



COMITE MARITIME INTERNATIONAL

PRESIDENT

19 May 2014

Presidents of NMLAs
Titulary Members
Executive Councillors
Consultative Members
AMD
AAA

By email

Dear Sir/Madam

Meeting International Subcommittee on General Average - Hamburg – 14 and 15 June 2014

At the meeting of the International Subcommittee on General Average (ISC-GA) during the Dublin Conference in 2013 the topics for further consideration were selected. Following that meeting the International Working Group on General Average (IWG-GA) did further work on the selected topics and held a meeting on 3 March in London to discuss draft reports to be further discussed at the Hamburg Conference.

Please find attached three reports which were prepared by the IWG-GA:

- Financial Issues
- Rules X and XI, Security Documents (and processes), Low Value Cargo, Rule F
- Salvage

These reports will be the basis for discussion at the ISC-GA meeting which will take place on 14 and 15 June 2014 in Hamburg.

A further group, co-ordinated by Richard Cornah as co-rapporteur, will be looking at 'tidying up' amendments that will need to be considered once the major issues have been resolved. A fourth report will be issued prior to Hamburg simply as a matter of record of the number of items currently agreed to need review, rather than as a matter of discussion on this occasion.

Please distribute the three reports amongst your members and particularly amongst those persons designated to participate in the ISC-GA meeting in Hamburg, so they can properly prepare for the discussion. In that respect it is noted that, apart from IWG-GA members, the following persons attended the ISC-GA meeting in Dublin:

STUART HEATHERINGTON COCOLIN BIGGERS & PAISLEY,
Level 42, 2 Park Street, Sydney, NSW, 2000, Australia -
GPO Box 214, Sydney, NSW 2001 Australia

Tel: +61 2 8281 4477 E-Mail: swh@cbp.com.au Fax: +61 2 8281 4567

Registered Office CMI, Aisbl: Everdijstraat 43, 2000 Antwerpen, Belgique

www.comitemaritime.org

- Andreas Bach (Switzerland)
- Nelson Cavalcante e Silva Filho (Brazil)
- Haedong Jeon (Korea)
- Martin Kröger (Germany)
- Jolien Kruit (Netherlands)
- Darren Lehane (Ireland)
- Didem Light (Turkey)
- Eamonn Magee (Ireland)
- Dan Malika Gunasekera (Sri Lanka)
- Howard M. McCormack (United States)
- Adriana P. Padovan (Croatia)
- Rucemah Pereira (Brazil)
- Erik Rosaeg (Norway)
- Dieter Schwampe (Germany)
- Andrew Taylor (United Kingdom)
- Jiangou Yang (China)

With kind regards

A handwritten signature in black ink, appearing to read 'Stuart Hetherington', written in a cursive style.

Stuart Hetherington

CMI

IWG on General Average

Report of Financial Issues Sub-Group

CURRENCY OF ADJUSTMENT

By way of background to this issue, the following is an extract from the third edition of THE YORK-ANTWERP RULES (Hudson & Harvey - 2010):

Currency of adjustment and rates of exchange

- 33.14 Although the delegates at the Sydney Conference were not able to bring themselves to approve a text to be incorporated in the scheme of the Rules to regulate the interconnected questions of the currency in which an adjustment should be prepared and the rates of exchange to be employed in converting allowances in other currencies into the currency of the adjustment, these subjects had been widely researched within both AIDE and CMI in the run-up to the Conference; indeed, these topics had been placed first on the list of questions asked of national Maritime Law Associations in part B of the questionnaire despatched by the chairman of the CMI International Sub-Committee in 1991.
- 33.15 In order to appreciate the desirability of establishing some international rule on these related subjects - or at least some internationally accepted practice - it is perhaps useful to observe how both jurisprudence and the practice of adjusters have changed under the influence of commercial and economic considerations:

Anglo-American Jurisprudence up to the 1960s

- 33.16 The general average adjustment should be prepared in the national currency of the port of destination. In broad terms, the rate for exchanging general average admissions into the currency of adjustment should be that ruling at the time of the loss, and not that at the time of preparing the adjustment. The cases in which these general principles were expressed were:
- in England, *Noreuro Traders Ltd. v. Hardy*¹ and *Chandris v. Argo Insurance Co. Ltd.*²
 - in United States, *The Arkansas*.³

Under the commercial influences operating in the 1960s and 1970s

- 33.17 In some instances bills of lading and charterparties would stipulate for any case of general average to be adjusted in a specified currency- frequently, but not always, United States dollars. For this purpose it became the accepted practice of adjusters to exchange the contributory values and amounts made good for general average sacrifice (other than disbursements) into the specified currency at the rate of

¹ *Noreuro Traders Ltd. v. Hardy* (1923) 16 L.L.Rep. 319.

² *Chandris v. Argo Insurance Ltd.* [1963] 2 Lloyd's Rep. 65.

³ *Det Forenede Dampskibsselskab v. Insurance Co. of North America (The Arkansas)*, 1929 AMC 581.

exchange prevailing at the termination of the adventure, and for disbursements to be exchanged at the rate prevailing when payment had been made. Influenced by these tendencies, an AIDE working group drafted two alternative recommended clauses dealing with the currency of adjustment and rates of exchange, and included them in a booklet of recommended clauses for insertion in bills of lading and charterparties published in 1981.⁴

Changes in the law in the 1980s and thereafter

- 33.18 Rather belatedly the world's legal systems came to recognise that the majority of international trade was financed not so much by transactions in domestic currencies, but in a relatively few stable currencies which were readily convertible. So far as English law is concerned, the breakthrough came with the case of *Miliangos v. George Frank (Textiles)*⁵ in which the English courts were prepared for the first time to give judgment in a currency other than sterling. From there it was a short step to the recognition of international currencies in shipping transactions. See *The Despina R and the Folias*.⁶
- 33.19 The rationale now developed from these cases was that, irrespective of the nature of the transaction, a plaintiff was entitled to judgment in the currency in which he had "felt his loss", i.e. the currency in which he maintained his accounts.
- 33.20 The practice of adjusters has followed these developments fairly closely and can now be said to be reasonably well settled, but difficulties continue to arise when, in addition to the shipowner's claim in the currency in which he keeps his accounts, there are also a number of cargo claims in a different currency or currencies.
- 33.21 When this is the case, and unless a specific currency has been selected for the adjustment by the terms of the bill of lading or charterparty, the adjuster has to do his best to solve the problem in one of the following ways:
1. To select a common currency for the establishment of the contributory values and use this as the basis for apportioning each of the various claims in the currencies in which they have been established. So far so good, but the system becomes complicated after the apportionment of the total of the admissions in each currency, at which stage the debit and credit currencies in each currency have to be assembled and set off at the rates of exchange ruling at the time of adjustment. Although theoretically fair and equitable, this system adds to the complexities of the final stages of adjustment as well as in the settlements to be made thereunder.
 2. To select a "currency of convenience", taking into consideration the currencies in which the major claimants keep their accounts, and considering which of them has remained, and is likely to continue to remain, relatively stable vis-à-vis the others. In extreme cases, it may be prudent for the adjuster to seek the agreement of the claimants to the currency proposed for the adjustment.
- 33.22 The conundrum - how to avoid the effect of currency variations - has exercised the minds of average adjusters for as long as the author can remember. Since no-

⁴ See report of AIDE working group on General Average clauses presented to the Xth General Assembly at Cambridge 1979.

⁵ *Miliangos v. George Frank (Textiles) Ltd.* (H.L.) [1976] 1 Lloyd's Rep. 201.

⁶ *The Despina R and The Folias* (consolidated in H.L.) [1979] 1 Lloyd's Rep. 1.

one can predict how the value of different currencies will move between the date of incurring the expense or suffering the sacrifice and the date when the adjustment will be issued, the nearest one can get to a solution in practice is to select for the adjustment a currency offering the best chance of stability or, better still, a worldwide index to which all national currencies are related. This approach was considered very seriously during the run-up to the Sydney Conference, and was expressed in two different ways, the Americans canvassing the extended use of clauses in bills of lading and charterparties stipulating for adjustment in United States currency, and the BMLA proposing formally the introduction of a new paragraph into Rule XXI in the following terms:

“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.”

- 33.23 The BMLA proposal excited a good deal of interest when it was discussed at working meetings of the International Sub-Committees of CMI and AIDE. The latter, being particularly concerned at the mechanics of adjustment, appointed two members of its working group G (Mr Gerritzen and Mr Hebditch) to investigate what practical problems there might be in ascertaining the information necessary for the preparation of an average adjustment, and to provide guidance as to the easiest way of obtaining this information. The results of their research were incorporated in the AIDE Report.⁷ They concluded that there was no problem: the current rates of exchange for SDRs are widely available in the international and national financial press; rates of exchange for SDRs of an older date could always be obtained at the central bank of the country where the average adjuster is resident. Notwithstanding this endorsement, the AIDE recommendation, approved at its General Assembly in Prague in September 1993, was that, in the absence of agreement by the parties, the average adjuster should have a discretion to select an appropriate currency. The AIDE recommended text for insertion into Rule XXI was:

“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 or place other than the final port of destination, and

⁷ The AIDE Report of 30 July 1993 at pp. 60-61.

disbursements shall be so converted at the rate of exchange prevailing on the dates when payment was made.”

- 33.24 At the Sydney Conference both these projected solutions found enthusiastic advocates as well as fierce critics. The Brazilian delegation, as representing a country which has suffered severe devaluations in its currency in past years, was particularly strong in its support for the SDR solution, but in the voting neither proposal was able to command the required majority.

A Factsheet concerning Special Drawing Rights (SDRs) issued by the International Monetary Fund is attached. It is important to bear in mind that although SDRs may be bought and sold by IMF members, their function in international trade is as a mechanism to avoid significant variations in exchange rates. For example the Convention on Limitation of Liability for Maritime Claims 1976 uses SDRs as the unit of account for calculating limitation funds which are then, for practical purposes, exchanged into the required currency.

Aside from limiting the potential affect on the parties to general average as a result of significant variations in exchange rates, SDRs have their own interest rate which may be of assistance in dealing with the problems of assessing the rate of interest under Rule XXI; this is discussed below.

The sub-group considered the following issues:

1. Should the YAR contain an express provision with regard to the currency of adjustment?
2. If so, and unless the contract of carriage expressly provides to the contrary, should that currency be SDRs? Or USD?

The sub-group considers that, if only in the interest of uniformity, it is desirable that there be some rule on the issue of currency of adjustment and the related issue of rates of exchange. In this respect the sub-group considers that the best solution would be for the currency of adjustment to be agreed between the parties beforehand in the general average clauses in the contract of carriage. The difficulty with this approach is that we can see little prospect of this being achieved in the foreseeable future and, in any event, it is difficult to see where pressure could be applied to achieve this objective.

General average clauses which designate the currency of adjustment are few and far between. However, the inclusion of such a provision is a simple matter. The current BIMCO General Average Clause provides as follows:

General Average shall be adjusted, stated and settled according to the York-Antwerp Rules 1994 in London unless another place is agreed in the Charter.

Cargo's contribution to General Average shall be paid to the Carrier even when such average is the result of a fault, neglect or error of the Master, Pilot or Crew.

The following amendment to the first paragraph would simply deal with the matter:

General Average shall be adjusted, stated and settled in United States Dollars according

to the York-Antwerp Rules 2015 in London unless another place is agreed in the Charter.

The sub-group considers that, in the absence of some express provision in the contract of carriage on the issue, the adoption of SDRs as the currency of adjustment brings significant benefits. The adoption of SDRs would also neatly avoid the potential prejudice to creditor interests where a currency of convenience is chosen by the adjuster.

All AMD adjusters canvassed considered that it would be beneficial for the YAR to contain an express provision with regard to the currency of adjustment and that, unless the contract of carriage provided to the contrary, that currency should be SDRs. The sub-group agrees and considers that this might best be achieved by adopting the wording proposed by the BMLA at the Sydney Conference in 1994. The BMLA considered that the following wording should be added to Rule XXI dealing with interest:

Unless the parties have agreed that the general average 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.

It should be noted that the provisions relating to rates of exchange, reflect the almost universal practice of adjusters.

Although the use of the AIDE recommended text (see quotation 33.23 above) with the inclusion of SDRs as an option for consideration by the adjuster has been considered, it is felt that this would not produce uniformity of practice and, potentially, could place the adjuster in a position of conflict.

RULE XX – COMMISSION

At the Vancouver Conference in 2004 IUMI successfully proposed the abolition of the allowance for commission, arguing that shipowners (and other parties advancing funds for general average disbursements) are already adequately recompensed by the allowance of interest.

The argument in favour of the retention of commission is that it acts as an incentive for the shipowner (or other parties to the adventure) to fund GA expenses. However, it has also been pointed out that there is a link between the allowance of commission and the rate of GA interest with the allowance of commission being more difficult to justify where generous interest rates apply.

The sub-group considered the following issues:

1. In reality, does the allowance of commission act an incentive to fund GA expenditure?
2. Are there other factors which may justify the allowance of commission?
3. Should the allowance of commission be looked upon any differently depending upon the level of GA interest rate that applies?

The sub-group seriously doubts that in practice the allowance of commission provides an incentive to the parties to fund GA expenses. However, it is accepted that those funding GA expenses will incur costs such as bank charges although in the experience of adjusters these are frequently claimed separately.

With regard to any relationship between the allowance of commission and the rate of interest under Rule XXI, the ICS member of the sub-group advised that “... *provided the rate of interest allowed is realistic the allowing of a commission on top of this may no longer bear the same relevance as it once did ...*”.

The sub-group has concluded that given modern banking practices and their cost, an allowance of a commission of 2% can no longer be justified. It should be borne in mind that certain charges, such as exchange commission, are effectively admitted via the allowance of funds disbursed to settle an invoice in a foreign currency.

Although a reduction in the rate to say 0.5% has been considered it is apparent that the number of invoices rather than their value has the greatest impact in the cost of providing funds. The sub-group has therefore concluded that provided that a consensus can be reached with regard to a rate of GA interest that would compensate for the abolished Commission, Rule XX should be abolished. However, it is noted that this would not bar adjusters from allowing bank charges etc on an actually incurred basis.

RULE XXI – INTEREST

It would appear to be generally agreed that an interest rate fixed for the ‘life’ of a set of YARs is inappropriate. The idea of having a fixed interest per year has wide support although concerns have been raised as to the guidelines used by the CMI to establish the rate.

In particular, ICS/BIMCO are concerned that the guidelines do not reflect the commercial rate of borrowing money and the availability of funds and are thus not realistic.

The sub-group considered the following issues:

1. Do the CMI guidelines which require consideration of the rate of interest charged by a first class commercial bank to a shipowner of good credit rating require reconsideration?

2. If so what should be the basis used?
3. Should the CMI committee that establishes the rate include a representative shipowner and banker?
4. Are there any other methods by which a “fair” rate might be established?
5. Could the adoption of SDRs as the currency of adjustment satisfactorily deal with this issue?

The principle problem with the CMI guidelines is that they require consideration of the situation that exists between a shipowner of good credit rating and a first class commercial bank. It is understood that in practice the rates of interest available to a ‘blue chip’ shipowner have been adopted. The reality is that most shipowners do not have the standing of a ‘blue chip’ company and will therefore be unable to secure funds from first class commercial banks.

If the existing procedure is to continue, it is recommended that the guidelines be amended to reflect the standing of an ‘average’ shipowner and funding from an ‘average’ commercial bank. In addition it is suggested that a representative shipowner and banker be co-opted onto the committee that sets the rate annually.

It is, however, pointed out that even these changes will not fully overcome the two principal problems with this approach. Firstly, the variation of interest rates during the period from when the annual rate is set until the end of the following calendar year and, secondly, the variation between the rates applicable in different countries and currencies.

In the past alternative methods of establishing an appropriate rate of interest have involved consideration of the use LIBOR as a base. However, the scandals involving the collusion of banks in setting LIBOR and the subsequent reforms recently implemented make the use of LIBOR unattractive. It also has the problem of determining an acceptable uplift. Similarly, the use of official state bank rates creates difficulties in determining an appropriate uplift.

The determination of an appropriate uplift is affected by the level of the base rate. Where a base rate is, say, 1% an uplift of 3-4% might be regarded as reasonable. However, this may not be the case when the base rate is 7-8%.

As noted earlier in relation to the currency of adjustment, the use of SDRs brings 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 on short-term debt in the money markets of the SDR basket currencies (USD, GBP, JPY and EUR).

Historic SDR interest rates are available in a spreadsheet downloadable from http://www.imf.org/external/np/fin/data/sdr_ir.aspx . A review of these rates shows them to be a little volatile. For example the rate for the period 10/16 February 2014 was 0.13%; equivalent to 6.76% per annum. Whereas the rate for the period 11/17 November 2013 was 0.09%; equivalent to 4.68%. The average

rate for 2013 was 4.24% and 3.95% for 2012. The CMI rates for these years are 2.75% and 3% respectively.

By contrast all current USD LIBOR rates are significantly below 1%. However, we are advised that current interest rates available to shipowners are currently in the region of 4-5% above LIBOR.

Whilst the use of the SDR interest rate is attractive, it is considered that more needs to be understood regarding its apparent volatility before its use can be recommended. There is also, at this stage, some doubt whether what the IMF describe as a weekly rate is, in fact, an annual rate; this is currently under investigation.

In order to reflect commercially available interest rates and the possible abolition of GA Commission an uplift to the SDR interest rates of, say, 1% should be considered.

Rule XXI currently requires interest to be calculated until three months after the date of issue of the GA adjustment; this having been considered to be a reasonable period for debtor interests to examine the adjustment and effect settlement. In practice, this has frequently resulted in those debtor interests delaying settlement but overall the system has worked well. It is to be noted that delayed settlements increase the cost of adjustment and are unfair where the payment of interest after the issue of the adjustment is limited. The sub-group considers that these delays may be reduced by imposing a punitive interest rate (say 2% above the rate applied post issue of the adjustment) up to the actual date of settlement.

The only alternative would appear to be for the adjustment to include interest up to the issue date, or maybe one or two months after issue, with additional interest being payable up to the date of settlement at the rate applicable at the date of issue if a variable rate applied. This methodology would appear to be reasonable and fair.

If SDR rates and other proposals outlined above are found to be acceptable, the following wording might be added to Rule XXI after that proposed above in relation to the currency of adjustment:

Interest shall be allowed on expenditure, sacrifices and allowances from the date of conversion, as set out in the preceding paragraph, until two months after the date of issue of the adjustment. Interest shall be calculated using the SDR interest rates published by the International Monetary Fund. The interest rate applied the period of two months from the date of issue of the adjustment shall be the SDR interest rate prevailing at the date of issue of the adjustment. If settlements are not made within the three months after issue of the adjustment additional interest shall be payable until the actual date of settlement at the rate prevailing at the date of the issue of the adjustment plus 2%.

RULE XXII – TREATMENT OF CASH DEPOSITS

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 rather than in the joint names of representatives of the ship and cargo interests. This state of affairs has been brought about by the reluctance of banks to permit joint accounts primarily due to the impact of money laundering regulations.

It is clear that this situation should be recognized by the rules. However, it has been suggested that some procedures / safeguards should apply.

The sub-group considered the following issues:

1. Is it sufficient to amend the rule to recognize that adjusters may hold deposits in their own name?
2. Should the liberty to adjusters apply to all adjusters or only those of some standing; i.e. State appointed adjusters, sworn adjusters or members of average adjusting associations which impose standards of conduct on their members?
3. Should funds held by adjusters be ‘ring fenced’ against the adjuster’s liquidation?
4. Should a code of best practice with regard to cash deposits be developed and, perhaps, annexed to the YARs?

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 is considered that this responsibility should be backed by a code of conduct. Thus the general view is 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, this may be difficult, if not impossible, 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 be regulated in the Rules. Other ways to achieve the objective have been considered including a possible insurance solution.

Many adjusters maintain Professional Indemnity insurance that may provide cover in relation to the fraudulent acts of employees. However, this is most unlikely to extend to principals, particularly sole traders. The possibility of an ‘industry’ insurance cover, perhaps supported by the CMI, has also been considered. However, this would not appear to be a practical proposition.

The IVR General Average Rules (formerly the Rhine Rules) include the following as part of Rule XVII relating to the treatment of cash deposits: “*When cash*

deposits have been collected as security for cargo's liability to contribute to general average, such deposits shall be paid, without any delay, into a special account in the joint names of the Average Adjuster and the IVR, with a bank indicated in the average bond." However, it is understood that this provision is now rarely applied in practice.

In view of the above, it is considered that the possibility of the CMI coming to an agreement with a bank to operate an account where the signatories would be the CMI and the adjuster should be explored. As an alternative the CMI could place the cash deposits in a bank account to which they were the sole signatory and from which payments would only be made when certified to the CMI by the adjuster. This latter procedure might be more practical if the CMI were prepared to accept the responsibility.

As a matter of practice, it may be considered desirable to exchange deposits made in different currencies into the currency of the adjustment. In fact this was formally proposed by IUMI in 1985 in what is known as the "Montreux Resolution". This is no longer accepted as a guide to practice, it being considered more prudent to retain the deposits in the currency in which they were provided.

It is considered that the deposit receipt issued by the adjuster to the depositor ought, if only for the sake of transparency, contain full details of the account into which the deposit has been placed. It is also considered that funds should not be taken from the deposit without first seeking the depositor's agreement. However, a time limit must be placed on this as many depositors are not pro-active in responding to adjustments.

Proposed wording:

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. The average adjuster shall issue a receipt for the deposit which shall include full details of the account into which the deposit has been placed.

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 to 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 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.

All deposits and payments or refunds shall be without prejudice to the ultimate liability of the parties.

CMI
INTERNATIONAL WORKING GROUP ON GENERAL AVERAGE

SUBGROUP

Rules X and XI, Security Documents (and processes), Low Value Cargo
Rule F (added March 2014)

Andrew Bardot
Frédéric Denèfle
Christian Hoppe (BIMCO/ICS/IG) – joined late Feb 2014
Jiro Kubo
Jonathan Spencer (Chairman)

Phase 3 (Hamburg) discussion paper

Following our Phase 1 and Phase 2 discussions, the following topics remain:

I. Rule X and Rule XI

Rule XI: Wages and maintenance at a port of refuge

A possible reversion to the 1994 position, where crew wages are allowed during a detention at a port of refuge, remains open for discussion. There is no inherent dissatisfaction with the 1994 or 2004 Rule XI wordings, which read as follows:

1994	2004
(b) 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, 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 ready to proceed upon her voyage, shall be admitted in general average.	(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 re-paired, 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 as general average, except such fuel and stores as are consumed in effecting repairs not allowable in general average.

The 2004 wording was of great importance to IUMI, whose response to the 2013 Questionnaire summarized their position:

IUMI's position on crew wages in the run-up to the CMI Conference in Vancouver was that crew wages, while at or deviating to or from a port of refuge, should not be

allowed in GA. IUMI argued that crew wages are a loss caused by delay and that to allow them in GA was contrary to Rule C and discriminated in favour of shipowners against cargo who cannot recover other losses caused by delay such as loss of market.

Allowing the crew wages while deviating to and from a Port of Refuge (but not while at a Port of Refuge) was a compromise wrung out of IUMI's representatives when it appeared that no changes to Rule XI might get through unless the concession was made. Although this issue is worth only about 1% of the monies shifted in GA, it is controversial because shipowners themselves would have to pay the wages if they were excluded from GA, whereas pretty well everything else in GA is funded by insurers. Nevertheless the removal of all crew wages at or deviating to or from a place of refuge remains on IUMI's wish list.

Nevertheless, a clear majority appears to be in favor of reverting to the 1994 position, with the UK AAA's subcommittee suggesting an addition for clarity, as follows:

When a ship shall have entered or been detained in any port or place in consequence of accident, sacrifice or other extraordinary circumstances which render that **entry and/or detention** necessary for the common safety, or to enable damage 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 ready to proceed upon her voyage, shall be admitted in general average.

It remains to be determined whether:

- A. we will revert to the 1994 wording or preserve the 2004 wording
- B. if we revert to the 1994 wording, should we adopt the UK AAA addition for the sake of clarity?

Rule XI: Port charges and the “Trade Green” decision

The subgroup considered the uncertainty introduced by the “Trade Green” decision into the interpretation of the term ‘port charges’ in Rule XI* and how the wording can be improved. The relevant language of Rule XI currently reads –

Port charges incurred during the extra period of detention shall likewise be admitted/allowed as general average except such charges as are incurred solely by reason of repairs not allowable in general average.

* (1994 XI(b), third paragraph; 2004 XI(c)(ii))

It is agreed that it would be unwieldy to define ‘port charges’* but the subgroup brings forward for discussion two possible clarifying amendments:

Amendment Version A:

Port charges incurred ~~during~~ **as a consequence of** the extra period of detention shall likewise be allowed as general average except such charges as are incurred solely by reason of repairs not allowable in general average.

Amendment Version B:

All port charges ~~incurred during~~ **in connection with** the extra period of detention shall likewise be allowed as general average except such charges as are incurred solely by reason of repairs not allowable in general average.

ICS’ further comments to Rule X and XI YAR 1994 – 12.05.2014:

ICS has advanced the following observations subsequent to our March 3rd meeting:

The IWG’s mandate is to carry out a general review of all aspects of the York Antwerp Rules on General Average, to draft a new set of rules which meet the requirements of the ship and cargo owners and their respective insurers, with a view to their adoption at the 2016 Conference.

With this in mind, shipowners wish to make certain observations with regard to Rules X and XI. In particular:

- Shipowners can incur a variety of port expenses when, following a general average incident, a ship calls at a Port of Refuge for the common safety. Some of these expenses are presently unrecoverable. Having considered the position carefully, shipowners consider that all port charges incurred by a vessel relating to its operation on arriving at, staying in, and on leaving a port of refuge should be recoverable in general average insofar as they arise in connection with matters necessary for the common benefit.
- Secondly, shipowners submit that the cap on Rule G expenses incurred under a Non-Separation Agreement, can operate unfairly. The relevant part of the Clause reads as follows:

“The proportion attaching to cargo of the allowances made in General Average by reason of applying the third paragraph of this Rule shall not exceed the cost which

would have been borne by the owners of the cargo if the cargo had been forwarded at their expense”.

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 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 or application.

We take the first bullet point to reinforce support for Amendment Version B in the immediately preceding section. We take the second bullet point as a proposal to discuss at Hamburg the deletion of the final paragraph of Rule G, as cited.

II. Security Documents (and processes), Low Value Cargo

The subgroup has observed some support for the proposition that the York-Antwerp Rules specifically 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. We noted that a similar procedure is already provided for in Lloyd's Standard Salvage And Arbitration Clauses.

The topic was left open for further discussion at Hamburg. If the Rules are to be appropriately amended, can this be achieved by inserting the following language* after the second paragraph of Rule G?

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 disproportionate to its eventual contribution.

(The subgroup noted the suggestion by BIMCO/ICS/IG that there may be merit in requiring GA security to be provided at the port of refuge rather than at the port of

* Compare LSSA Clause 15:

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

discharge. Whilst this is outside the scope of the YAR, it is a practice clearly to be encouraged to minimise delay in the release of cargo.)

III. Rule E: time limit

The second part of Rule E provides as follows:

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.

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.

There is general agreement that an inquiry from the average adjuster thus restarts the clock and that it is preferable that it should not. We therefore offer possible amendments to the second part of Rule E, designed to accelerate the receipt by the average adjuster of full details of contributory values.

Amendment A:

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.**

Amendment B, for greater clarity and rigor:

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.

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

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.

We offer an alternative version of the third paragraph, designed to streamline how contributory values are established:

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~~ shall be communicated to the party in question, and will be binding if not challenged within 2 months.

IV: Rule E: treatment of recoveries

The minutes of the March 3rd meeting, in discussion under Rule D, note that –

It was concluded that the issue of 'express wording relating to recoveries' should perhaps be dealt with in Rule E instead of Rule D, and it was suggested that it therefore could be dealt with by the subgroup **Rules X and XI, Security Documents (and processes), Low Value Cargo** (Spencer) before the Hamburg conference.

We submit the following, additional, final paragraph of Rule E for discussion:

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. If, in consequence of failure to supply such particulars, the adjustment of general average, once issued, requires to be amended, all costs of preparation, distribution and collection of the amended adjustment will fall solely on the party that has failed to give notice of the recovery to the average adjuster.

Items dropped at Phase 2

For the sake of completeness, we make note of the following items deemed not to need further discussion following our Phase 2 discussions on March 3rd 2014:

- **Rule X(b):** Further discussion of a suggestion that the costs of restowage should be allowed as General Average in all circumstances, rather than solely when necessary for the common safety, was dropped.
- **Rule XI(a):** Further discussion of a suggestion to eliminate the allowance of crew wages and maintenance while bearing up for a port of refuge was dropped.
- **Rule X(b) and XI(b):** A question had been raised about whether the proviso excluding allowances when damage is discovered at a port of refuge, etc., without any accident having taken place during the voyage required further re-examination. The consensus is that the existing wording is clear.

- **Rules X and XI. Detention while salvage security is being arranged (Phase 2 discussion paper under '11.3 ISC Report page 17', p. 6 and following – the particular question being raised on p. 8)**

After an extensive discussion regarding different practices around the world, it was agreed that a strict construction of the Rules prevented any allowance, although some adjusters feel there are equitable grounds for making an allowance in some cases. The Phase 2 meeting concluded that no solution could be brought about by an amended text of the YAR. The remedy is to be found in the use of the appropriate ISU salvage guarantee form.

- **Security Documents (and processes) (Phase 2 discussion paper under '7b. ISC Report page 5', p. 10 and following – the particular question being raised on p. 11)**

Donald Chard stated that some incentive was needed to speed things up in the port of refuge.

Frédéric Denèfle reported carriers refusing to transship cargo from the port of refuge to the port of discharge unless they had received GA security. Ben Browne reported the same, but had given the GA security in escrow with the adjuster to be given to the carrier only after discharge at the port of discharge. Richard Cornah referred to the problems raised by the judgment in the City of Colombo.

Bent Nielsen stressed that as it was decided in Dublin not to pursue this point at this stage of the process, it was better not to cherry pick certain points.

- **Rule E:** We dropped any discussion of shortening the 12-month period provided for in Rule E or its proposed revisions.
- **Rule F: towage to destination**

The minutes of the March 3rd meeting note that –

This point was not allocated to a particular subgroup at the Dublin conference (Jonathan Spencer's e-mail of 21 January 2014, further distributed to all by Taco van der Valk's email of 26 February 2014). In nature it belonged to the subject matter of this subgroup.

Following a discussion to clarify the problem it was agreed that Kiran Khosla would consult with ICS/BIMCO to rediscover the original reasons for their proposal. She will then report to Jonathan Spencer for inclusion in the report of this subgroup for the Hamburg Conference.

Subsequently, the ICS representatives advised that they had not formulated any proposals that they considered likely to achieve consensus, and had opted to not pursue this point.

Item deferred until “tidying up” phase

We recommend the following revision of Rule XI(d)(iv):

(iv) necessarily in connection with the **handling**, discharging, storing or reloading of cargo **or bunkers** whenever the cost of those operations is allowable as general average.

CMI HAMBURG - JUNE 2014

SALVAGE WORKING PAPERS

1. Vancouver 2004

The arguments for and against the re-apportionment of any salvage which is payable independently by the parties (for simplicity this is referred to as LOF salvage although other contracts/jurisdictions achieve the same effect) were set out in the IWG report presented at Vancouver as follows:

“REDISTRIBUTION OF SALVAGE CHARGES

6.1 *General comments*

As noted in Lowndes and Rudolf (12 edition para. 6.11) in all maritime countries other than the United Kingdom, salvage has generally been treated as General Average and has, together with other General Average losses, been apportioned over values at destination. The divergence of British practice occurred during the latter part of the 19th century when adjusters began to distinguish, on grounds of principle, between salvage and General Average, with salvage being apportioned over values pertaining at the place where the services ended.

In 1926 the British Association of Average Adjusters passed a Rule of Practice that permitted the allowance of commission and interest on salvage awards, but the divergence in practice regarding inclusion of salvage awards in General Average was not finally resolved until a further Rule of Practice in 1942.

During the 1974 revision of the YAR, the old Rule VI was removed and the first version of the current Rule VI was inserted in order to ensure that international practice was uniform on this point.

The rule that salvage remuneration shall be allowed in General Average is criticised on the following grounds:

- In most jurisdictions, salvage charges are only payable to the salvor by each of the salvaged interests; i.e. ship owners are not responsible for the cargo's share, cargo owners not for other cargo's or the ship's share. Therefore, the salvage remuneration is already distributed between the parties and a (new) distribution via the General Average is not necessary.*
- Redistribution by General Average adjustment disturbs separate settlements between the salvor and/or the owner of a salvaged interest, because the latter does not obtain a final solution, as his share of all the remuneration paid by all parties may eventually be fixed at a different amount.*

After considerable debate during the preparatory work of the 1994 YAR and also during the conference in Sydney, proposals to exclude salvage settlements were not carried.

However, the criticism has continued and IUMI have strongly urged that this should be considered again (see IUMI paper dated 2 April 1998, section 15). It should be noted that the majority of the MLAs responding to the Reme questionnaire favoured IUMI's proposal on this point.

6.2 Arguments for and against excluding salvage

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 apportionments.*
- *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.”*

Notes:

* The effects of Made Good were explained in the following footnote to the report:

“Take, for example, a vessel with a sound value of \$1,500,000 and cargo of \$1,000,000. The vessel is internationally run aground for the common safety and suffers damage of \$500,000. She is then salvaged. After deducting the cost of damage repairs for the purpose of arriving at the salvaged values at the termination of the salvage service, ship and cargo would each pay 50% of the salvage award, assuming that it was settled separately and not included in General Average. However, the ship owner will ultimately receive an allowance in General Average for the sacrificial damage. If salvage is included in General Average, as it is at present, and the amount made good is added to the arrived value of the vessel at the completion of the voyage, then the contributory value of the vessel would be \$1,500,000, and ship would pay 60% of the salvage, which is more equitable in the circumstances.”

** In this paper this situation is referred to as a “differential salvage settlement” – see further below.

2. IWG Questionnaire 2013

The points raised in the questionnaire (italics) and the responses (plain type) received from MLAs and others were summarised as follows, prior to the 2013 Dublin symposium:

RULE VI

6.1(a) *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.*

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 a 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.*

6.1(a) The options put forward in relation to Rule VI were supported as follows (options (i), (iv) and (v) are not mutually exclusive).

- (i) Argentina, Brazil, Croatia, Denmark, Finland, Norway, ICS/BIMCO.
- (ii) Belgium, Canada, France, Italy, Japan, Spain, Ukraine, IUMI.
- (iii) Switzerland.
- (iv) China, Croatia, Denmark, Netherlands, Norway, AMD, AAA.
- (v) Netherlands.

UK and Germany were unable to establish a consensus within their Associations.

6.1(b) *Are there other options that should be considered?*

6.1(b) With regard to other options for dealing with the issue, AMD put forward three specific situations in which re-apportionment should take place, thus proceeding by express inclusion rather than exclusion.

6.1(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?*

6.1(c) There was relatively little comment on the possibility of amending Rule XVII, if option (ii) was adopted, to avoid the need for deduction of salvage payments. AAA and AMD considered this a logical step if that route is pursued.

6.2 *At present Rule VI of YARS 1994 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.*

6.2 There was general support for the continuing allowance of legal costs in connection with salvage. Some felt a need for clarifying amendments but to some extent these can only be considered fully when the issues under 6.1 above are resolved.”

3. IWG Meeting March 2014

The following minutes record further discussions in London regarding Rule VI.

“Salvage

The respective positions of ICS and IUMI were noted to remain firmly entrenched, so that there remained a significant task for the IWG to find an acceptable compromise if any 2016 Rules were to be accepted by all parties, as required by CMI’s brief to the IWG.

The compromise put forward in Beijing was mentioned and all agreed this was not workable because of the impossibility of finding a percentage cut-off point that would be effective across a wide range of circumstances and be acceptable to all parties.

The IWG was reminded of the alternative compromise outlined by Michael Harvey at Dublin, suggesting a rule that excluded reapportionment of LOF-type salvages unless:

- 1) *There was a subsequent accident affecting values.*
- 2) *Significant GA sacrifices.*
- 3) *Salved values were manifestly incorrect.*

Bent Nielsen noted that a differential salvage settlement might stand as a fourth exception. Ben Browne indicated that a compromise of this kind might well be an acceptable way forward, subject to detailed drafting and further consideration.

ICS mentioned that it is important for ship-owners that allowance of salvage in GA is the main rule from which exceptions may be made if this is agreed.

Richard Cornah suggested that such a result might be achieved by starting with the premise that salvage was allowable as GA, using similar wording to YARs 1994 and then dealing with the limitation of apportionment in LOF-type cases. This would:

- a) *Remove the need for the convoluted wording in 2004 VI(a) – “save only.....payment was made.”*
- b) *Re-instate the payments as GA, rather than an accounting credit, so that interest is allowable, thus encouraging owners to make 100% interim settlements with salvors when appropriate.*

The second part of the Rule would then deal with reapportionment along the lines of:

- *Where parties have settled salvage independently, there will be no reapportionment in G.A. unless:*
 - 1) *As above*
 - 2) *As above*
 - 3) *As above*
 - 4) *? Differential salvage settlement.*

The question of differential salvage was discussed further, with property insurers indicating that this was not a concern and they would be happy with the first three exceptions. ICS wished to consider the matter further.

There was general agreement that a new Rule structured on this basis could be developed

into a workable compromise.

Bent Nielsen noted that if the compromise was accepted and some salvages were therefore not reapportioned, it was necessary to consider the question of deducting salvage payments (not allowed in GA) from contributory values as would be required by the current wording of Rule XVII. Two issues needed to be considered:

- Protecting interests from paying out more than 100% of values in respect of the combined total of salvage (when not GA) and GA.
- Reducing the costs of ascertaining salvage payments and making the necessary calculations in multi-bill cases.

Jurgen Hahn said that in the multiple b/l cases large costs could be saved. This was generally agreed.

There was general discussion as to the possible way of achieving these objectives but it was evident that further work was needed.

Bent Nielsen said that he had made a first draft to change of rule XVII as follows:

Insert in §2 after "the general average act, except": 'salvage payments unless in the circumstances described in § 3 of this Rule or'.

Insert a new §3 as follows:

'Irrespective of §2 above all salvage payments shall be deducted from the value of the property if the contribution to general average by any party plus any such party's salvage payment otherwise would exceed the total value of such a party's property.'

4. 1994 Rule VI text

"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."

5. 2004 Rule VI text

"RULE VI. SALVAGE REMUNERATION

a. Salvage payments, including interest thereon and legal fees associated with such payments, shall lie where they fall and shall not be allowed in general average, save only that if one party to the salvage shall have paid all or any of the proportion of salvage (including interest and legal fees) due from another party (calculated on the basis of salvaged values and not general average contributory values), the unpaid contribution to salvage due from that other party shall be credited in the adjustment to the party that has paid it, and debited to the party on whose behalf the payment was made.

- b. *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 Article 13 paragraph 1(b) of the International Convention on Salvage 1989 have been taken into account.*
- c. *Special compensation payable to a salvor by the shipowner under Article 14 of the said Convention to the extent specified in paragraph 4 of that 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.”*

The provisions in the 1994 and 2004 Rules regarding Articles 13 and 14 of the Salvage Convention are not contentious and are omitted in subsequent drafts etc. for the sake of brevity.

6. Alternative wordings for Hamburg meeting

- 6.1 Although the majority of the respondents to the questionnaire favoured options (i) or (iv) and many parties wished to reserve their position on the matter, there appears to be agreement that it is worth exploring further a possible compromise that would see LOF salvages allowed as general average in certain circumstances – essentially where the need to achieve an equitable result justifies the additional costs that may be involved.

The following drafts are offered as illustrations of possible ways of achieving this type of compromise and are not intended to be definitive wordings. Assuming the idea of a percentage cut-off point is now discarded, there would appear to be two approaches that could be followed:

6.2 “excluded unless”

This wording follows the 2004 approach of excluding salvage unless one party pays salvage on behalf of others (as in the existing wording). The new subparagraphs (ii), (iii) and (iv) then take account of other factors that have a significant impact on salvaged/contributory values, and would therefore justify bringing LOF salvage back into GA.

- “a. *Salvage payments, including interest thereon and legal fees associated with such payments, shall lie where they fall and shall not be allowed in general average, unless*
 - (i) *one party to the salvage shall have paid all or any of the proportion of salvage (including interest and legal fees) due from another party (calculated on the basis of salvaged values and not general average contributory values), in which case the unpaid contribution to salvage due from that other party shall be credited in the adjustment to the party that has paid it, and debited to the party on whose behalf the payment was made.*
 - (ii) *there is a subsequent accident during the voyage that results in significant differences between salvaged and contributory values.*
 - (iii) *there are significant general average sacrifices involving salvaged property.*

- (iv) *salved values were manifestly incorrect and resulted in a significant and inequitable division of salvage expenses.*

In cases where sub-paragraphs (ii), (iii) and (iv) are applicable, salvage payments including interest thereon and associated legal fees shall be allowed in general average."

A fifth exception could be added with regard to differential settlements where, for example, party A reaches a negotiated settlement with salvors that is equivalent to 15% of the value of their property and party B is subject to an arbitration award equivalent to 25% of the value of their properties. Under the 1994 Rules the total salvage would be included as general average and re-apportioned, so that both parties will ultimately pay the same proportion of salvage.

Sub-paragraph (i), as drafted above, preserves the 2004 position that the party paying an LOF salvage in full receives only a simple credit for payments made on behalf of others without the amounts being treated as general average, therefore receiving no commission and interest. This could be changed to put it on the same footing as ii – iv by dealing with the payment made as general average. This would simply require the deletion of the words in (i) from "*in which case.....*" and amendment of the final lines.

6.3 "included unless"

This version starts from the basis of salvage being allowed as General Average, as in the 1994 Rules:

- "(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) and (c) (regarding Articles 13 & 14).*
- (b) Where the parties to the adventure have paid salvors independently in accordance with separate contractual or legal liability there shall be no allowance or re-apportionment of salvage and associated expenses as general average unless:*
 - (i) there is a subsequent accident during the voyage that results in significant differences between salved and contributory values.*
 - (ii) there are significant general average sacrifices involving salved property.*
 - (iii) salved values were manifestly incorrect and resulted in a significant and inequitable division of salvage expenses."*

Again, differential salvage settlements could be added to the list of exceptions.

6.4 As an alternative to the above two approaches, which necessarily involve the parties (and adjuster) in determining what may properly be judged to be "significant" in a particular case a more objective test might be to follow 6.3 but instead of (b) (i) to (iii) as the criteria for exclusion to say:

(b) *Where the vessel is laden partly or wholly with containers and the parties to the adventure have paid salvors independently in accordance with separate contractual or legal liability, there shall be no allowance or re-apportionment of salvage and associated expenses as general average.*

7. Contributory values

7.1 Some of the principal objections to reapportioning an LOF salvage can be summarised under two headings:

- **The unnecessary cost** in terms of professional time for solicitors, representatives and adjusters in ascertaining the information to carry out the re-apportionment, which consists of:
 - a) Amounts paid in respect of award, interest, Lloyd's costs etc.
 - b) Associated costs for solicitors/representatives fees.
 - c) Dates of payment (for interest calculations).
- **The additional delays** arising from the process, particularly in large and complex cases where the award goes to appeal.

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”*.

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.

It is suggested that there are two possible routes that could be taken.

7.2 Route 1 – Alter Rule XVII

The simplest amendment might take the following form:

“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 and payment for salvage services that have not been allowed as General Average by reason of Rule VI.”

While this would guarantee the cost savings that are being looked for, concern has been expressed about the position where cargo (in particular) might end up (for example) paying a GA contribution of say 80% (say

consisting of cargo sacrifices and various port of refuge or forwarding expenses) and also paying an LOF award of 50%.

At present under Rule XVII of the 2004 Rules, the salvage payment and any other expenses not allowed in GA (e.g. costs of reconditioning accidentally damaged cargo) would be deducted from the CV of cargo and it is that net value that would contribute to the 80% GA, so that property can never pay more than its net CV.

It has been suggested that the following amendments could be made to deal with that situation (referring to the numbering adopted in the 2004 version):

- *Insert in §2 after "the general average act, except": 'salvage payments unless in the circumstances described in § 3 of this Rule or'.*
- *Insert a new §3 as follows:*

'Irrespective of §2 above all salvage payments shall be deducted from the value of the property if the contribution to general average by any party plus any such party's salvage payment otherwise would exceed the total value of such a party's property.'

Some difficulties may arise in practice since the possibility of total payments exceeding 100% of values may not become clear until the closing stages of a case.

7.3 Route 2 – Status Quo for Rule XVII

Cases involving bulk cargo or a small number of cargo interests tend not to generate any significant additional costs or delays in re-apportioning an LOF salvage. The argument for changing Rule VI in favour of no or restricted re-apportionment is therefore driven by cases involving multiple interests, of which container vessels are the most obvious example and cause for concern.

When dealing with such a case the adjuster is faced with having to obtain accurate information in respect of a), b) and c) in para 7.1 above, knowing that most cargo interests will check closely the details shown in the adjustment. 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.

However, it is suggested that obtaining adequate figures to make a reasonable adjustment to the contributory value of cargo need not be such a time consuming task – dates of payment could 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.

This 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 approach 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.

A limited amendment to Rule XVII could be made:

“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.”

R.R. Cornah
(Co-rapporteur CMI IWG)
16 May 2014