with the application of this Rule.
- 2.2 The problem is not with this Rule but in applying Rule XI to tug and tow situations. In particular, how should the wages & maintenance of the crew of a tug which has taken its tow to a port of refuge for repairs be dealt with?

3. RULE C.

- 3.1 It is considered that the issue of “loss of market” should not be revisited.
- 3.2 a) & b) These amendments would seem to be sensible as clarification.

4. RULE D.

See comments under Section 1 item 2.

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

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

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

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

5. RULE E.

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

5.2 It might be worthwhile clarifying this point

6. RULE F.

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

6.2 a) Whilst the inclusion of substituted losses would appear equitable, they would be difficult and time consuming to adjust.

b) Whilst not aware of any difficulties in this respect, clarification may be in order.

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

windfall.

7. RULE G.

- 7.1 A good point. It would have to be a fairly flexible formula to apply to every type of vessel from a small coaster to a vast container vessel, but perhaps it should be explored.
- 7.2 As there appears to be a lack of uniformity of practice on this issue, clarification should be considered.
- 7.3 The requirement should be retained if only because it gives the cargo owners the opportunity to take delivery of their cargo at the port of refuge if they have the right to do so.
- 7.4 Whilst it is generally considered that a) is the correct approach, the point should be clarified.
- 7.5 No obvious solution presents itself.

SECTION 4 – NUMBERED RULES

1. RULE I

Prior to 1994 the BMLA disliked this Rule as the proviso “custom of the trade” introduced the question of fault into a numbered Rule. They had a point, but no one else was interested. Should it be raised again?

2. RULE II.

No comments.

3. RULE III

No comments.

4. RULE IV

The principle should be preserved but preferable language does not readily come to hand. It is considered that that the Rule should be extended to include cargo.

5. RULE V

No comments.

6. RULE VI

6.1

- a) Option iv) is favoured as the adjuster is usually in the best position to decide on the point.
- b) The allowance of Salvage as GA (in instances where each party has discharged its liability directly to the salvor) might only be considered where there have been (i) GA sacrifices, (ii) where there has been damage to the property due to another casualty subsequent to the GA act or (iii) where the values used for the apportionment of the salvage are manifestly wrong.
- c) This would be the sensible course to take.

6.2

- a) Yes if only for the avoidance of doubt.
- b) It is not entirely clear why this idea would encourage co-operation.

7. RULE VII

Yes.

8. RULE VIII

a) and b) Yes

9. RULE IX

No comments.

10. RULE X

10.1 Yes – it is considered that the addition of the words in italics would clarify the position.

10.2 It is considered that the timing of the discharge in relation to the point of frustration or termination is important. It appears harsh that the cost of discharging cargo ashore to allow a vessel to be drydocked for repairs necessary for the safe prosecution of the voyage is not allowed purely because it is determined some time later that the voyage is frustrated.

11. RULE XI

- 11.1 To allow wages and maintenance as in 1994 Rules.
- 11.2 In view of the judgement clarification may be desirable.
- 11.3 One of the dangers of clarification is that not all circumstances may be covered – in practice this rule seems to work well.
- 11.4 Yes.
- 11.5 a) No.
- b) No.
- c) This might be a wise clarification.
- d) Yes.

12. RULE XII

No comments.

13. RULE XIII

In the interests of modernization and simplification, consideration might be given to the abolition of this rule. In any event it is considered that the final part relating to cleaning and painting is technically out of date.

14. RULE XIV

- 14.1 No objection to the 2004 change.
- 14.2 No practical difficulties encountered.

15. RULE XV

No comments.

16. RULE XVI

This amendment is supported as it gives effect to general practice.

17. RULE XVII

- 17.1 Yes – It would deal with a divergence of international practice.
- 17.2 Whilst it is generally considered that no clarification is required there has been a suggestion that an express exclusion might be of practical assistance in dealing with parties less familiar with the Rules.
Members of the WG have not encountered the specific difficulty in

practice but recognize that clarification could be desirable, in which case we would propose the following wording:

“The value of the cargo shall include the cost of insurance and freight unless and insofar as such freight is at the risk of interests other than the cargo, deducting therefrom any *physical* loss or damage suffered by the cargo prior to or at the time of discharge; *no deduction shall be made for loss of market, and any loss or damage sustained or expense incurred by reason of delay, whether on the voyage or subsequently, or any indirect loss whatsoever.*”

18. RULE XVIII

Prior to 1994 it was discovered and debated at length by the AIDE committee that the apportionment of drydock dues etc varied from country to country – is this an issue that should be dealt with in the Rules?

19. RULE XIX

No comments.

20. RULE XX

Whilst it is generally considered that the allowance of commission is outmoded, it is recognized that it may act as an incentive to a shipowner to assume small salvage costs.

21. RULE XXI

12.1 It is agreed that a fixed rate of interest is inappropriate. However, we are not convinced that the CMI setting the rate annually in the way that they do is appropriate; see below.

12.2 There are two concerns regarding the method adopted by the CMI to establish the annual rate. Firstly, the rate is based on interest charged by first class commercial banks to shipowners with a good credit rating. As noted in the questionnaire this results in a rate which is not realistic for many shipowners or indeed cargo owners.

Secondly, the CMI establishes the rate some months in advance of the date from which it runs which is unsatisfactory.

It is recognized that there is no easy solution to the problem of establishing interest rates particularly now that LIBOR has been tarnished. However, the utilization of SDRS as the currency of adjustment has an inbuilt advantage that SDRS have their own interest rate which could be adopted in some form for the purpose of this Rule.



22. RULE XXII

It is, in practice, impracticable for adjusters to comply with the terms of this rule with regard to the retention of cash deposits. This is primarily due to banks being reluctant to offer reasonable interest rates for joint accounts and due to the impact of money laundering regulations. Thus in practice in the UK, USA, Canada, France, Denmark and Germany the adjuster alone retains the deposits in a special bank account. This position should be regularized.

23. RULE XXIII.

No known problems.

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