ASSOCIATION FRANCAISE DU DROIT MARITIME

Paris, 24 July 2013

RESPONSE BY THE FRENCH MARITIME LAW ASSOCIATION TO THE CMI QUESTIONNAIRE ON GENERAL AVERAGE

SECTION 1 — GENERAL

1. THE BIG PICTURE

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

a) Would you support this approach?

b) If so,

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

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

1.2 The current edition of Lowndes

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

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

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

2. ROTTERDAM RULES

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

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

We consider this issue to be premature as long as Rotterdam rules are not yet in force. As far as we can consider Rotterdam Rules they are not bound to have any effect as such on Y&A R.

3. DEFINITIONS

a) Should the YARs include a section of definitions?

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

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

4. SCOPE

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

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

A more comprehensive regulation could create a lack of flexibility.

5. FORMAT

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

Do MLA's consider this should be maintained?

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

6. DISPUTE RESOLUTION

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

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

7. ENFORCEMENT

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

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

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

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

Therefore we do not see the interest of such question.

8. ABSORPTION CLAUSES

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

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

We do not have any recommendation on such issue.

9. PIRACY

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

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

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

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

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

10. COSTS

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

a) Adjusters fees

b) Costs of collecting security

c) Format of adjustments

d) Involvement of legal and other representatives

No problem with such questions

11. OTHER MATTERS

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

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

We propose that such point should be raised.

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

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

We recommend to consider such question.

SECTION 2 — INTRODUCTORY RULES

1. RULE OF INTERPRETATION

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

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

No comment.

2. RULE PARAMOUNT

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

We think such issue is complex and is sorted out by the legal action of the innocent cargo interest against the Carrier according to BL.

We do not see the point to raise a question on this matter.

3. RULE OF APPLICATION

The draft wordings put forward by CMI at Beijing included for the first time a Rule of Application. The IWG has proposed that this rule be inserted as the first provision of the YAR before the Rule of Interpretation." The proposed rule had the following wording:

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

Should the 2016 Rules contain a similar provision?

We do not see the point of such question.

SECTION 3 — LETTERED RULES

2. RULE B

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

No comment on such proposed question.

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

No interest for such question which should not be raised.

3. RULE C

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

Is this an issue that should be revisited?

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

3.2 Should the second paragraph of Rule C:-

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

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

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

5. RULE E

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

We agree to keep such question.

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

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

6. RULE F

6.1 Since 1974, substituted expenses are allowed wholly to GA *"without regard to savings to other interests."* Previously, English Rules of Practice dealing with specific types of substantiated expense (cargo sold at a port of refuge, towage and cargo forwarding from a

port of refuge) provided for the expense (up to the savings) to be divided in proportion to the saving in expenses thereby occasioned to the parties to the adventure.

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

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

6.2 The wording of Rule F refers only to any extra "expense" and the drafting committee in 1974 rejected the proposal that the words "or loss" should be included, following the English Rule of Practice F17

a) Do you consider this Rule should be amended to include "loss"

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

This question should not be raised.

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

Do you consider this should be looked at further?

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

7. RULE G

7.1 The Rule sets out "non-separation allowances" and specifies that such allowances (removal to and whilst at a repair port) can only be made "for so long as justifiable under the contract of affreightment and the applicable law".

Whilst frustration by reason of damage may be easy to determine, frustration of a voyage by reason of delay is a much more uncertain matter.

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

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

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

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

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

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

No doubt that the requirements for information should be maintained as it is.

7.4 Where a voyage is frustrated by reason of delay (e.g. the damage is serious and requiring lengthy repair but is not so costly as to make the vessel a commercial total loss), should non-separation allowances continue:-

a) Only up to the point at which it becomes apparent that the voyage is frustrated.

b) Up to the point at which the delay became sufficient to frustrate the voyage.

We consider that non-separation allowance issue should be treated as per the transportation rules of the contract and in a more general point of view frustration issue should not be considered as per the RYA.

7.5 Deciding how long is *"justifiable under the contract of affreightment and the applicable law"* has proved controversial in some cases. Given that the decision is often "fact sensitive" and subject to differing criteria according to national laws, is there a better way of establishing an equitable cut-off point for such allowances?

Allowances issue should be handled by the applicable law of the transportation contract and/or CP and not the RYA.

SECTION 4 — NUMBERED RULES

4. RULE IV

The use of the terms "wreck" and "carried away" sounds rather archaic and Lowndes (para 4.18/4.19 - see attached) finds other grounds to criticize the rule.

Assuming the principle needs to be retained, can it be expressed in a clearer and more contemporary way?

We do not see the interest of redefining it; the principle should be maintained.

6. RULE VI

6.1. The debate regarding the inclusion or exclusion of salvage where the law or contract already provides for a means of distribution between the parties (for simplicity we suggest this is referred to as LOF salvage, although other contracts/jurisdictions achieve the same effect) was unresolved after Beijing. The arguments for and against were set out in the Report by the CMI International Subcommittee on General Average which can be found in the CMI Yearbook 2003 at pages 290-292 on the CMI website. In 2012 a compromise version of Rule VI was put forward by a CMI IWG (which can be found on the CMI website under Work in Progress, York- Antwerp Rules) which provided for exclusion of

LOF salvage from GA if it constituted more than a fixed percentage of the total general average.

Some adjusters have commented that it is already their practice to approach the parties if it seems likely that the effect of re-apportioning salvage will be disproportionate to the time and cost involved. Adjusters have also pointed out that if salvage payments are excluded from GA they still rank as an extra charge incurred in respect of the property subsequent to the GA act and therefore should be deducted from the Contributory Value (see Rule XVII). The saving in procedural cost of excluding salvage would therefore not necessarily be that significant.

Looking to 2016 the current options would appear to be:-

- i) Retaining the 1994 position
- ii) Adopting the 2004 position
- iii) Adopting a compromise position as put forward by CMI in Beijing which would also involve deciding on the percentage figure.
- iv) Continuing as in (i) but encouraging adjusters' "ad hoc" approach wherever possible.
- v) Continuing as in (i) and (iv) but including an express provision obliging the adjuster to consider the possibility of not including salvage, perhaps linked to the Rule Paramount.

a) Which option(s) do you support?

b) Are there other options that should be considered?

c) If options (ii) or (iii) are supported should an amendment to Rule XVII be made so that salvage payments are not deducted from contributory values when salvage is not allowed as GA?

We clearly are in favor of the 2004 approach (ii) as we believe such option was a clear common benefit for all parties and allowed to save time and costs.

6.2 At present Rule VI makes no reference to legal and other costs incidental to a salvage operation and subsequent award. Such costs are customarily allowed by adjusters under Rule C, as a direct consequence of the GA act of engaging salvors.

a) Should the allowance for legal and other costs be expressly recognized in Rule VI?

b) Would it encourage co-operation amongst salved property interests and early negotiated settlements if legal costs were expressly excluded?

We think that these questions are premature without any definitions of legal costs and absence of claims arise in this respect.

7. RULE VII

Should the word "ashore" be replaced by "aground"?

No need to change.

8. RULE VIII

a) Should the word "ashore" be replaced by "aground"?

b) The word "reshipping" is capable of mis-interpretation; should it be replaced by "reloading"?

No need to change.

10. RULE X

10.1 In the second para of X(a) should the words in italics be inserted "…is necessarily removed to another port or place of refuge because repairs *necessary to complete the voyage* cannot be carried out at the first port of refuge."

in order to confirm the line taken in the *"Bijela"* [1992] 1 Lloyds Rep 636 (see Lowndes para 10.36 attached)

This precision will permit to clearly and better apply the rule and avoid any interpretation and discussion.

10.2 With regard to X(b) should express wording be introduced to say that the cost of discharge is not GA if the voyage is frustrated or voluntarily terminated, or if repairs are not carried out from some reason?

No need.

11. RULE XI

11.1 Wages and maintenance of crew are allowed in GA while detained at a port of refuge for the common safety or to effect repairs necessary for the safe prosecution of the voyage, under the YARs 1994 (Xl(b)) but not in YARs 2004. Both sets of Rules allow wages during the deviation to a port of refuge, and some have suggested that no crew wages should be allowed in General Average at all. What should be the position under YARs 2016?

2004's version was made in order to avoid difficulties in respect of the adjustment and simplify the calculations rules, but it can still be discussed.

11.2 In the *"Trade Green"* [2000] 2 Lloyds Rep 451, the judge decided that the term "port charges" relates only to the charges a vessel would ordinarily incur in entering a port, and went on to say:

"I do not think that r.XI(b) can be construed so as to cover all sums' charged by the port authority regardless of the circumstances; in my view it is much more limited in its scope. It is true that in the present case the services of the tugs and the charges for those services were imposed on the vessel by the port authority, but they were imposed in response to an unusual situation and were not imposed in the common interests of the ship and cargo. In these circumstances, I do not think that they can properly be regarded as port charges within the meaning of r.Xl(b)."

Most adjusters would regard this view as being against both principle and practice. For example, the cost of a standby tug if required by the port authority is commonly allowed as a port charge.

Does this point now need to be covered expressly by the Rules either by amendment to Rule XI or by inclusion of a definitions section (see Section 1-3 above)?

We do not see the interest of such question and this should be dealt on a strict case by case basis.

11.3 With regard to the phrase *"until the ship shall or should have been made ready to proceed upon her voyage",* Lowndes (para 11.34-5 attached) refers to examples of delays caused by ice conditions or strikes.

Is express wording needed to deal with such contingencies and/or to clarify the situation when a delay arises from a second accident or the condition of cargo?

We do not see the interest of such question and this should be dealt on a strict case by case basis.

11.4 Rules X(b) and Xl(b) contain the provision excluding allowances *"when damage 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."*

Does the wording of this provision (added in 1974) fulfill its intended purpose?

We do not see the interest of such question and this should be dealt on a strict case by case basis.

11.5 The introduction of Rule Xl(d) was the most significant feature of the 1994 Rules.

a) Is there any need to change the overall basis of the compromise between property/liability insurers reflected in the Xl(d)?

b) Have you encountered any difficulties in the application or wording of Xl(d)?

c) Do the words "actual escape or release" need to be qualified as in Rule C with the words "from the property involved in the common maritime adventure", or in any other way?

We do not see the interest of such question and this should be dealt on a strict case by case basis.

d) Should sub-paragraph (iv) include reference to bunkers as well as cargo?

Such question should have a further analysis, notably in respect of the Bunker Convention (International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001) and the mandatory insurance to be taken by the Owner.

14. RULE XIV

14.1 The 1994 and 2004 Rules deal with temporary repairs for the common safety and for sacrificial damage in the same way. The 2004 Rules adopted a different approach which gives priority to Particular Average savings.

Do you consider the 2004 version should be retained?

We think 2004 version should be retained but we have no problem with such question.

14.2 The House of Lords judgment in the *"Bijela"* [1992] 1 Lloyds Rep 636 was handed down only shortly before the Sydney Conference on 1994.Have you encountered any practical difficulties regarding the application of Rule XIV, there having been no reported litigation since 1994?

We have no problem with such question.

16. RULE XVI

This Rule provides for cargo sacrifices to be determined "at the time of discharge". Modern transportation involves cargo being carried under one contract of carriage from the port of shipment by sea to a port of discharge and thence by road or rail to in inland destination for delivery to the consignee under a through Bill of Lading. The commercial invoice referred to in the Rule and Rule XVII will include the freight and insurance cost of the whole journey and will not normally be shown broken down between the different sea and land transits. For practical reasons average adjusters have normally, since such multimodal transport became common, adopted CIF values at the time and place of delivery in terms of the invoice; this is frequently the inland destination. They acknowledge that this practice is not strictly in accordance with the wording of the Rules. The practical reasons for its adoption are the great difficulty and consequent cost of determining in these circumstances what the value "at that time of discharge" is.

Should the relevant wording be changed to *"at the time of delivery under the contract of carriage",* or should both phrases be included, allowing the adjuster to decide the most equitable basis?

(The point also arises with regard to the same wording found in Rule XVII.)

This suggestion should permit to simplify the discussion on GA.

17. RULE XVII

17.1 Clause 15 of LOF 2011 LSSA Clauses expressly allows the Arbitrator to disregard low value cargo when "the cost of including such cargo in the process is likely to be disproportionate to its liability for salvage."

Adjusters have similarly excluded low value cargo when appropriate as a matter of good practice, but would it be useful to have an express sanction for doing so in the Rules?

We should have a more practical approach based on a case by case analysis on this subject.

17.2 Claims for deductions from contributory values of cargo may be made because of loss of a seasonal market or (for example) losses caused by the need to purchase a replacement item for a time sensitive contract. Rules C refers to losses by delay but only in the context of making allowances, not the calculation of contributory values.

Is this an area where clarification is required?

This question arises some difficulties in respect of the carriage contract and the cargo insurer.

20. RULE XX

In the discussions at the Vancouver Conference (2004) it was argued strongly that payment of commission could no longer be justified under modern banking practices, and the 2004 Rules no longer provide for such allowances.

Do you consider that the 2004 position should be maintained in 2016?

Yes we think this should be maintained and that commission should not be allowed under GA.

21. RULE XXI

21.1 It appeared to be common ground at the Vancouver Conference that a fixed rate of interest was too inflexible over the life of a version of the YARs and that a variable rate, set annually by CMI, should be preferred.

Do you remain of this view?

We think such question should be maintained.

21.2 The Vancouver conference agreed guidelines for the CMI International Working Group responsible, essentially that the rate should be *"interest applicable to moneys lent by a first class commercial bank to a shipowner of good credit rating."*

While agreeing with the principle of flexible rates, some shipowners have expressed concern that the rates adopted are unrealistic in the current climate when bank lending is extremely tight and sentiment is against the creditworthiness of the shipping industry, however reputable individual owners maybe.

Do you have any proposals to assist with the setting of annual interest rates?

We think such question should be maintained.

22. RULE XXII

Due to the difficulty in setting up joint accounts, sometimes in a foreign currency, it has become the practice of adjusters to hold deposits in trust accounts in their own name. Should this practice be recognised by the YARs?

No need to handle such issue within the YAR as it is an accounting matter which can vary to one country to another.

23. RULE XXIII

The 2004 Rules introduced the time bar provisions for the first time. While recognising possible difficulties in certain jurisdictions, do you consider these provisions should be retained and, if so, are there any areas needing improvement?

We think such question should be maintained.