

YORK ANTWERP RULES PROPOSALS FOR 2016

CMI GUIDELINES

Introduction

In the 2011 CMI Questionnaire consideration was given to:

- including a “Definitions” section in the Rules in line with many international conventions
- expanding the Rules to cover matters that presently require reference to text books or other sources to understand fully.

It was agreed by the IWG that “Definitions” would simply extend the scope for arguments on the various definitions. Additionally, while making the Rules more self-contained had some merits, it would be at the expense of the brevity and flexibility of the present Rules which were considered to be essential features that must be retained.

Other areas such as maintaining liens and forms of security were seen as being too dependent on local jurisdictions to make the drafting of useful new Rules possible.

However, against this background it was considered that CMI could play a useful role by providing a set of Guidelines that, while not binding, would reflect existing best practice and provide a source of information and guidance for commercial interests.

At the Istanbul International Sub-Committee meetings in June 2015, support for the introduction of CMI guidelines was confirmed and it was agreed that more detailed drafting work should commence.

The following pages are offered as a first draft for review and discussion by all interested parties. The draft guidelines are shown in black with explanatory notes and comments in blue italic type.

The proposed order of this draft of the guidelines differs from the format suggested in the Istanbul Working Papers in that it was deemed to be more logical to cover general matters first and then to cover guidelines relating to specific York Antwerp Rules.

R.R. Cornah (Co-Rapporteur)

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CMI GUIDELINES RELATING TO GENERAL AVERAGE

A) INTRODUCTION

1. Objective

These guidelines are intended to assist commercial interests in dealing with general average cases and to provide:

- general background information
- guidance as to recognised best practice
- recommended wordings

2. Effect of guidelines

These guidelines do not form part of the York-Antwerp Rules; they are not binding on the parties and are not intended to over-ride or alter in any way the provisions of the York-Antwerp Rules, the contracts of affreightment or any governing jurisdictions.

3. Oversight and amendment

The first edition of the CMI Guidelines has been adopted by the plenary session of the 42nd international conference of CMI in New York, May 2016, and ultimately approved by the Assembly of CMI.

In order to monitor the working and effectiveness of the CMI Guidelines, a Standing Committee shall be constituted to consist of:

- A chairman nominated by the Assembly of CMI
- A Convenor ([Rapporteur ?](#)) nominated by the Assembly of CMI
- A representative nominated by the International Chamber of Shipping
- A representative nominated by the International Union of Marine Insurers
- Five additional members nominated by the Assembly of CMI

The Standing Committee may recommend changes to the Guidelines as circumstances dictate which shall be submitted to the Assembly of CMI for approval. In the event that the Assembly consider that the proposed changes may not meet with general acceptance, the matter will be referred to an International Conference of CMI when next convened.

B) BASIC PRINCIPLES

1. Background

The principle of general average was first formulated by the ancient Greeks in a maxim dealing with the question of jettison, but it is probable that the idea itself was of still more ancient origin. As the doctrine developed various types of losses were added to that of jettison; perhaps the most important step was the recognition that expenditure of money was in principle no different from the sacrifice of property, if it was incurred in similar circumstances and for the same purpose.

General average varied in its development in the different leading maritime countries, so that by the latter part of the 19th century substantial differences existed in law and practice throughout the world. In view of the international character of shipping the disadvantages of this were obvious, and there began the series of attempts to obtain international uniformity. An International Conference held in York in 1864 produced the York Rules, which were revised at Antwerp in 1877 to become the first set of York-Antwerp Rules.

In a modern context, as well as continuing to provide an equitable remedy when property is sacrificed for the common good, the principles of general average, as now embodied in the York-Antwerp Rules, also continue to perform a useful function in helping to define important borders that lie between:

- Matters that form part of the shipowners' reasonable obligations to carry out the contracted voyage and those losses and expenses that arise in exceptional circumstances.
- Property and liability insurers as their differing responsibilities meet and sometimes merge, in the context of a serious casualty.

Both of these difficult areas benefit from the reservoir of established law and practice that general average provides, helping to secure a degree of certainty that is always the objective of commercial interests.

It is important to appreciate that the York-Antwerp Rules do not have the status of an international convention. They take effect only by being incorporated into contracts of affreightment.

Rule A of the York-Antwerp Rules defines a general average act as follows:

"There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure."

2. York-Antwerp Rules

The York-Antwerp Rules consist of lettered rules (A-G) and numbered rules 1-23. The lettered rules set out various broad principles as to what constitutes general average; the numbered rules deal with specific instances of sacrifice and expenditure and set out detailed guidelines concerning allowances etc.

Broadly speaking, the York-Antwerp Rules have recognised two main types of allowance:

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“Common safety” allowances: sacrifice of property (such as flooding a cargo hold to fight a fire) or expenditure (such as salvage or lightening a vessel) that is made or incurred while the ship and cargo were actually in the grip of peril.

“Common benefit” allowances: once a vessel is at a port of refuge, expenses necessary to enable the ship to resume the voyage safely (but not the cost of repairing accidental damage to the ship) for example, the cost of discharging, storing and reloading cargo as necessary to carry out repairs, port charges, and wages etc. during detention for repairs and outward port charges.

The York-Antwerp Rules are prefaced by a Rule of Interpretation which gives priority to the numbered rules when there is a conflict with the lettered rules. For example, Rule C excludes losses due to delay but Rule XI says that certain detention expenses at a port of refuge (e.g. port charges, wages and maintenance) can be allowed; Rule XI takes priority over the lettered Rule C and such expenses can therefore be allowed.

The York-Antwerp Rules also include a Rule Paramount after the Rule of Interpretation, which states as follows:

"Rule Paramount

In no case shall there be any allowance for sacrifice or expenditure unless reasonably made or incurred."

The burden of proof lies on the party claiming in general average to prove that both the general average act and the amount of any allowance are reasonable. It is suggested that in applying this rule there can be no absolute standard of "reasonableness" and that a situation must be judged on the particular facts prevailing at the time and place of the incident.

3. General Average events

The following are simple examples of general average situations:-

<u>Casualty</u>	<u>Type of sacrifice or expenditure</u>
<i>Grounding:</i>	Damage to vessel and machinery through efforts to refloat. Loss of or damage to cargo through jettison or forced discharge. Cost of storing and reloading any cargo so discharged. Port of refuge expenses.
<i>Fire:</i>	Damage to ship or cargo due to efforts to extinguish the fire. Port of refuge expenses.
<i>Shifting of cargo in heavy weather:</i>	Jettison of cargo. Port of refuge expenses.
<i>Heavy weather, collision, machinery breakdown, or other accident involving damage to ship and resort to or detention at a port:</i>	Port of refuge expenses.

<i>General:</i>	Payments relating to salvage may also be allowed as general average in any of the above circumstances.
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4. Adjustment of general average

The basic principles are:

1. Property at risk

All property that is at risk in the common adventure at the time of the occurrence giving rise to the general average act and is saved by that act contributes to general average, according to its value at the termination of the adventure.

2. Contributory values

The basis for calculation of contributory values and general average losses is the value of the property to its owner at the termination of the adventure. In the case of goods there is an exception to this under the York-Antwerp Rules, in that they contribute on the basis of their invoice or shipped value.

Charges incurred in respect of the property after the general average act (other than charges which are themselves allowed in general average) must be deducted in arriving at the contributory value, so as to ensure that each owner of property contributes according to the actual net benefit he has received, by deducting all the expenses he has to bear to realise that benefit.

Since values are assessed as at the termination of the adventure, it follows that the amount of contribution may be varied by further loss or damage to the property between the time of the general average act and the termination of the adventure.

3. Termination of adventure

Normally, the adventure is considered as terminated on completion of discharge of cargo at the port of destination. If there is an abandonment of the voyage at an intermediate port then the adventure terminates at that port. If, because of a casualty, the whole cargo is forwarded from an intermediate port by another vessel the cost of forwarding may be allowable as general average subject to criteria set out in Rules F and G of the York-Antwerp Rules.

4. Deductions

Expenses incurred in respect of the property after the general average act (other than expenses which are themselves allowed in general average) must be deducted in arriving at the contributory value, so as to ensure that each owner of property contributes according to the actual net benefit he has received, by deducting all the expenses he has to bear to realise that benefit.

5. "Made Good"

Equality of contribution must be maintained between the owner of the property sacrificed and the owner of the property saved. In practice this is achieved by the device of adding to the contributory values of property lost or damaged by general average sacrifice the amount allowed in general average in respect of that sacrifice. If this were not done the owner of jettisoned cargo would receive benefit

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in the form of money from the general average for loss of his goods without participating in or contributing to the general average losses. The owner of an identical parcel delivered sound from the same ship, whilst receiving his cargo and no money from the general average, would still have to pay his contribution.

5. Example adjustment

		General Average
Shipowners' losses and expenses		US\$ 250,000
Cost of repairs of damage to vessel's machinery sustained in refloating operations.		100,000
Cost of discharging, storing in lighters, and reloading cargo discharged to lighten vessel.		
Salvage awarded to tugs for refloating vessel.		1,150,000
Cargo owner's losses		
Value of cargo jettisoned in efforts to refloat.	US\$ 500,000	
Damage to cargo caused by forced discharge, storage and reloading.	100,000	
	600,000	600,000
		US\$2,100,000
 Apportioned		
Ship		
Arrived value at destination in damaged condition.	US\$6,750,000	
Add allowance in general average for refloating damage.	250,000	
	US\$7,000,000	pays in ppn. US\$ 700,000
 Cargo		
Invoice value after deduction of loss and damage.	US\$13,400,000	
Add allowance in general average in respect of jettison and damage due to forced discharge.	600,000	
	14,000,000	" 1,400,000
	US\$21,000,000	pays in ppn. US\$2,100,000

(General Average equals 10% on the contributory values.)

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Balance under the adjustment

The Shipowner:

Receives credit for general average losses and expenses.	US\$	1,500,000
Pays general average contribution.		700,000
		<hr/>
<i>Balance to receive</i>	US\$	800,000
		<hr/>

The cargo owner:

Pays general average contribution.	US\$	1,400,000
Receives credit for general average losses.		600,000
		<hr/>
<i>Balance to pay</i>	US\$	800,000
		<hr/>

6. Contract of affreightment

The parties to the adventure usually make special provision in the contract of affreightment regarding general average, the most common being a clause to the effect that general average is to be adjusted in accordance with the York-Antwerp Rules. Such stipulations may be contained in the charter party, if any, or the bills of lading, or in both documents.

Rule D of the York-Antwerp Rules gives explicit recognition to the fact that general average exists irrespective of fault or breach of contract by any of the parties. It follows that normally the procedures for protecting the rights of the parties in general average must be observed even when it is suspected that such a fault or breach has taken place. Equally, the existence of a general average does not prejudice any rights or defences that are open to parties, for example with regard to cargo damage or alleging a breach of contract as grounds for not paying a general average contribution.

The giving of general average security in the customary terms is a promise to pay any general average contribution that is found to be *properly and legally* due. Generally, if there has been a breach of contract the contribution cannot be so described.

7. General Average security

Most jurisdictions recognise that the shipowner can exercise a lien (i.e. refuse to allow delivery) on cargo at destination in respect of general average losses sustained by any of the parties to the adventure. The preparation of an adjustment will usually take some time, so that the shipowner will relinquish his lien in return for satisfactory security. This will usually take the following form:

- (a) Signature to an Average Bond by the receiver or other party on behalf of cargo owners.
- (b) A cash deposit for an amount estimated by the adjuster to cover likely general average liabilities, usually expressed as a percentage of the invoice value of cargo. It is usual for an Average Guarantee signed by a reputable insurer to be accepted by the shipowner in place of the cash deposit.

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Recommended wordings for general average security documents are set out in section C) below.

8. Salvage security

In cases where ship and cargo have been salvaged under contracts such as Lloyd's Open Forum, it may be necessary for ship and cargo to give separate security to salvors, in addition to the customary general average security.

C) GENERAL AVERAGE SECURITY DOCUMENTS

1. Introduction

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

A variety of forms are used to provide security for the liability of the cargo owner (Average Bonds) and the undertakings given by their insurers (Average Guarantees).

Variations in the wordings of such forms have arisen largely as a result of market practices and the CMI offer the following forms providing recommended wordings that have been agreed by the International representatives of shipping interests (International Chamber of Shipping, ICS) and insurers (International Union of Marine Insurers, IUMI). It is recognised that the wording adopted in practice may vary in some cases due to circumstances or legal issues, however the recommended wordings are offered with the following objectives in mind.

- To provide an acceptable level of security to the shipowner and other parties to the adventure that may be GA creditors.
- To preserve the position under Rule D in respect of defences.
- To encourage the timely provision of information and evidence to ensure the adjustment process is not delayed.

DISCUSSION NOTE 1

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

AVERAGE GUARANTEE

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

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

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

VESSEL..... From..... to.....

CASUALTY and DATE.....

In consideration of the delivery in due course of the goods specified below to the consignees thereof without

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collection of a deposit, we, the undersigned insurers, hereby undertake to pay to the shipowners or to the Average Adjusters, XXXXXXXX on behalf of the various parties to the adventure as their interests may appear, any contribution to General Average and/or Salvage and/or Special Charges which may hereafter be ascertained to be properly due in respect of the said goods.

We further agree:

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

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

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

LLOYD'S AVERAGE BOND

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

Quantity and description of goods

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

We also agree to:

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

The drafts shown below are intended to meet some of the common objections to the above wordings.

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2. Average Bond

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

Examples of additional wording that may also be found in both Average Bonds and Average Guarantees are shown in para 3.2 below.

AVERAGE BOND

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

VESSEL:

CASUALTY and DATE:

Port of shipment:

Port of destination/discharge:

[Container Number(s): optional]

Bill of Lading or waybill number(s):

Quantity and Description of Goods:

Invoice Value (**attach copy**):

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

We agree further:

- a) to furnish promptly to the Average Adjusters particulars of the value of the goods, supported by a copy of the commercial invoice rendered to us or, if there is no such invoice, details of the shipped value;
- b) to make a payment on account of such sum as may be properly and legally due in respect of the goods by the shippers or owners thereof as soon as the same may be certified by the said Average Adjusters after completion of the voyage.
- c) that any period of prescription, whether provided by statute law, contract or otherwise, shall commence to run from the date upon which the general average adjustment is issued.

COMPANY NAME:

ADDRESS:

TEL NO: EMAIL:

AUTHORISED SIGNATORY: DATE:

2.2 Note: the words shown in square brackets above may be regarded as surplus to requirements. If a general average is not drawn up in accordance with the provisions of the contract of affreightment or the law of destination, any contribution requested would not be properly or legally due.

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3. Average Guarantee

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

AVERAGE GUARANTEE

(Wording recommended by Comite Maritime International)

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

VESSEL:

CASUALTY and DATE:

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

We agree further:

- a) to furnish promptly to the said Average Adjusters all information which is available to us relative to the value and condition of the said goods;
- b) to make payment(s) on account of such contribution as may be properly and legally due in respect of the said goods, as soon as the same may be certified by the said Average Adjusters after the completion of the voyage.
- c) that any period of prescription, whether provided by statute law, contract or otherwise, shall commence to run from the date upon which the general average adjustment is issued.

Port of shipment:

Port of destination/discharge:

Bill of Lading or waybill number(s):

[Container Number(s): optional]

Quantity and Description of Goods:

Insurers Policy / Reference number:

Insured Value:

SIGNATURE: NAME OF SIGNATORY:

COMPANY NAME AND ADDRESS:

.....

.....

TEL NO: EMAIL:

DATE:

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

i) A jurisdiction clause

The following is shown as an example:

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

ii) A currency clause

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

iii) Electronic transmission clause

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

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

D) ROLE OF THE ADJUSTER

DISCUSSION NOTE 2

a) Prior to the Istanbul conference, IUMI proposed the following Draft Numbered Rule:

“In adjusting the General Average and in all activities associated therewith (such as collecting security, publishing the Adjustment, exercising discretion and all other aspects of the role of an Adjuster) the Adjuster shall act independently and impartially in the interests of all parties to the common maritime adventure. Guidelines shall give examples of best practice for Adjusters.”

The leading professional association present expressed concern about the scope for additional disputes and possible litigation, and it appeared to be generally agreed that a new rule was not appropriate. However, it was argued that further consideration should be given to guidelines regarding best practice. IUMI had suggested the following:

Draft Guidelines for examples of best practice for Average Adjusters

“Adjusters should:

- 1. Genuinely act in the interests of all parties to the Common Maritime Adventure (“CMA”);*

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2. *Make available copies of vouchers and relevant contracts (e.g. for repairs) relating to expenses allowed in the Adjustment;*
3. *Where appropriate collect G.A. security from all those interested in the CMA (including the ship and time charterers' bunkers) as well as the cargo so that no party to the CMA is left un-secured should it turn out they are creditors in the Adjustment;*
4. *Explain in appropriate detail the reason for the currency of the Adjustment;*
5. *Investigate (and state in the Adjustment) the steps which the parties to the CMA have taken and, if applicable, are taking to effect a recovery which might result in a re-adjustment;*
6. *State upon the basis of which YAR rule each expense or sacrifice is allowed in the Adjustment (this is the subject of an AAA provisional Rule of Practice);*
7. *Explain and justify the basis upon which GA contributions are claimed: this will usually (but not always) be a contract of carriage and, if it is, then the Adjuster should explain in the Adjustment if necessary pursuant to which contract of carriage the Adjustment is done and the reason why other contracts are not being relied upon (e.g. why is the G.A. clause in the Voyage C/P being adopted rather than the B/L?);*
8. *Not seek payments on account before the CMA has been completed.*
9. *If the adjuster is aware that there has been a substantial cargo sacrifice, offer the cargo parties interested the opportunity to check the wording of security given by the other main contributing parties to the CMA;*
10. *Accept G.A. security wording which provides that payment is only made when properly and reasonably due;*
11. *Not obtain the shipowners' approval of the adjustment before it is distributed (a draft adjustment may be circulated but, if it is, it should be sent to all parties or at least all legally represented parties to the CMA and not just the shipowner);*
12. *Arrange the collection of the contributions on behalf of all parties to the CMA."*

b) With regard to the IUMI proposals above the following general comments can be made:

- IUMI items 1, 2, 4, 5, 6, 7 and 10 are addressed in the proposed guidelines below:
- IUMI item 8 is addressed in the proposed new recommended average guarantee wording.
- IUMI item 3 is something which the adjuster can draw the shipowners' attention to, but this is essentially a matter for the shipowner and the P&I Club.
- IUMI items 9 and 10 are addressed by the provisions of recommended security wordings.
- IUMI item 11 would remove an important stage in ensuring the final adjustment is factually correct. It is suggested that agreeing a pro forma adjustment with cargo representatives is best left to the discretion of the adjuster.

1. Appointment of adjusters

In the majority of jurisdictions the findings of an average adjuster regarding amounts payable by the parties to a maritime adventure are not legally binding, as would be the case with an arbitration award. In rare cases an adjustment may be enforced by the Courts, but the majority of adjustments are accepted by the parties (subject to any Rule D defences) on the basis of the professional standing and expertise of the adjuster.

CMI, the International Union of Marine Insurers and the International Chamber of Shipping, therefore recommend strongly that only average adjusters who are appropriately qualified under national legislation or by membership of a recognised professional association should be instructed to deal with General Average matters.

2. Best practice of adjusters

Qualified adjusters work under different regulatory and professional regimes, however the following elements of best practice appear to be universal and are endorsed by the leading professional associations.

2.1 Irrespective of the identity of the instructing party, the Average Adjuster is expected to act in an impartial and independent manner in order to act fairly to all parties involved in a common maritime adventure.

2.2 In all cases the adjuster should:

(a) Give particulars in a prominent position in the adjustment of the clause or clauses contained in the charter party and/or bills of lading that relate to the adjustment of general average or, if no such clause or clauses exist, the law and practice obtaining at the place where the adventure ends. Where conflicting provisions exist, the adjuster should explain in appropriate detail the reason for the basis of adjustment chosen.

(b) Set out the facts that give rise to the general average.

(c) Where the York-Antwerp Rules or similar apply, identify the lettered and/or numbered Rules that are relied upon in making the principal allowances in the adjustment.

(d) Explain in appropriate detail the choice of currency in which the adjustment is based.

(e) Make appropriate enquiries as to whether any recovery from a third party is possible and what steps are being undertaken, and set out the results of their enquiries in the adjustment.

2.3 On request, and when practicable, the adjuster should make available copies of reports and invoices relied upon in the preparation of the adjustment.

2.4 The adjuster should recommend general average security in the forms recommended by CMI, or provide reasons as to why different wordings are required.

E) ROLE OF THE GENERAL INTEREST SURVEYOR

“The General Interest” or “G.A. Surveyor” is appointed by the Shipowners on behalf of all parties involved in the common maritime adventure. The Shipowner is responsible for settlement of the Surveyor’s charges, which are allowed as General Average.

The G.A. Surveyor is not required to investigate the circumstances leading up to a G.A. situation (i.e. the cause of a fire) but once the situation exists, his role is as follows:

- 1) To advise all parties on the steps necessary to ensure the common safety of ship and cargo.
 - 2) To monitor the steps actually taken by the parties to ensure that proper regard is taken of the General Interest.
 - 3) To review General Average expenditure incurred and advise the Adjusters as to whether the costs are fair and reasonable.
 - 4) To identify and quantify any General Average sacrifice of ship or cargo.
 - 5) To ensure that General Average damage is minimized wherever possible i.e. by reconditioning or sale of damaged cargo. Except in cases of extreme urgency or where communications are difficult, any significant action with regard to cargo (i.e. arranging for its sale at a Port of Refuge) must be taken in consultation with the concerned in cargo.
2. The authority and funds to make disbursements will generally come from the Shipowner, usually via the Master or the Local Agents. The G.A. Surveyor therefore has no authority to order any particular course of action and his role is an advisory one. However, the Surveyor’s impartial position and his influence on the eventual treatment of the expenditure will give his advice considerable weight with the other parties involved.
3. The Surveyor should also be aware that several other Surveyors may be in attendance on behalf of particular interests and that, for reasons of economy, duplication of reporting should be avoided. In the event of any doubt arising as to the depth of investigation required from the G.A. Surveyor, the Adjuster should be contacted for guidance. The Surveyor is effectively appointed to act on behalf of the whole General Average community, any of whom are generally entitled to view all his exchanges of correspondence and reports.

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DISCUSSION NOTE 3

At Istanbul and subsequently the adjuster members of the IWG discussed the possibility of providing a definition for the meaning of the word “significant” in the context of Rule VI. The unanimous view was that this was unlikely to be possible and, if attempted, would probably not be helpful. It was felt that the best that could be done was to set out the objectives of the proposed Rule VI(b) and that would provide a context to show whether the judgement exercised in a particular case by the adjuster was reasonable.

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The adjusters have expressed concern about the point at which the information required to form their judgement would come available to them – it is not uncommon for the numbers in a complex case to change toward the final stages of a case, for example a potential claim for ship or cargo sacrifice is found not be allowable. It may be appropriate to add something further about the practicalities of making a judgement call at various stages in the case.

1. Rule VI - Salvage

The wording of Rule VI paragraph (b) is new to the York Antwerp Rules 2016. It arises from concerns that, if the ship and cargo have already paid a salvage award separately (for example under Lloyd's Open Form) based on salvaged values (at termination of the services), allowing the salvage award as general average and re-apportioning it over contributory values (at destination) may give rise to additional cost and delays, while making no practical difference to the proportion payable by each party.

A variety of measures to meet these concerns have been considered, ranging from complete exclusion of such salvage awards to using a fixed percentage mechanism. Such measures have been found during CMI discussions to produce inequitable results or were impossible to apply across the range of cases encountered in practice.

It was pointed out that many leading adjusters will, when appropriate, propose to the parties that if re-apportionment of salvage as general average will not produce a meaningful change in the figures or will be disproportionately costly, the salvage award will be omitted from the adjustment; it is then up to the parties to decide whether it should be included or not. However, it was considered that a means should be found to make this practice more universal and to set out express criteria that would help to ensure that the allowance and re-apportionment of salvage awards as general average (where already paid separately by ship and cargo etc.) would only occur in cases where there was a sound equitable or financial basis for doing so.

The average adjusters will still be required to exercise their professional judgement in applying paragraph (b) because several of the criteria (i-v) that are listed require a view to be taken as to what should be deemed to be "significant" in the context of a particular case. Because of the wide range of cases that the York Antwerp Rules apply to, it was not considered desirable to offer a fixed definition of how "significant" should be construed, other than to note that the objective of the new clause was to reduce the time and cost of the adjustment process where it is possible to do so, without prejudicing the interests of any of the parties to the adventure.

2. Rule XXII – Treatment of Cash Deposits

Under Rule XXII(2) the adjuster is required to hold deposits in a special account constituted in accordance with the legislation regarding holding client or third party funds that applies in the domicile of the appointed adjuster.

In the absence of such legislation, or where it is incomplete, CMI recommends that any special account should have the following features:

- Funds should be held separately from the normal operating accounts of the adjuster.

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- Funds should be 'ring-fenced' in the event of liquidation or the cessation of the adjuster's business.
- The holding bank should provide regular statements that show all transactions clearly.