

CMI GUIDELINES STANDING COMMITTEE

REVIEW OF GENERAL AVERAGE SECURITY DOCUMENTS

WORKING PAPER (1)

(06.12.2016)

I) INTRODUCTION

During International Working Group and International Sub-Committee discussions it was generally agreed that it would be useful if the Guidelines could include recommended general average security wordings that were, in principle, generally acceptable to the commercial organisations. The objectives were to ensure that:

- Clear and equitable terms are used.
- The time and cost of arguments over minor wording changes when collecting security are avoided.

The proposal recognised that both bonds and guarantees are free-standing contracts and may be varied by parties. The intention is to provide a “default” set of wordings that can be used in the majority of cases and have the “blessing” of CMI, as a neutral body, and the industry stakeholders.

In the run up to the CMI meeting in May 2016 there was insufficient time to complete the project, but again there was a general consensus that it should be continued, with a view to having completed recommendations ready for the next CMI Assembly in Genoa in September 2017. Although this is many months away, it is suggested that initial consultations should proceed as soon as possible.

The members of the Standing Committee are as follows:

- Taco van der Valk (Convenor)
- Ben Browne (IUMI)
- Jonathan Spencer (US and Canadian AA)
- Jörn Groninger (Germany)
- Jurou Kubo (Insurer, Japan)
- Kiran Khosla (ICS)
- Michael Harvey (AMD)
- Richard Cornah (AAA)
- Sveinung Makestad (Insurer, Norway)

The Committee members have already been closely involved in the YARS project and will have valuable individual contributions to make, but the intention is that these Working Papers should be circulated via them to the industry and professional bodies they represent or belong to.

The final product will need to be approved by the MLAs at the Assembly and it is of course important that the MLAs can review the proposals in plenty of time and provide their input. However, it is suggested that this would best be done after this initial, narrower consultation

is completed and something nearer to a final document (with stakeholder endorsement) is available.

Section II sets out the 'standard' versions that were last approved by Lloyds (the bond) and the Institute of London Underwriters (the guarantee) in 1977 and 1995 respectively. Both have been 'tweaked' by practitioners in various ways since then, but they do provide a starting point of reference.

Section III sets out a first draft of how the relevant section of the Guidelines might look, together with some notes and comments. At this stage no particular attempt has been made to modernise the wording, or to harmonise the wordings used in the bond and guarantee (e.g. "proportion" in the bond and "contribution" in the guarantee). The possibility of unintended consequences suggests that it will be necessary to proceed with caution but it might be appropriate to make the attempt.

Other points may be worth considering, for example

- Should a wording be recommended for security in respect of time charterers' bunkers?
- Should there be a recommended wording for deposit receipts?

When responding as individuals or on behalf of stakeholders and professional bodies, it would be helpful if comments already made in past exchanges could be included to ensure that nothing is missed.

It is suggested that we should aim to complete the first stage of consultation by the end of February 2017 and we can then decide whether an actual meeting is necessary – it may be that the next draft can be agreed by email.

R.R. Cornah
6 December 2016

II) PAST WORDINGS

1. Average Bond

The wording of the Lloyd's Average Bond was updated in 1977 (LAB 77) in the following form:

LLOYD'S AVERAGE BOND

To
Owner(s) of the
Voyage and date
 Port of shipment
 Port of destination/discharge
 Bill of lading or waybill number(s)

| Quantity and description of goods |
|-----------------------------------|
| |

In consideration of the delivery to us or to our order, on payment of the freight due, of the goods noted above we agree to pay the proper proportion of any salvage and/or general average and/or special charges which may hereafter be ascertained to be due from the goods or the shippers or owners thereof under an adjustment prepared in accordance with the provisions of the contract of affreightment governing the carriage of the goods or, failing any such provision, in accordance with the law and practice of the place where the common maritime adventure ended and which is payable in respect of the goods by the shippers or owners thereof.

We also agree to:

- (i) furnish particulars of the value of the goods, supported by a copy of the commercial invoice rendered to us, or, if there is no such invoice, details of the shipped value and*
- (ii) make a payment on account of such sum as is duly certified by the average adjusters to be due from the goods and which is payable in respect of the goods by the shippers or owners thereof.*

2. Average Guarantee

The last occasion on which a standard Average Guarantee was put forward appears to have been in 1995 when the following wording was endorsed by the Institute of London Underwriters and the Association of Average Adjusters.

AVERAGE GUARANTEE

*Wording approved by the Association of Average Adjusters
and the Institute of London Underwriters*

NOTE: This guarantee will be accepted provided that no additions, deletions or amendments are made to it.

To: The Owners of the vessel named below and other parties to the adventure as their interests may appear.

VESSEL..... From..... To.....

CASUALTY and DATE.....

In consideration of the delivery in due course of the goods specified below to the consignees thereof without collection of a deposit, we, the undersigned insurers, hereby undertake to pay to the shipowners or to the Average Adjusters, XXXXXXXXX on behalf of the various parties to the adventure as their interests may appear, any contribution to General Average and/or Salvage and/or Special Charges which may hereafter be ascertained to be properly due in respect of the said goods.

We further agree:

- (a) to make prompt payment(s) on account of such contribution as may be reasonably and properly due in respect of the said goods, as soon as the same may be certified by the said Average Adjusters.*
- (b) to furnish to the said Average Adjusters at their request all information which is available to us relative to the value and condition of the said goods.*

This agreement shall be governed by English Law and the High Court of Justice, London shall have exclusive jurisdiction over any dispute arising out of this agreement, and each party shall irrevocably submit to the jurisdiction of the English Court.

III) DRAFT GUIDELINES

[The suggested draft is shown in plain black type with comments and notes shown in red type and square brackets.]

1. Introduction

In most maritime jurisdictions it is recognised that the shipowner is entitled to exercise a lien on cargo at destination until satisfactory security for general average contributions is provided.

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 templates 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 Insurance, IUMI). It is recognised that the wording adopted in practice may vary in some cases due to circumstances or legal issues, however the 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 general average creditors.
- To preserve the position under Rule D in respect of defences.
- To encourage the timely provision of information and evidence to ensure that the adjustment process is not delayed.

The leading professional associations for average adjusters have also endorsed these templates and will generally recommend their use. Where different wordings are required, the average adjuster should explain the reasons for their use when requesting security.

2. Average Bond

The Average Bond is a distinct contract in its own right, and may, like any contract, be altered by agreement between the parties. The following wording is recommended by CMI and has also been endorsed by the International Chamber of Shipping and the International Union of Marine Insurance. Examples of additional wording that may also be found in both Average Bonds and Average Guarantees are shown in paras 4 and 5 below.

AVERAGE BOND **(Wording recommended by Comite Maritime International)**

To: *The Owners of the vessel named below and other parties to the adventure as their interests may appear* [Note 1].

VESSEL:

CASUALTY and DATE:

Port of shipment:

Port of destination/discharge:

[Container Number(s): optional]

Bill of Lading or waybill number(s):

Quantity and Description of Goods:

Invoice Value (**attach copy**):

In consideration of the delivery to us or to our order, on payment of the freight due, of the goods noted above we undertake to pay to the shipowners or to the Average Adjusters, XXXXXX on behalf of the various parties to the adventure as their interests may appear, the proportion of any salvage and/or general average and/or special charges which may hereafter be ascertained to be properly and legally due from the goods or the shippers or owners thereof under an adjustment prepared in accordance with the provisions of the contract of affreightment governing the carriage of the goods or, failing any such provision, in accordance with the law and practice of the place where the common maritime adventure ended and which is properly and legally payable in respect of the goods by the shippers or owners thereof.

We agree further:

- a) *to furnish promptly to the Average Adjusters particulars of the value of the goods, supported by a copy of the commercial invoice rendered to us or, if there is no such invoice, details of the shipped value;*
- b) *to make a payment on account of such sum as may be properly and legally due in respect of the goods by the shippers or owners thereof as soon as the same may be certified by the said Average Adjusters after completion of the voyage.* [Note 2].
- c) *that this agreement shall be governed by [insert required law and jurisdiction clause here]*
- d) **[insert optional clauses here, if required]**

COMPANY NAME:

ADDRESS:

TEL NO: EMAIL:

NAME OF SIGNATORY:

SIGNATURE:..... DATE:

[Note 1: It has been suggested by IUMI that the phrase “*as their interest may appear*” that appears here and in the body of the document is unclear and might be thought to apply only to interests described or “appearing” on the form. “*So far as concerned*” is offered as a better alternative.]

[Note 2: It has been suggested by IUMI that delivery of the cargo to the receiver is the better “trigger” point.]

3. Average Guarantee

As with the Average Bond, the Insurer's Average Guarantee is a distinct contract in its own right and may, like any contract, be altered by agreement between the parties. The following wording is recommended by CMI and has also been endorsed by the International Chamber of Shipping and the International Union of Marine Insurers.

AVERAGE GUARANTEE

(Wording recommended by Comite Maritime International)

To: *the Owners of the vessel named below and other parties to the adventure as their interests may appear*
[Note 3]

VESSEL:

CASUALTY and DATE:

In consideration of the delivery in due course of the goods specified below to the consignees thereof without collection of a deposit, we, the undersigned insurers, hereby undertake to pay to the shipowners or to the Average Adjusters, xxxxxxxx on behalf of the various parties to the adventure as their interests may appear, any contribution to General Average and/or Salvage and/or Special Charges which may hereafter be ascertained by the appointed adjusters and which is to be properly and legally due in respect of the said goods.

We agree further:

- a) *to furnish promptly to the said Average Adjusters all information which is available to us relative to the value and condition of the said goods;*
- b) *to make payment(s) on account of such contribution as may be properly and legally due in respect of the said goods, as soon as the same may be certified by the said Average Adjusters after the completion of the voyage.*
[Note 4]
- c) *that this agreement shall be governed by [insert required law and jurisdiction clause here]*
- d) **[insert optional clauses here, if required]**

Port of shipment:

Port of destination/discharge:

Bill of Lading or waybill number(s):

[Container Number(s): optional]

Quantity and Description of Goods:

Insurers Policy / Reference number:

Insured Value:

SIGNATURE: NAME OF SIGNATORY:

COMPANY NAME AND ADDRESS:

.....

.....

TEL NO: EMAIL:

DATE:

[Note 3: See Note 1]

[Note 4: See Note 2]

4. Law and jurisdiction clause

It will be noted that paragraph (c) on both the Bond and Guarantee template anticipates the inclusion of a law and jurisdiction clause, for example:

“that this agreement shall be governed by English Law and the High Court of Justice of England and Wales shall have exclusive jurisdiction over any dispute arising out of this agreement and each party shall irrevocably submit to the jurisdiction of that Court.”

Where the Guarantee is provided by Agents, the clause can be extended to include service of suit, for example:

“that this agreement shall be governed by English Law and the High Court of Justice of England and Wales shall have exclusive jurisdiction over any dispute arising out of this agreement and each party shall irrevocably submit to the jurisdiction of that Court. We agree to nominate an address for service of proceedings under this Guarantee in England and Wales within 7 days of a request by the Shipowners or their lawyers to do so.”

5. Optional wordings

According to the circumstances of the case the following optional wordings may be appropriate for addition into the Average Bond and Average Guarantee.

5.1 A currency clause

It may not be possible for the adjuster to confirm the currency of adjustment in the early stages of the case, but it is understood to assist insurers in their reserving if they are given the earliest possible notice of the currency of adjustment.

[Suggested wording needed?]

5.2 Electronic transmission clause

Considerable savings in time and cost are achieved by electronic transmission of security documents, particularly in large containership cases. In such cases the following may be inserted:

“that this bond is intended to create a legally binding obligation notwithstanding that it may be transmitted and stored solely in electronic form. It is hereby agreed that transmission of this bond to the average adjusters by email constitutes good delivery to the Owners and other parties to the adventure who wish to enforce this bond.”

5.3 Amendment to time bar

[It has been suggested that the YARs 2016 Rule XXIII time limit of 12 months after completion of the adjustment may cause problems on large container ship cases with numerous credit/debit balances between cargo interests and between cargo and ship. In order to avoid the cost of issuing protective writs as the year end approaches, should security documents in such cases be clausured appropriately? If so, what should the recommended clause say? It is recognised that any such clause might be defeated by statutory provisions in certain jurisdictions that might also over-ride Rule XXIII. There seemed to be less concern over the six year overall limit, but perhaps this also needs to be considered.

It is assumed that even if (for example) English law and jurisdiction was specified in the bond/guarantee, a Court would prefer the specific provisions in Rule XXIII to the general position set out in cases such as Castle Insurance v. Hong Kong Island Shipping (The “Potoi Chau” 1984) unless there were express terms to the contrary. Is that assumption valid?

A wording that is commonly inserted when a jurisdiction clause cannot be used is as follows:

“that any period of prescription whether provided by statute law, contract or otherwise, shall commence to run from the date upon which the general average adjustment is issued.”]

5.4 [Any others?]

R.R. Cornah
6.12.2016