

CMI
INTERNATIONAL SUBCOMMITTEE ON GENERAL AVERAGE

REPORT OF THE MEETING HELD IN LONDON
ON 7 AND 8 DECEMBER 2015

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 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. 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 was also noted that the representatives of ICS and other organizations present at the meeting had indicated that they were unable to cast firm votes in this ISCGA meeting as the points raised in the three reports would still have to go through a formal decision making process within their respective organizations. These meetings were 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 three reports were then discussed as reported in the [Hamburg ISCGA Report](#).

Following the ISCGA meeting at Hamburg the IWG wanted to make sure that the representatives of the main stakeholders were clear on which particular points of principle the IWG wished to receive further feedback. Therefore a 'clearing-up' meeting was held in London on 29 July 2014 between representatives of ICS and IUMI, and the chairman and

both rapporteurs of the IWG. Following that meeting some tentative conclusions were received from ICS. On 3 December 2014 another meeting was held to clarify these tentative conclusions, to obtain a clearer view of IUMI's views and to see whether the IWG could work towards one document which would show all remaining points of discussion, with some drafting options along with them. Co-rapporteur Richard Cornah prepared such a document under the heading 'CMI Drafting Meeting Papers' which were discussed in a full IWG meeting in London on 25 February 2015.

The results of the discussions at that meeting and further documents exchanged by email (the [Working Papers](#) and a [Supplement](#) thereto) were submitted to the next, i.e. third, ISCGA held in Istanbul on Saturday 6 and Sunday 7 June 2015 just prior to the CMI Istanbul Colloquium. The meeting focused on reaching a compromise between the main stakeholders on some remaining controversial points and on making further progress on the drafting of changes proposed in the interest of clarity and uniformity, and to bring the rules up to date. The discussions in Istanbul were reported in the [Istanbul ISCGA Report](#).

In order to be fully prepared for the CMI Conference in New York 2016 (3-6 May), it was thought to be necessary to call a further, i.e. fourth, ISCGA meeting. The discussions were to take place on the basis of the Istanbul [Working Papers](#) and [Supplement](#), the [Istanbul ISCGA Report](#), a copy of the judgment in the Longchamp [2015] 1 *Lloyd's Rep.* 76, a [discussion paper on the Longchamp judgement](#), and an [extended draft of proposed CMI Guidelines](#), the latter two documents prepared by co-rapporteur Richard Cornah.

This (fourth) meeting of the ISCGA was held on Monday 7 and Tuesday 8 December in London at the offices of the International Chamber of Shipping. The ISCGA meeting, under the chairmanship of Bent Nielsen, was attended by the following (23) persons:

Ben Browne (United Kingdom/IUMI)
Donald Chard (United Kingdom/BIMCO)
Richard Cornah (United Kingdom/Co-rapporteur)
Jörn Groninger (Germany)
Jürgen Hahn (Germany)
Michael Harvey (United Kingdom/AMD)
Christian Hoppe (Denmark/BIMCO)
Kiran Khosla (United Kingdom/ICS)
Jiro Kubo (Japan)
Didem Light (Turkey)
John MacDonald (United Kingdom/AAA)
Sveinung Måkestad (Norway)
Bent Nielsen (Denmark/Chairman)
John O'Connor (Canada)
Tomas Fernandez Quiros (Spain)
Lauri Railas (Finland)
Katrina Ross (United Kingdom/ICS)
Peter Sandell (Finland)
Dieter Schwampe (Germany)
Jonathan Spencer (United States/AMD)
Taco van der Valk (Netherlands/Co-rapporteur)
Esteban Vivanco (Argentina)
Tilo Wallrabenstein (Germany)

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After opening the meeting the *chairman* thanks the International Chamber of Shipping for its willingness to host another meeting in this process. He continues with an explanation of the purpose of the meeting. He suggests the following agenda for the meeting:

- go through the remaining items in the draft YAR by following the numbering of the Drafting Notes found in the Istanbul [Working Papers](#);
- deal with the issues raised by the Longchamp judgment;
- go through the extended draft of the Guidelines
- any other matters.

DRAFT YAR

Drafting Note 3) Rule E - Treatment of Recoveries (p. 5 and 17 of the [Istanbul ISCGA Report](#))

Cornah/UK explains the issue.

The *chairman* asks whether the text at p. 17 of the Istanbul report can go forward to the New York Conference.

O'Connor/Canada suggest to remove the words 'to him' in the third paragraph. *Chard/UK/BIMCO* would like it to stay in, as it would make it a clearer reference to the adjuster. It is decided to change the words to 'to the adjuster'.

Chard/UK/BIMCO is of the opinion that it was decided in Istanbul to change the '2 months' in paragraph 3 and 4 to '60 days'. Others suggest to keep the '2 months' as the words 'months' are used throughout the YAR.

The meeting adopts the following text:

2. All parties to the adventure shall as soon as possible 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 such notified claim.

3. Failing such notification, or if any party does not supply particulars in support of a notified claim, or evidence of value in respect of a contributory interest within 12 months of the loss or payment of the expense, 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~~ the adjuster. This estimate shall be communicated to the party in question in writing. This estimate may only be challenged within 2 months of receipt of the communication and only on the ground that it is manifestly incorrect.

4. Any party to the adventure pursuing a recovery from a third party in respect of sacrifice or expenditure claimed in general average, shall so advise the average adjuster and, in the event that a recovery is achieved, shall supply to the average adjuster full particulars of the recovery within 2 months of receipt of the recovery.

Drafting Note 4) Rule G – Treatment of ‘Bigham’ cap (p. 8 and 21 of the [Istanbul ISCGA Report](#))

Khosla/UK/ICS and *Browne/UK/IUMI* inform the meeting that the main stakeholders have reached a compromise so that a limited cap will be included in the YAR. The draft text associated with the limited cap was set out in paragraph 4.7 of the Istanbul [Working Papers](#). After a suggestion from *Harvey/UK/AMD* is adopted to change ‘shall not apply to’ into ‘shall not include’ the text for the new Rule G paragraph 4 is as follows:

4. 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 that would have been borne by the owners of cargo if the cargo had been forwarded at their expense. This limit shall not ~~apply to include~~ any allowances made under Rule F.

Drafting Note 5) Rule VI – Reapportionment of salvage (p. 9 and 17-18 of the [Istanbul ISCGA Report](#))

Hoppe/Denmark/BIMCO refers to the text of Rule VI sub (b) chapeau as set out on page 18 of the Istanbul ISCGA Report and asks why the phrase ‘to salvors and have settled that liability’ was added. He wonders what will happen if the liability has not been settled. *Cornah/UK* and *Harvey/UK/AMD* explain that the idea was that the liability has to be discharged first. The *chairman* suggests to apply the maxim ‘If in doubt, leave out’ and strike out the words ‘and have settled that liability’, but keep the other part ‘to salvors’. The text of Rule VI paragraph (b) chapeau is then as follows:

(b) Notwithstanding (a) above, where the parties to the adventure have a separate contractual or legal liability to salvors ~~and have settled that liability~~ salvage shall only be allowed should any of the following arise:

The *chairman* asks whether the main stakeholders have been able to reach a compromise regarding the text of subparagraph (b)(v) as set out on page 18 of the Istanbul ISCGA Report.

Khosla/UK/ICS informs the meeting that ICS agrees in principle to include the text in square brackets. Further discussion of text leads to a change of ‘settled the salvage’ to ‘satisfied the salvage claim’ as the former is associated more with salvage awards. It is also decided to leave out the reference to the ‘gross base award’ and to replace it with an explanation in the Guidelines. Although *Hahn/Germany* is wondering whether things are not made too complicated, the following text is finally adopted:

v) a significant proportion of the parties ~~settled the salvage satisfied the salvage claim~~ on substantially different terms ~~[as to principle the gross base award or settlement (, no regard being had to interest, currency correction or the legal costs of either the salvor or the contributing parties)]~~.

O’Connor/Canada refers to subparagraph (a) as set out in paragraph 5.3. of the Istanbul [Working Papers](#) at pages 9 and 10. *O’Connor/Canada* indicates the word paragraph at the end of the provisions should have been plural. This is agreed so that the following text is adopted:

(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 paragraphs (b), (c) and (d).

It is also pointed out that the text of subparagraph (d) as set out in the Istanbul [Working Papers](#) at page 10 contains a typing error. The following text is adopted:

(d) Special compensation payable to a salvor by the shipowner under Art. 14 of the said Convention to the extent ~~of the~~ specified in paragraph 4 of the Article or under any other provision similar in substance (such as SCOPIIC) shall not be allowed in General Average and shall not be considered a salvage payment as referred to in paragraph (a) of this Rule.

Drafting Note 6) Rule X – Detention during restowage (p. 5 of the [Istanbul ISCGA Report](#))

It is noted that it was decided on the first day of the meeting in Istanbul (6 June 2015) to discuss the issue of adding a sentence to Rule X(c)(ii) further on the next day. This was however apparently forgotten.

Khosla/UK/ICS has the feeling that the matter was actually dealt with, i.e. to adopt the text as suggested in paragraph 6.2. of the Istanbul [Working Papers](#) (p. 12), but replacing 'However' by 'Nonetheless'.

O'Connor/Canada suggests to also change 'shall be applied' to 'shall apply', something which should also be done in Rule X(c).

The inclusion of the draft wording is accepted on principle, subject to *O'Connor/Canada's* suggestions being considered in the final "tidying up" process.

Drafting Note 8) Rule XI – Wages at Port of Refuge

The *chairman* notes that after lunch on the first day of the meeting in Istanbul (6 June 2015) the main stakeholders informed him that they had been able to reach an understanding on several points. One of those points was that crew wages would remain in the YAR (see p. 8 of the [Istanbul ISCGA Report](#)). All other points were subsequently discussed in Istanbul, except crew wages, so the *chairman* wonders whether this point would need further discussion. It becomes apparent that this is not needed.

Drafting Note 7) Rule XI – Detention for Common Safety (p. 5-6 of the [Istanbul ISCGA Report](#))

Harvey/UK/AMD refers to Drafting Note 7 (p. 13 of the Istanbul [Working Papers](#)) and asks the question which of the three suggested texts should be adopted. *Khosla/UK/ICS* feels the first of the suggested texts should be adopted. *O'Connor/Canada's* suggestion to rephrase the text to change 'entry and detention' to 'entry or detention', is adopted, so the phrase reads:

which render that entry ~~and or~~ detention necessary for the common safety or to enable damage...

Drafting Note 12) Rule XIV – Temporary repairs

On the first day of the meeting in Istanbul (6 June 2015) the *chairman* suggested to discuss this topic the next day (see p. 10 of the [Istanbul ISCGA Report](#)). This was however forgotten. The *chairman* now suggests to discuss the issue after the lunch break, to allow the representatives of the main stakeholders a chance to seek a compromise.

Confusion about Drafting Notes 17 and 18 (not included in Istanbul Working Papers), and 16 and 19

The *chairman* raises the issue. *Van der Valk/Netherlands* points to inconsistencies in the numbering of the Drafting Notes. The Drafting Notes were originally introduced in a document called 'CMI Drafting Meeting Papers' which was prepared for a meeting of the IWGGA in London on 25 February 2015. At that meeting it was decided that some of the issues would not be pursued in Istanbul. As a result the (original 23) Drafting Notes were reduced to 19 Drafting Notes in the Istanbul [Working Papers](#). The numbering of the four Drafting Notes at the end was, however, not entirely consistent. The list of contents of Section A – Draft Rules at (the second) p. i of the Istanbul [Working Papers](#) include the following:

- (...)
- 14) Rule XVII – Treatment of low wage value cargo.
- 15) Rule XVII – Deductions in respect of salvage.
- 19) Rule XVII – Personal effects.
- 20) Rule XX – Commission.
- 21) Rule XXI – Interest.
- 22) Rule XXII – Cash deposits.
- (...)

The actual contents of the Istanbul [Working Papers](#) however contained the following headings:

- (...)
- DN 14 – Low value cargo
- DN 15 – Deductions for salvage
- DN 16
- DN 20 – Commission
- DN 21 – Interest
- DN 22 – Cash deposits
- (...)

The conclusion is that, as far as the process after the London meeting of 25 February 2015 is concerned, Drafting Notes 17 and 18 no longer exist, and that Drafting Notes 16 and 19 are actually one and the same Drafting Note, that deals with Personal effects. *Van der Valk/Netherlands* used Nr 16 in the [Istanbul ISCGA Report](#) (at p. 10) as he based the report on the actual contents of the Istanbul [Working Papers](#) instead of the list of contents.

Rule XI – Fuel and Stores

O'Connor/Canada asks whether there still is a Rule XI(b)(2). This is affirmed.

Tidying Up

The chairman reminds the meeting that a Tidying Up/Wordings document was issued prior to the Hamburg Conference as a matter of record of the items that had so far been agreed to need review. This document was, however, not discussed at the Hamburg Conference.

It is agreed that tidying up is still necessary. *Cornah/UK* and *O'Connor/Canada* will make suggestions on the basis of a full text of the YAR which include the revisions as agreed so far.

At the suggestion from *O'Connor/Canada* it is also agreed that the YAR 2004 need to be looked at in the current tidying up process as the YAR 2004 contained improvements on the wording of the YAR 1994.

A suggestion to abandon the system of roman numerals is not adopted, in order to maintain consistency with the past.

Drafting Note 9) Rule XI – Definition of port charges

Harvey/UK/AMD wonders whether the text agreed upon in Istanbul (see p. 5-6 of the [Istanbul ISCGA Report](#)) – which is the text suggested in paragraph 9.3 of the [Istanbul Working Papers](#) as amended following the suggestion from *McDonald/UK/AAA* - actually deals with the issue of the Trade Green judgment.

Cornah/UK refers to earlier Working Papers and confirms there was not any intention to disturb the main finding of the Court. However in the course of the judgment it had been suggested that “port charges” in Rule XI included only the normal charges that a vessel was required to pay in entering that port. This is a much narrower view than the accepted practice of allowing additional costs that may arise from the vessel’s distressed condition, e.g. extra tugs and pilots. The drafted wording was accepted in principle with a possible change from “for the purpose of this and other Rules” to “for the purpose of these Rules” to be considered during the tidying up phase.

Drafting Note 13) Rule XVII – Value at inland destinations (p. 7 of the [Istanbul ISCGA Report](#))

It was concluded in Istanbul that there was agreement in principle, but that the wording of the suggested provision (see p. 19 of the [Istanbul Working Papers](#)) would need another look.

It is discussed whether or not to include the word ‘inland’ so that ‘final delivery’ would become ‘final inland delivery’. It is decided not to add the word ‘inland’. It is also suggested to change ‘shall be deemed’ to ‘may be deemed’, ‘may be deemed by the adjuster’ or ‘may be deemed in the adjustment’ in order to show that the adjuster has a discretion. A lengthy discussion follows about the effects of the wording, whether it necessary to refer to adjuster in this particular rule or in any of the YAR, and whether giving the adjuster a discretion would actually manoeuvre the adjuster into a difficult position.

The following text is adopted:

Such commercial invoice ~~shall~~ **may** be deemed to reflect the value at the time of discharge irrespective of the place of final delivery under the Contract of Carriage.

Further changes may be proposed in the course of the tidying Up.

THE 'LONGCHAMP'

The *chairman* gives a brief introduction of the issue that was identified at the IWGGA meeting London on 25 February 2015. It was decided there not to bring the issue up at the ISCGA meeting in Istanbul as it was thought better to await a judgment of the Court of Appeal, which judgment was expected before the 2016 CMI New York Conference. As it has become clear that the case will not be heard by the Court of Appeal until later in 2016, the issue is raised in this meeting. The meeting will have to decide whether the judgment of the High Court raises problems which may need to be remedied in the new YAR, although the appeal is pending.

Cornah/UK explains that the basis of the 'Longchamp' decision was essentially a determination regarding the facts. The judge had outlined the principles that he felt were relevant and his summary in this regard was in line with current case law and practice, so that no new principles of construction or law appeared to be involved. His decision that the (notional) payment of the first ransom demand by the Somali pirates would have been reasonable, given all the circumstances (and thereby qualifying as an allowable general average expense that could be substituted against under Rule F), may have surprised many practitioners but is an example of the different views about the facts of a complex case that may be taken. It was difficult to envisage any possible changes to this aspect of Rule F that would help with the formation of such views without possibly undesirable or unintended consequences. However, outside the main rationale of the case, he notes that some grey areas continue to exist: firstly whether the word 'additional' in Rule F includes the ordinary commercial and running expenses of the vessel if these are enhanced due to a substituted course of action, and secondly whether Rule C imposes any limitation on Rule F allowances, either in its 1974 form which was considered in the 'Longchamp', or in the 1994 / 2004 forms which include the word 'expense' in addition to loss or damage. *Cornah/UK* also notes that flexibility was an important part of the appeal of Rule F to commercial interests, and that the majority of cases were resolved satisfactorily under current wordings, but plainly concerns do exist.

During initial discussions it was noted that adjustments had been put forward using the same 'Longchamp' rationale in relation to the detention of vessels while negotiating a salvage settlement with, for example, a canal authority. *Hahn/Germany* explained his approach to the preparation of the adjustment featured in the 'Longchamp'; he had given the matter lengthy consideration and felt this approach was justified in the unusual circumstances of this case which he felt were highly unlikely to arise in other situations.

The *chairman* suggests that more express wording should appear in Rule C to ensure expenses such as charter hire were excluded. *Harvey/UK/AMD* notes the dangers of a 'Longchamp' approach being extended to other cases but considers it was up to the stakeholders to indicate their views before any amended wordings were attempted; a possible solution to some of the concerns regarding wages could be located within Rule XI. *Khosla/ICS* considers that the main issue of what is reasonable could be left to the courts to decide. *Chard/UK/BIMCO* gives a similar view. *Browne/IUMI* expresses reluctance to second guess the outcome of the Appeal and does not consider that changes were appropriate or necessary at this time.

A lengthy discussion follows about the interpretation of the High Court judgment, its effects for general average in practice, and the possible outcome of the proceedings in appeal. In view of the many uncertainties it is decided not to propose any text in this respect.

THE GUIDELINES

Cornah/UK gives an introduction on the basis of the [14/10/2015 Draft of the Guidelines](#). He has received some comments on the draft before the meeting. It is agreed to go through the Guidelines in the order of the text in the Draft.

A) Introduction

- 1) Objective
- 2) Effect of guidelines

Spencer/US/AMD mentions that it was suggested at a recent AMD meeting that the Guidelines perhaps should include an additional section on best practices for insurers. The Guidelines might seem a little one-sided for providing a mark for adjusters to step up to, but not for insurers.

The *chairman* feels the meeting should continue digesting the current text. After that the question remains whether the meeting even wants Guidelines at all.

Khosla/UK/ICS suggests to replace the words 'commercial interests' by 'parties' (as is done under 2 Effect of guidelines), as GA is contractual. *Van der Valk/Netherlands*, however, suggest other legal systems, like his own, may treat GA basically as a non-contractual issue. *Hahn/Germany* suggests 'proprietary interests and their insurers'. In reaction, *Browne/UK/IUMI* points to liability insurers.

The *chairman* reiterates that the Guidelines are intended to provide a brief general introduction for laymen and it would not be appropriate to use too much legal terminology.

It is decided to strike out 'commercial interests' in Section A.1. altogether and 'on the parties' in Section A.2. and not replace the text with anything else.

3) Oversight and amendment

The *chairman* asks the meeting whether a CMI Standing Committee is needed. *O'Connor/Canada* doubts that this necessary, as the Guidelines will only need to amended from time to time. *Spencer/US/AMD*, however, thinks some sort of permanent mechanism is needed.

Cornah/UK says the idea is to make sure that the stakeholders are represented in some way in the committee.

Chard/UK/BIMCO wonders what will happen if the CMI Assembly refuses a proposal from the Standing Committee. And what if the Standing Committee itself is split about a certain proposal? He also raises the question whether the Standing Committee could change the unbindingness of the Guidelines to a binding set of Guidelines. *Hahn/Germany* feels the Guidelines will be unbinding in name only. They will be seen as best practices.

The *chairman* asks the question whether – if it is agreed to have a Standing Committee – the meeting is ok with representatives from ICS and IUMI. Would it not be strange not to include members of AMD or a number of adjusters in general. He suggests the chairman of the Standing Committee should be an active adjuster.

Khosla/UK/ICS suggests to add to 'Five additional members nominated by the Assembly of CMI' the text 'two of whom should be adjusters'. *Browne/UK/IUMI* feels the Standing Committee should not be too big. Three additional members instead of five would be

enough. The *chairman* adds that it is natural for the AMD to be amongst the nominees, 2 out of 5 adjusters at least.

At the suggestion of the *chairman* the 'safety valve' of the final sentence ('In the event...when next convened.') is stricken out.

At the suggestion of *Khosla/UK/ICS* the heading of this Section A.3. is changed to 'Review and amendment', as oversight may mean supervision, but also an omission.

B) Basic principles

1) Background

Khosla/UK/ICS's suggestion to move the final paragraph 'Rule A...common maritime adventure' to the beginning of Section B.2. York-Antwerp Rules is not adopted.

2) York-Antwerp Rules

The first sentence of the first paragraph is amended as follows:

The York-Antwerp Rules consist of lettered rules (A-G) and numbered rules (I-XXIII).

3) General Average events

Browne/UK/IUMI suggests to change 'are' in the first sentence to 'may be'.

Wallrabenstein/Germany suggests instead to add the word 'possible' before 'general average situations:'. The latter suggestion is adopted.

At the suggestion of *Groninger/Germany* 'Lightening of the vessel' is added to the types of sacrifice or expenditure connected to 'Grounding'.

At the suggestion of *Spencer/US/AMD* 'Towage' is added to the types of sacrifice or expenditure connected to 'Heavy wheather, collision etc.'

4) Adjustment of general average

Several proposals to simplify the wording with the layman in mind (adventure – voyage, termination – end) are rejected in the end, as the meeting agrees with *Harvey/UK/AMD* that it is better to use the wording of the YAR in text, perhaps adding explanations in a glossary elsewhere in the Guidelines.

Browne/UK/IUMI wonders whether the text under 3. Termination of the adventure should include some words about multiple discharge points. *Cornah/UK* suggests to leave it out, as it would become too complicated for the layman.

Hoppe/DK/BIMCO feels the paragraph under 5. "Made Good" needs clarification, if possible by a set of figures. *Cornah/UK* agrees to include a set of figures in the next draft of the Guidelines, and agrees to consider and incorporate the various other suggestions into the next draft.

5) Example adjustment

The words General Average and the numbers US\$ 250,000 and 100,00 in the right hand column will be brought down a little, to restore the balance between the columns.

At the suggestion of *Harvey/UK/AMD* 'Salvage awarded to tugs for refloating vessel' is changed to 'Salvage paid to tugs for refloating vessel'.

6) Contract of affreightment

Schwampe/Germany wonders whether the text under 2. York-Antwerp Rules and 6. Contract of affreightment should not be amalgamated to one text.

Van der Valk/Netherlands feels the text, particularly the final sentence of the second paragraph, and the third paragraph are too suggestive on the point of not having to pay a GA contribution on the basis of a breach of the contract of carriage. There is conflicting case law on this issue in the Netherlands, and it would seem not to be appropriate for unbinding guidelines to suggest one of the possible answers to that problem to be the right one.

7) General Average security

The *chairman* wonders whether some words should be added about the declaration of general average which is required in some jurisdictions, and *Cornah/UK* agrees to add appropriate wording.

Harvey/UK/AMD and *Cornah/UK* agree that the words 'the receiver or other party on behalf of the cargo owners' in the text following (a) should be replaced by 'owner or receiver of the cargo'.

Harvey/UK/AMD wonders whether (a) and (b) should not be turned around, as the average guarantee is more common than the average bond.

8) Salvage security

Quiros/Spain identified a typing error in Lloyds Open Forum.

The *chairman* suggests wording is added to explain away the problem of double security (salvage security and GA security), so that it becomes clear in the end one has to pay only once, and *Cornah/UK* agrees to add appropriate wording.

C) General Average Security Documents

1) Introduction

Kubo/Japan objects to CMI forms for security documents as there will be a risk that security offered on the basis of other texts will be rejected, as the CMI text will be regarded as the standard. His comments also apply in particular to the text in paragraph 2.1. at p. 11 of the Draft Guidelines, and paragraph 2.4 at p. 15 of the Draft Guidelines.

3) Average Guarantee

Cornah/UK suggests that a blank jurisdiction and applicable law clause is added to the standard forms. This is acceptable to *Browne/UK/IUMI* and *Khosla/UK/ICS*.

Browne/UK/IUMI does however object to the paragraph starting with (c) in the Average Bond and the Average Guarantee dealing with prescription, as issues of time bar most likely will be governed by national law. It is agreed that this paragraph (c) will be deleted. It is, however, also mentioned that wording in conformity with Rule XXIII YAR 2004 could be included. This remark also served as a reminder with regard to Rule XXIII itself. At the first ISCGA meeting in Dublin it was decided that the time bar issue (Rule XXIII YAR 2004 and an amendment suggested by IUMI) would be taken up by the IWGGA for further work. The issue was included (with no suggested changes compared to the YAR 2004 text) in the [Report on Tidying up/Wordings](#) issued prior to the Hamburg Conference, but this report was, however, not discussed at the Hamburg Conference. So a question remained about the

status of the suggested new Rule XXIII in current process.

Railas/Finland mentions that not only jurisdiction but also arbitration should be considered.

As the ILU/AAA 1995 form of Average Guarantee and the 1977 Lloyd's Average Bond (LAB 77) are referred to in the Guidelines, *Chard/UK/BIMCO* would like to see the BIMCO Average Bond Clause 2007 included in the document as well.

It is decided a subgroup is formed, consisting of *Browne/UK/IUMI*, *Groninger/Germany* and *Van der Valk/Netherlands* who will look at the draft forms and add-on clauses as suggested on p. 13 of the Draft Guidelines.

D) Role of the Adjuster

1) Appointment of adjusters

Kubo/Japan is concerned with the wording of the second paragraph, as there is no procedure for qualification for adjusters in Japan, and many good adjusters are employed by reputable firms, but are not necessarily members of an association. *Light/Turkey* adds that adjusting in Turkey is usually done by qualified lawyers. *Khosla/UK/ICS* suggests removing the words 'under national legislation', as they may not be any law on the issue in many countries. The question is also raised whether even AMD can be considered a 'recognized' professional association as the text requires. *Khosla/UK/ICS* wonders whether the bar is not too high, and too discriminatory. *Cornah/UK* suggests that the paragraph is not essential but it is the commercial stakeholders that have been pressing for higher standards from adjusters so it should be up to those parties, particularly IUMI, to say what they expect. The *chairman* suggests redrafting. *Browne/UK/IUMI* and *Khosla/UK/ICS* will consider the issue further.

The chairman adjourns the meeting, which is continued the next day.

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THE GUIDELINES

D) Role of the Adjuster

2) Best practice of adjusters

At the suggestion of *Harvey/UK/AMD* the words 'or similar' are deleted from the text of paragraph 2.2(c).

Browne/UK/IUMI suggests to deleted the word 'principal' in the same paragraph 2.2(c), because it could mean 'all' or 'some', and most likely 'some' to the party instructing the adjuster. He wonders why adjusters could not simply identify the Rule applied for each item of allowances, as it would make the adjustment much more readable. Some adjusters present indicate that they usually do so, where practical. The word 'principal' is deleted.

Kubo/Japan is concerned with the effects of paragraph 2.2(e). He feels it would be very difficult for adjusters to comply with this requirement. *Cornah/UK* agrees the wording may be a bit too strong. *Hahn/Germany* directs the attention to the 'third party' mentioned in the

paragraph. What would be the effect in e.g. fire damages cases of a time chartered ship? The chairman cuts short the ensuing discussion. It is decided to change the paragraph as follows:

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

The discussion then moves to paragraph 2.3. *Hahn/Germany* has experience with P&I Clubs objecting to the disclosure of reports, often for defense purposes. *Måkestad/Norway* has no similar experience. *MacDonald/UK/AAA* mentions reports sometimes being redacted. The general feeling is that reports that are relied upon in the adjustment should be made available, but also that they usually are made available.

Kubo/Japan then suggests to delete paragraph 2.4 as it is too strong, and as the issue is already clear under C.3.1, discussed earlier. *MacDonald/UK/AAA* suggests to replace 'should' with 'may'. *Khosla/UK/ICS* feels the last part of the text 'or provide reasons...are required' should be taken out. *Groninger/Germany* wonders why the security forms currently under consideration are limited to security from cargo interests. Should there not be a form that can be used when the ship has to provide security? And perhaps also a bridging guarantee, like Salvage Guarantee Form ISU 2? *O'Connor/Canada* feels the text under C.3.1 is already very strong. *Hahn/Germany* says that the purpose of the whole exercise is to avoid lengthy discussions on the wording of security. *Cornah/UK* explains that the current wording was simply intended to take care of point 10 of the IUMI 'wish list' as appears on p. 14 of the Draft Guidelines. *Browne/UK/IUMI* makes it clear that he wants the adjuster to explain when different wording is used for GA security than the wording of the CMI forms. Suggestions are made to delete paragraph 2.4 and move the text to other parts of the Guidelines, e.g. the introduction (C.1) or in both C.2.1 (Bond) and C.3.1 (Guarantee). This will be considered by *Cornah/UK* when amending the draft Guidelines.

The *chairman* wonders whether there is more on the IUMI 'wish list' that needs to be discussed. *Browne/UK/IUMI* replies there is not enough time to discuss it further.

The *chairman* then raises the question whether there are any objections against having a list of best practices as such for the adjuster. No such objections are raised.

E) Role of the General Interest Surveyor

On a question from the *chairman* *Cornah/UK* explains that the text under this heading was based on a text in use at his firm.

O'Connor/Canada wonders whether an GI surveyor is used in all cases. This is not so, *Cornah/UK* explains. This being so, *O'Connor/Canada* suggests to start the text with something like 'Where a General Interest Surveyor is appointed...'.

Khosla/UK/ICS is interested to know what interactions the GI surveyor has with other surveyors or the Special Casualty Representative under SCOPIC. *Cornah/UK* indicates there may be some overlap in the surveyors' perception of responsibilities, but that instructions are given to prevent this from happening. *Hahn/Germany* points out that the GI surveyor may in fact be representing unknown parties (e.g. unknown receivers). The cost of the GI surveyor is recoverable in GA.

Khosla/UK/ICS suggests to replace the wording 'The G.A. Surveyor is not required to...' by 'The G.A. Surveyor's role is not to...'. *Quiros/Spain* suggests to add wording requiring the GI

surveyor to act impartially, like the adjuster. He also suggests to add 'G.A.' before 'Surveyor' in section 2, line 4 and in section 3, line 1 and 5. *Spencer/US/AMD* indicates the 'i.e.' in section 1, paragraph 2, line 3 and section 1, subsection 5, line 4 should be amended to 'e.g.'.

Light/Turkey indicates that in Turkey only particular average surveyors are appointed, and wonders how duplication of reporting can be prevented. *Harvey/UK/AMD* thinks the term 'horses for courses' applies in the appointment of GI surveyors, but he also explains that the appointment may be limited to certain activities, e.g. the lightening of the vessel by removing cargo. *Browne/UK/IUMI* wonders whether the precise instructions given to GI surveyors could be disclosed, so the cargo interests can instruct their own surveyors appropriately. *Cornah/UK* thinks adjusters would be happy to provide copies on request but it is not helpful to distribute them to all parties routinely, particularly in multi-bill cases. *Hahn/Germany* adds that this would be burdensome as the instructions are not infrequently amended. Following this discussion the *chairman* suggests to add 'unless otherwise instructed' at the end of section 1, paragraph 2.

F) York-Antwerp Rules 2016

Cornah/UK explains why there are no definitions in the draft, but only an explanation of the objectives of the proposed Rule VI(b).

1) Rule VI - Salvage

At the suggestion of *Groninger/Germany* 'salvor's' will be inserted before 'services in fourth line of the the first paragraph.

O'Connor/Canada asks whether the third paragraph would go beyond what is actually in Rule IV(b). *Hahn/Germany* and *Harvey/UK/AMD* reply that it is ok, which is further explained by *Cornah/UK*.

The *chairman* proposes to remove the round brackets in the third paragraph. *Cornah/UK* would like them to remain in.

Måkestad/Norway sees a problem in the term 'salvage award' used throughout the text of this section. It is decided to remove the word 'award', so salvage settlements or payments are also covered.

The *chairman* wonders whether the last line of the fourth paragraph ('without prejudicing ... the adventure') is too strong. *Cornah/UK* agrees; it promises too much. The line is taken out.

With regard to explaining the proposed wording of Rule VI(b)(5), *Browne/UK/IUMI* proposes the following text to be added to this section (F.1) of the Guidelines:

When assessing whether there is a significant difference between settlements and awards for the purposes of Rule VI(b)(5) the adjuster should have regard only to the notional award or settlement against all salvaged interests before currency adjustment, interest, cost of collecting security and all parties' legal costs.

O'Connor/Canada wonders whether it is a very user-friendly clause. *Spencer/US/AMD* and *Khosla/UK/ICS* raise the question what a notional award actually is. *Browne/UK/IUMI* explains. The *chairman* wants to make sure that when it is decided to do a redistribution, those costs (currency adjustment, interest, collecting security, legal costs) are included in

the redistribution. *Browne/UK/IUMI* confirms this. The chairman concludes that that the text suggested by *Browne/UK/IUMI* will be included, but that we will revisit the issue later. *Spencer/US/AMD* and *Khosla/UK/ICS* insist on a further clarification of notional award. *Schwampe/Germany* suggests to include an example in the next draft of the Guidelines. *Browne/UK/IUMI* agrees to provide a calculated example to illustrate his point. A proposal from the *chairman* to include a text to deal with lumpsum settlements, outlining that the adjuster will have to calculate his way back to the notional settlement, is not adopted.

2) Rule XXII – Treatment of Cash Deposits

The *chairman* raises two points: (1) Should we not write why we cannot have joint accounts anymore?, and (2) What happens when there is no adjuster appointed? This first point is agreed. With regard to the second point the meeting agrees with *Spencer/US/AMD* that there will almost always be an adjuster in cases where the YAR are applied.

Spencer/US/AMD does not like the word 'ring-fenced' (top of page 18 of the Draft Guidelines) as it is unclear. It will be replaced by 'protected'.

Browne/UK/IUMI asks the question who owns the money that is held in the account. The chairman replies that this is a difficult question that depends on the applicable law. *MacDonald/UK/AAA* adds that there is also the question whether the adjuster should move funds to a particular jurisdiction where they can be (better) protected. Also discussed is the problem of the freezing of the money held in the account by creditors of the party paying the money into the account.

Browne/UK/IUMI wonders why nothing is said about receipts. *Harvey/UK/AMD* replies that the receipts are covered by the Rule itself. *Browne/UK/IUMI* then asks what happens if the receipt is lost. *Harvey/UK/AMD* replies that in that case the money may be paid out against an indemnity. *Browne/UK/IUMI* is of the opinion that this should be said in the Guidelines.

It is decided a small committee will talk more about 'ring-fenced' and the lost receipt.

At the end of the discussions about the Guidelines *Harvey/UK/AMD* raises the general point that the true Guidelines should perhaps come first, and the explanation of GA for the layman could be moved to the back. However, at the suggestion of the *chairman* this issue is dropped.

NEW YORK MEETING

The *chairman* asks whether another meeting before New York (early May 2016) is necessary. He also mentions that the current draft programme for New York suggests there are two days reserved for an ISC meeting prior to the conference itself. The question is whether this much time is needed, as little remains to be done on the YAR themselves. Perhaps the full time can be used for the Guidelines. *O'Connor/Canada* indeed wonders whether it is even necessary to meet before the conference itself.

Groninger/Germany indicates the NY conference will simply have to respect the document as it is presented to them. *Schwampe/Germany* adds that the text can be seen as a negotiated settlement involving the main stakeholders, and that this should be explained to the CMI members. The chairman agrees that this should be done, e.g. in the cover letter. *Chard/BIMCO* confirms that the YAR that will be submitted to the conference should be seen as a full package. He would not want to see that endangered. Others raise the question what would happen if somebody at the conference found a relevant point, as often happens.

Cornah/UK sets out what needs to be done right after this meeting on the basis of which we can assess how much time we need in NY, or even prior to NY: (1) Report of this meeting, (2) Full text of the YAR 2016 as prepared so far, (3) Updated draft of the Guidelines, (4) Compromise on Rule XIV.

The discussion then returns to the problem of presenting a 'take it or leave it' proposal to the CMI conference. There may be things the IWG or ISC has not thought about before. *Khosla/UK/ICS* agrees, but adds that it is also impossible to expect ICS' or BIMCO's prior approval of a text that is amended by the CMI conference. The chairman points out that the revision of the YAR is also a very important topic at the NY conference. If there is nothing to discuss, people may not want to come to NY. *Schwampe/Germany* and *Van der Valk/Netherlands* agree that it cannot be said under the CMI constitution that the proposed YAR text cannot be changed at the conference. What can be said is that the YAR text cannot be changed if we want to be assured of the support of the main stakeholders.

DRAFT YAR (CONTINUED)

Drafting Note 12) Rule XIV – Temporary repairs (continued)

After a question of *Groninger/Germany* the *chairman* clarifies that his suggestion of the day before to allow the representatives of the main stakeholders a chance to seek a compromise on this point over lunch failed as one of the main stakeholders did not have proper instructions to negotiate the matter. The stakeholders will try to reach a compromise following this meeting.

Drafting Note 21) Rule XXI – Interest (continued)

Harvey/UK/AMD explains why he would like to revisit Rule XXI(a) as set out in the the Istanbul [Working Papers](#) (at p. 24, identical to the text of Rule XXI(a) YAR 2004). The rule provides for GA interest for a limited period of 3 months. However, contributors in GA seem to take more and more time when paying their contributions. *Harvey/UK/AMD* describes a case where a representative of a contributor seemed to use delaying tactics over several years simply to negotiate a reduced contribution.

The *chairman* asks whether there is a real problem as many national laws have their provisions about late payment. *Schwampe/Germany* wonders what would happen if the adjuster would receive extra interest for late payment. Would he readjust? *Harvey/UK/AMD* replies that the extra payment could be set off against other extra costs for which no readjustment would be carried out. *Khosla/UK/ICS* feels that if there is a real problem, the meeting should have a look at it. She thinks it may be necessary to introduce Guidelines for other parties beyond simply the adjusters. *Browne/UK/IUMI* retorts that in that case a similar provision should be devised for the late (or non-) provision of evidence. The parties involved in GA all have their weapons; late payment of the contribution being the only weapon of cargo interests. *Hahn/Germany* points to understaffing (at the companies representing cargo) as the big cause of late payment. *Cornah/UK* agrees with *Harvey/UK/AMD* that there is a real problem, often in cases where cargo interests are the creditors and there is no basis for alleging any breach of the contract of affreightment, and that it should be possible of IUMI to do more to encourage prompt settlement of contributions that were properly due.

The *chairman*, however, feels that *Harvey/UK/AMD's* suggestion came in very late. If there was agreement now, it would be ok, but under the current circumstances it would be better to drop the issue. *Cornah/UK* thinks the topic should nevertheless be brought to the attention of IUMI because the anticipated time and work on settlements has to be factored in

to the adjuster's fee which everyone pays for. The tactics of some representatives are therefore increasing the cost of the general average process. *Browne/UK/IUMI* is willing to put it to IUMI as a means of saving costs.

Spencer/US/AMD then refers to post-conference comments to the draft of Rule XXI(b) as contained in the [Istanbul ISCGA Report](#). He suggest to change the first sentence as follows:

b. The rate used for calculating interest accruing during each calendar year shall be 4% plus the 12 month ICE LIBOR for the currency in which the adjustment is prepared as announced on 1 January of that calendar year, ~~increased by 4%~~. (...)

As the meeting had to come to a close, it is decided to take this point up in the tidying up process.