

CMI
INTERNATIONAL SUBCOMMITTEE ON GENERAL AVERAGE

REPORT OF THE MEETING HELD AT THE
2014 HAMBURG CONFERENCE

Introduction

At the (first) meeting of the International Subcommittee on General Average (ISCGA) at the CMI/IMLA Dublin Symposium (28 September – 1 October 2013) those GA/YAR topics were identified that would need further work.

Directly following that first ISCGA meeting a meeting was held by the International Working Group on General Average (IWGGA). In that meeting it was decided to allocate the work to be done on the selected topics to five subgroups dealing with:

- 1) Financial Issues
- 2) Rule D
- 3) Rules X and XI, Security Documents (and processes), Low Value Cargo
- 4) Salvage, Rule B (Tug and Tow)
- 5) Tidying up

The subgroup Tidying up was only to become active at a later stage. The other four subgroups did preparatory work which was discussed at a meeting of the full IWGGA in London on 3 March 2014. At that meeting it was decided to focus the work in the run-up to the CMI Hamburg Conference on finalizing of three (subgroup) reports:

- 1) Financial Issues
- 2) Rules X and XI, Security Documents (and processes), Low Value Cargo
- 3) Salvage

The three reports were circulated by [letter of the CMI President of 19 May 2014](#). The reports were to form the basis of the discussion of the ISCGA meeting at the Hamburg Conference to be held on 14 and 15 June 2014. A [fourth report on Tidying up/Wordings](#) was issued prior to the Hamburg Conference as a matter of record of the items that had so far been agreed to need review. The fourth report would, however, not be discussed at the Hamburg Conference.

The (second) meeting of the ISCGA at the Hamburg Conference was held on Saturday 14 June 2014. The ISCGA meeting, under the chairmanship of Bent Nielsen, was attended by the following (27) persons:

Andrew Bardot (United Kingdom/International Group)
Ben Browne (United Kingdom/IUMI)
Camila Cardoso Mendes Vianna (Brazil)
Frédéric Denèfle (France)
Jörn Groninger (Germany)
Philip Groninger (Germany)
Jürgen Hahn (Germany)
Michael Harvey (United Kingdom/ADM)
Kiran Khosla (United Kingdom/ICS)
Jolien Kruit (Netherlands)
Jiro Kubo (Japan)

Lucas Leite Marques (Brazil)
Didem Light (Turkey)
Yi Liu (China)
John MacDonald (United Kingdom/AAA)
Eamonn Magee (Ireland)
Sveinung Måkestad (Norway)
Dan Malika Gunasekera (Sri Lanka)
Howard M. McCormack (United States)
Bent Nielsen (Denmark/Chairman)
John O'Connor (Canada)
Adriana P. Padovan (Croatia)
Jorge Radovich (Argentina)
Peter Sandell (Finland)
Tim Springett (United Kingdom/UK Chamber of Shipping)
Dieter Schwampe (Germany)
Taco van der Valk (Netherlands/Co-rapporteur)
Anne van Wingerden (Netherlands)

At the start of the meeting the *chairman* reiterated that the object of the whole process is to strive for unanimous decisions with regard to a possible revision of the York-Antwerp Rules. It is noted in that respect that the representatives of ICS and other organizations represented at the meeting have indicated that they are unable to cast firm votes in this ISCGA meeting as the points raised in the three reports were still to go through a formal decision making process within their respective organizations. These meetings are expected to take place in the coming months. The *chairman* therefore made it clear that during this meeting no firm decisions could be made.

The *chairman* continued his introduction with a summary of the process so far, from the reformation of the IWGGA at the CMI 2012 Beijing Conference to the run-up of the CMI 2014 Hamburg Conference.

The *chairman* suggested to go through the three reports in the following order:

- 1) Salvage
- 2) Financial Issues
- 3) Rules X and XI, Security Documents (and processes), Low Value Cargo

Salvage

Salvage in or out ('Alternative wordings for Hamburg meeting' – par. 6 report)

The *chairman* pointed out that the report (paragraphs 6.2, 6.3 and 6.4) mentioned three alternatives:

- 1) Salvage 'excluded unless' (paragraph 6.2);
 - 2) Salvage 'included unless' (paragraph 6.3);
 - 3) Alternative: salvage excluded in case of container vessels and 'LOF salvage' (paragraph 6.4);
- and gauged which alternative would have the most support.

Radovich/Argentina preferred 6.3.

Kruit/Netherlands stated that 6.3 was preferred, but also that the exclusions should be redrafted civil law style into general rule instead of a list of exclusions.

Browne/IUMI stated that the 6.2 option was preferred, and that the suggestion to include

'differential settlements' (see note** on p. 2 of the report) was particularly rejected. The *chairman* responded that this point might be deferred as a drafting issue.

Kubo/Japan stated 6.3 was preferred, but also rejected the inclusion of differential settlements.

Denèfle(France), stating to speak on a mere personal basis at this stage, also preferred the 6.3 option and rejected the inclusion of differential settlements.

Hahn/Germany clarified the fact that 'LOF Salvage' (see the report at the top of p. 1) might not include claims under e.g. the Towhire form.

Schwampe/Germany stated that the German MLA would meet after the conference, but that the inclusion of differential settlements would probably be rejected.

Kruit/Netherlands added that if at some point the 6.2 option would nevertheless be adopted, the wording of the suggested Rule VI.a.(i) under 6.2 would need redrafting. The wording follows the YAR 2004 approach, which is thought to provide for jurisdictions, such as the Netherlands, which have laws requiring the shipowner to pay salvage in full. *Kruit/Netherlands*, however, doubts whether the YAR 2004 wording, and therefore the 6.2 option, properly covers the Dutch situation, so that rewording would be needed.

The *chairman* noted that there were indications in the meeting that 6.3. was the preferred route, but that differential settlements were not to be included.

Khosla/ICS wondered what would happen if some of the separate 'LOF salvage' had in fact not yet been settled. The *chairman* suggested that in that case the interested party did not (yet) have a loss which could be redistributed in GA.

Browne/IUMI indicated there would be more problems with the drafting. He drew attention to 'have paid' in the chapeau of Rule VI.b as suggested in 6.3: what if the parties did not pay?

There was a lengthy discussion on this point. As the *chairman* felt the issue was more related to drafting, he suggested *Khosla* to take up the point more informally and revert. *Khosla/ICS*, however, questioned whether it was a mere drafting point. It was not about payment, but about liability.

Philip Groninger/Germany explained the fact that in Germany it had become common for average adjusters to help salvors with the collection of salvage dues. It was debated whether this was or should be considered part of GA work. The *chairman* stated that the example given by *Philip Groninger/Germany* that a party never settled his share of the salvage reward might be considered as an extreme example of a differential settlement.

Kubo/Japan pointed out the cases mentioned in Rule VI(b)(iii) under 6.3 should be quite rare and questioned whether in every case an adjuster should wait until all parties have fixed salvage award with salvors or whether an adjuster should be allowed to finalize an adjustment although not all salvage dues were settled. *MacDonald/AAA* stated it was a problem. *Browne/IUMI* suggested an interim adjustment, but *MacDonald/AAA* warned this was costly.

Khosla/ICS then raised the question what should be considered to be 'significant' or 'manifestly incorrect' as used in the draft provisions under 6.2 and 6.3. The *chairman* wondered whether it would be preferable to simply put a number or percentage in. *Schwampe/Germany* wondered whether it should be left to the discretion of the adjuster. *Khosla/ICS* also stated to prefer that option, but she suspected that the adjusters would not prefer that option themselves. *Browne/IUMI* stated a number or percentage would be helpful, but that it would be better to include it in a rule of practice and not in the YAR.

MacDonald/AAA warned that a percentage could only be applied after the whole adjustment was complete. *Kruit/Netherlands* raised the issue that it would be difficult giving adjusters discretionary powers, as (depending on the jurisdiction) the average adjuster may be considered to be the agent of shipowner (vide the English *Potoi Chau* judgment – Lowndes 14th ed., par. 30.04). If discretionary powers would be given, there would be a need to explicitly burden the adjuster with a duty of care towards all interests. The *chairman* asked adjusters whether they could work with more specific numbers, e.g. related to the tonnage limitation system. *Harvey/AMD* replied that we should look at a variety of claims for the IWGGA to figure out. *Jörn Groninger/Germany* felt a figure might be difficult. *MacDonald/AAA* pointed to the alternative suggestion of 6.4 which could be an attractive solution. Others present, particularly *Hahn/Jörn Groninger/Germany*, however, see many problems with that alternative suggestion.

Jörn Groninger/Germany indicated that Rule IV.b.(i) mentioned only 'a subsequent accident' resulting in significant differences between salvaged and contributory values, although there were other circumstances where significant differences between salvaged and contributory values might occur. He referred to fruit or meat going bad on a ship after salvage and before the ship could reach its destination.

Contributory values (par. 7 report)

It is noted that the points with regard to contributory values are only relevant in circumstances where salvage is 'out' (e.g. not to be redistributed via general average), therefore in respect of 6.2, and none of the proviso's (unless) of (i), (ii) or (iii) apply, or in the alternative, in respect of 6.3, and one of the proviso's (unless) of (i), (ii) or (iii) does apply.

Browne/IUMI would approve the text, provided a similar same text as referred to on p. 9 of the report:

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.

would be included. *Jörn Groninger/Germany* stated there should be a cap.] *Browne/IUMI* agreed to a cap idea. *Hahn/Germany* wondered who would bear the bit above the cap. *Jörn Groninger/Germany* and *Browne/IUMI* discussed the point at some length and agreed to help the co-rapporteur out with the summary thereof. *Hahn/Germany* suggested to stick with the status quo under the YAR 1994 (the 7.3 option). *Khosla/ICS* also preferred to stick to that status quo (the 7.3 option).

With regard to the amendment suggested in the final paragraph on p. 10 of the report, *Jörn Groninger/Germany* stated the amendment would make life easier for the adjuster. It would cut out the legal fees. *Browne/IUMI* wondered whether it would also apply to legal fees of hull insurers. It was concluded that this was indeed the case. *MacDonald/AAA* also felt the amendment would make adjusting easier.

Financial Issues

Currency of the adjustment

At the request of the *chairman* *Harvey/AMD* gives a summary on this point. In brief: the best option is to including wording regarding to the currency of the adjustment in the

contract of affreightment. It will, however, take a very long time before that could be achieved. If the YAR were to refer to a currency, the question was: which currency? Several options had been looked at: USD (as the currency now most commonly used in adjustments), an equitable currency to be determined by the adjuster (AIDE text) or the SDR (BMLA text). The subgroup had suggested in its report to opt for the SDR.

Kruit/Netherlands stated that it was not necessary to refer to the SDR. She also questioned the moments of exchange (sacrifice other than disbursements: date of termination of adventure; disbursements: date of payment) suggested in the report (p. 1-2, Hudson & Harvey par. 33.17).

McCormack/USA stated the US adjusters were used to using the USD and would accept the SDR reluctantly.

Hahn/Germany felt the SDR was a good idea, in view also of all the conventions which use SDR, and in view of the possibility of applying the SDR interest rate. He agreed with Harvey on the point of the moment of exchange.

Kubo/Japan agreed that the SDR was good in countering currency fluctuations but he was not sure, all things (including time and effort for the conversion of the final balance in SDR to the currency of creditor's choice at the stage of the final settlement) considered, whether the SDR was the best option. He preferred the AIDE text with the inclusion of SDR as an option for consideration by an adjuster.

Browne/IUMI favoured the SDR. He did recommend, however, that the reconversion from SDR into other currencies (on the date of settlement) would need further study.

Light/Turkey was also for the SDR in view of the international conventions using them.

MacDonald/AAA agreed with *Harvey/AMD* in so far it concerned a sacrifice of cargo, but wondered whether it would also be the right moment where it concerned the ship. Perhaps the date of payment would then be better.

Schwampe/Germany wondered whether we would get problems with cash deposits.

Hahn/Germany, however, suggested that it was possible to have SDR accounts. It was decided this would be looked into further.

MacDonald/AAA suggested that the proposed BMLA text needed further study as that BMLA proposal had been rejected before for reasons of practicality.

Commission

Harvey/AMD gives a summary of the report on this point.

Khosla/ICS reiterates that the commission may be abolished but on the condition that a consensus can be reached with regard to a rate of GA interest, and that adjusters are not barred from allowing bank charges etc on an actually incurred basis (see p. 6 report).

Schwampe/Germany, *Kruit/Netherlands*, *Browne/IUMI* all support the abolition of commission.

Interest

Harvey/AMD gives a summary of the report on this point. He points out, however, that shortly after the report was finalized he received information that suggested the SDR interest rate might not be a good option. He felt the YAR 2004 system may now be the best option, although the Guidelines would have to be changed (from 'by a first class commercial bank to a shipowner of good credit rating' to 'by an "average" commercial bank to a shipowner of "average" credit rating').

The *chairman* explains how the rate of interest is now determined under the system in place for the YAR 2004. The bankers that are consulted will usually refer to Libor USD, even after Libor was discredited. The main difficulty then is determining the 'spread', i.e. the top-up

needed to go from a rate for interbank lending to a rate for the lending from a bank to a shipowner. He suggests that if there will be a new system under new YAR, the guidelines to YAR 2004 should be amended at the same time to include the same system the new YAR will have. He also informed the meeting that with the passing of Richard Shaw and the withdrawal by Patrick Griggs the Interest Rate Committee needed new members. Andrew Taylor and Taco van der Valk had agreed to join the committee. But it might be a good idea to include a banker and a shipowner.

Khosla/ICS would be reluctant to abandon the SDR interest rate suggestion. She suggests to study it further, and otherwise wait and see what will happen to reinstate Libor.

To the suggestion in the report (p. 8) to impose some sort of punitive interest to counter delayed settlements *Browne/IUMI* retorts that it would be acceptable if the same rule would apply across the board, so that shipowners would be subject to a similar punitive interest rate for late payments. *Denèfle (France)* wants to know who gets the interest in the end. What about hull underwriters having made advance payments? *Harvey/AMD* suggests hull underwriters should get compensated under the current system for paying in advance. *Hahn/Germany* states that it is much more difficult to get timely payment these days.

Cash deposits

Harvey/AMD gives a summary of the report on this point.

The *chairman* states he was very hesitant at first, but that it now appears that CMI is not immediately dismissive of the idea of adopting a role like the IVR in the IVR General Average Rules (p. 9-10 report). It may do so via a special CMI account, but perhaps also by allowing particular law firms to do it under the name of CMI.

Hahn/Germany warns for the administrative burden that would go with it. *Harvey/AMD* responds that the administrative burden is high for containerships, but that the YAR should not only cater for containerships.

The chairman then refers to the clause suggested on p 10 of the report.

Bardot/International Group believes the clause causes more problems than it solves. It would seem insurance cover against theft and insolvency of the adjuster would be a solution. *Browne/IUMI* will look into this

The discussion then turns back to the conditions which would have to be satisfied for CMI to take up the role as trustee of the cash deposits.

Rules X and XI, Security Documents (and processes), Low Value Cargo financial Issues

Rule XI Wages and Maintenance at a port of refuge

Browne/IUMI supports the YAR 2004 wording.

Denèfle (France) wonders why the report does not mention the fact that the common loss of hire insurance covers the cost of wages and maintenance. He is for the YAR 2004 wording.

Kubo/Japan also supports the YAR 2004 wording.

Khosla/ICS does not agree with *Denèfle's (France's)* point on loss of hire insurance because YAR should not be prejudiced by owners having or not having insurance, and expresses her support for the YAR 1994 wording.

Kruit/Netherlands supports the 1994 wording.

MacDonald/AAA states that the British MLA supports the 1994 position.

O'Connor/Canada supports the 2004 wording.

The *chairman* wonders whether we should keep the point on the agenda. Browne/IUMI would like it to remain on the agenda as a compromise is still possible.

The *chairman* then turns to the suggestion on p. 2 of the report to add 'entry and/or detention'.

Harvey/AMD thinks it is a mere clarification.

O'Connor/Canada wonders what else it could mean.

It is concluded that it is an improvement for not a very large problem.

Rule XI Port charges and the 'Trade Green' decision

MacDonald/AAA gives a summary of the Trade Green decision, which is deemed to be wrong. The aim is merely to go back to what adjusters used to include under 'port charges'.

McCormack/USA supports a clarification.

Browne/IUMI and *Kruit/Netherlands* support Amendment Version A.

Harvey/AMD, however, suggests that both Amendment Versions do not properly address the Trade Green problem. The port charges are not incurred as a consequence of detention or in connection with detention.

Browne/IUMI agrees with the viewpoint that the Trade Green judgment is too narrow.

It is agreed that something is needed to counter the effect of the Trade Green decision, but that redrafting is needed.

ICS' further comments to Rule X and XI YAR 194 – 12.05.2014 (Bigham cap)

Khosla/ICS summarizes ICS's viewpoint.

Browne/IUMI explains why IUMI strongly favours retention of the cap.

Kubo/Japan agrees with Browne/IUMI and suggested that in order to exclude Bigham Cap from Rule G, the wording of third paragraph "if practicable" must be changed to "without failure". *Khosla/ICS* feels that the problem is what the hypothetical costs would be. The cap should be removed. The *chairman* suggests that no agreement seems to be possible, but feels the options should be kept open.

MacDonald/AAA adds that a further problem is that US lawyers have given a more extensive interpretation to the Bigham clause than UK lawyers.

It is concluded that the item shall stay on the agenda.

II. Low Value Cargo

Kruit/Netherlands is for the new wording suggested on p. 4 of the report, but suggests to add the word 'likely' to be inserted between '...would be' and 'disproportionate...'

MacDonald/AAA suggest the text to read '...would be likely to be disproportionate...'

Browne/IUMI's suggested to add the word 'reasonably' between 'a figure' and 'determined by...'. This had no support.

Harvey/AMD is of the opinion that 'an estimated contributory value' should be rephrased.

Jörn Groninger/Germany supports the retention of the current definition.

Denèfle (France) supports that low value cargo is taken out, but wonders what the effect is of the wording. It should mean that low value cargo is disregarded as contributory value, and that the total average is distributed over the remaining total (higher value) cargo and the ship.

The suggestion of BIMCO/ICS/IG noted by the subgroup at the bottom of p. 4 of the report is not pursued further, as it is outside the scope of the YAR.

III. Rule E: time limit

Denèfle (France) supports Amendment B.

Browne/IUMI points to a problem in drafting by giving the example of cargo interests waiting for a salvage reward for 15 months. Their claim in general average would then be too late.

The *chairman* reminds all that this particular wording already exists in the YAR 1994. Have there been problems now? He suggests to leave Amendment B in for the moment, but that the drafting needs further consideration. Although *Kubo/Japan* states to prefer the modification of the third paragraph included in the report on p. 5, it is agreed to leave both options in for the moment.

IV. Rule E: treatment of recoveries

Browne/IUMI does not support the last sentence of the suggested final paragraph of Rule E. *Kruit/Netherlands* feels the whole suggested final paragraph needs more thought.

MacDonald/AAA suggests to start the final paragraph with 'Any party to the adventure or their insurer achieving...'

Hahn/Germany wonders whether time charterers are covered.

Denèfle (France) fears for the position of the innocent cargo insurer. The last sentence of the suggested final paragraph is too harsh in his opinion.

It is decided to delete the last sentence, and to keep the first sentence in the process of further consideration.

Items dropped at Phase 2

Harvey/AMD reminds the meeting that the IWGGA had agreed not to talk about standard documents now, but he suggests now may be the time to take it up again. *Jörn Groninger/Germany* agrees with that suggestion.

Khosla/ICS wonders what is meant by the second bullet point (Rule XIa – dropping the suggestion to eliminate the allowance of crew wages and maintenance). Had we not just discussed that point? It was noted that the point suggested to be dropped referred to 'crew wages and maintenance while bearing up for a port of refuge' compared to 'crew wages and maintenance at a port of refuge' discussed earlier.

The item deferred until 'tidying up' phase would be included in the tidying up.