

**INTERNATIONAL CHAMBER OF SHIPPING
RESPONSE TO CMI QUESTIONNAIRE MARCH 2013
REGARDING A GENERAL REVIEW OF THE RULES ON
GENERAL AVERAGE**

This paper is submitted by ICS, representing shipowners' interests internationally, and is co-sponsored by BIMCO.

SECTION 1 - GENERAL

Presently there is widespread uniformity of General Average adjustments on the basis of the YAR 1994, which are well-functioning, widely known and applied. For a new set of Rules to be supported, a compelling need for change must be demonstrated and the proposals for change must be clear improvements on the present system.

1. THE BIG PICTURE

- 1.1.** ICS and BIMCO are opposed to the "abolition" of General Average. The system is widely understood and generally works well.

Shortly after the adoption of YAR 1994, the International Union of Marine Insurance (IUMI) requested CMI to amend the Rules. IUMI proposed initially that General Average should be abolished. However, the proposal was modified when the difficulties of abolishing a concept that is embedded in the law of most maritime nations were recognised. Nevertheless, in the lead up to the Vancouver Conference and the adoption of YAR 2004, the proposal to abolish General Average was exhaustively debated and rejected. ICS and BIMCO do not see any need for the arguments to be rehearsed again now. As intimated in questions 1.1 (b)(i) and (ii), the historic acceptance and practical recognition of General Average in the commercial law of maritime nations means that abolition would require international consensus with all the attendant challenges of securing such agreement; or, alternatively, clauses would need to be included in contracts of affreightment, which mutually (i.e. both ship and cargo) waive the right to claim General Average contributions. If General Average was abolished, either by law or by agreement, some other method of dealing with the losses or expenses that are at present divided between ship and cargo would have to be devised. Changes to the well-known system would inevitably lead to uncertainty, which would be resolved slowly, and at great expense, through the legal systems of leading maritime nations.

Further, while the remit for the IWG is drafted in broad terms, the understanding of the ICS and BIMCO representatives that participated in the Beijing discussions was that the work would focus on practical improvements and would not touch on fundamental issues. This question therefore, in inviting comments on the abolition of General Average itself, is contrary to the agreement that was reached in Beijing as to the scope of any review.

1.2. a) No. If General Average (as a system of adjusting and recovering expenses) was abolished, there would be uncertainty as regards recoverability in the short and medium term. No party would be inclined to incur expenditure in the first instance to progress matters with the result that cargo would be delayed. Indeed, a widening of the expenses admissible at a port of refuge in order to deal with cargo operations would speed up the way in which large casualties can be managed, thereby facilitating maritime commerce.

b) No new areas immediately come to mind though it is possible that unforeseen areas will arise from time to time. Somali-type piracy is an example of an unforeseen area where GA has been applied. When hijacking a vessel and holding the crew as hostages for ransom was a new phenomenon many owners did not have K&R cover. GA was declared and payment of ransom has been accepted as a legitimate expense.

2. ROTTERDAM RULES

a) ICS and BIMCO support the Rotterdam Rules and are actively promoting ratification. It is assumed that the introduction of a continuing obligation of due diligence throughout the voyage to maintain a seaworthy ship and the repeal of the nautical fault defence will result in cargo interests having a defence to a claim for general average contribution in more cases than under the Hague/Hague-Visby Rules. However, it would be premature to make any changes to YAR until it is known whether the Rotterdam Rules will achieve widespread acceptance and the provisions have been tested.

b) As in response to a), it would be premature to make any changes to YAR until the Rotterdam Rules have entered into force internationally and the provisions have been applied in practice.

3. DEFINITIONS

a) and b) ICS and BIMCO do not see any need for the inclusion of a section of definitions in the YAR. Terms and phrases used are understood by practitioners but where questions of interpretation or application arise, they are most appropriately resolved through legal process. In contrast, any attempt to list and define words or phrases could be expected to be incomplete and problematic.

4. SCOPE

ICS and BIMCO consider that the existing approach should be maintained. The YAR are mainly read and applied by average adjusters and accordingly there is no need for more information to be included. However, the "downside" noted in the question is recognised; there is a risk of a lack of uniformity when inexperienced courts are asked to rule on GA matters, and enforcement can be problematic in

such jurisdictions.

5. **FORMAT**

If it is agreed that other amendments should be made to YAR 1994 then ICS and BIMCO could support the introduction of the more extensive numbering system adopted in the 2004 Rules.

6. **DISPUTE RESOLUTION**

[Should CMI offer itself as part of the 2016 Rules as providing an arbitration or mediation facility on dispute resolution relating to the application of the Rules (excluding issues pertaining to the contract of affreightment)?]

No. CMI's role must continue to be that of custodian of YAR leaving questions of interpretation, meaning or application to be determined through the courts or other means of dispute resolution.

7. **ENFORCEMENT**

a) A noble idea in the interests of uniformity but unlikely to be followed in all jurisdictions in practice.

b) The development of CMI standard versions of key documents such as the Average Guarantee and (the BIMCO) Average Bond merits consideration.

8. **ABSORPTION CLAUSES**

ICS and BIMCO do not have any suggestions for changes that might be made to the YAR to assist in the use of Absorption Clauses or other methods to reduce the number of smaller uneconomic collections of security and contributions from cargo. Instead, changes should be made to the H&M policies (e.g. use of the BIMCO GA Absorption Clause).

9. **PIRACY**

a) ICS and BIMCO are of the view that it is not necessary to include express wording relating to piracy/payment of ransom in the YARs to deal with general principles or regulate specific allowances.

b) *[MLAs are asked to advise whether in their jurisdictions there are statutory or other restrictions on the payment of ransoms, or other related expenses.]* This is for MLAs to answer.

10. **COSTS**

[Are there any areas of the GA process where the costs could be avoided reduced controlled, including:-]

- a) Adjusters fees. Adjusters' fees are highest in complex casualties where security is problematic and there are issues on-shipping the cargo; as suggested in 1.2 a) above, a widening of the expenses admissible at a port of refuge in order to deal with cargo operations would speed up the way in which large casualties can be managed, and correspondingly reduce the fees for all professionals involved.
- b) Costs of collecting security. Use of the BIMCO Average Bond Clause should be promoted. In addition, there may be merit in requiring GA security to be provided at the POR (rather than at destination) and within a prescribed time of the survey being completed, failing which the adjuster could take steps to sell the cargo.
- c) Format of adjustments. This could be considered, though most adjusters have more or less the same format so this is probably not an issue.
- d) Involvement of legal and other representatives. No.

11. OTHER MATTERS

None at this stage.

SECTION 2 – INTRODUCTORY RULES

1. RULE OF INTERPRETATION

No, this is clear enough.

2. RULE PARAMOUNT

No, this is established practice.

3. RULE OF APPLICATION

ICS and BIMCO consider it premature to respond to this question. However, some shipowners have commented that such a provision would be unreasonable and it should be left to the parties to decide which version of YAR should apply. If revised YAR are seen to represent a fair balance they will, over time, become the standard for incorporation in contracts of affreightment as earlier versions fall out of use.

SECTION 3 – LETTERED RULES

1. RULE A

[*No known issues.*] No comment.

2. RULE B

2.1 [*Are the provisions relating to common safety situations involving tug and tow satisfactory?*] Yes.

2.2 [*Are further provisions needed to deal with allowances under Rules X and XI relating to tug and tow at a port of refuge?*] No.

3. **RULE C**

3.1 [*“Loss of market?”*] ICS and BIMCO are not in favour of changing this rule. To do so would complicate cargo operations in a GA incident, as cargo interests would press for immediate on-shipment of the cargo to avoid “loss of market”. Shipowners have made the following points:

- No party is allowed to claim a loss of market including the shipowner by for example losing a next voyage charter.
- Loss of market is very difficult to prove (if not impossible) and will no doubt lead to extensive discussions which will again cost time, effort, money and be difficult to resolve.
- How does one measure loss of market or anticipate same?
- Commercial losses can be regarded as consequential damage, also in most cases this is an item which is insurable.

3.2 [*Should the second paragraph of Rule C:-*

a) *include express reference to the exclusion of liabilities*

b) *make it clear that “in respect of” includes preventive measures*

a) It is apparent from Lowndes that this issue was debated at the Sydney Conference in 1994 and a proposed express reference to liabilities was deleted at the instigation of hull and cargo insurers, who while not disputing that in certain circumstances liabilities would be allowable under YAR, were anxious to avoid any express references to liabilities even in a provision excluding liabilities from allowances.

b) Not necessary.

4. **RULE D**

See Section 1 re the Rotterdam Rules.

5. **RULE E**

5.1 [*Are the present time limits sufficient or could further measures be included to help speed up the adjustment process?*] The present time limits are sufficient.

5.2 [*Para 3. Re-starting the clock. From the date of the casualty?*] The introduction of a reference to “the date of the casualty” in paragraph 3 might conflict with “the date of the termination of the common maritime adventure” in paragraph 2. In some incidents, the date of the termination of the common maritime adventure will be much later than the date of the casualty.

6. **RULE F**

6.1 [*Substituted expenses are allowed without regard to savings to other interests. Should this be revisited?*] No.

6.2 a) [*Should the words “or loss” be added?*] No. b) [*If not, should the meaning of “expense” be clarified?*] No. [NB. Note that loss of market is

not included according to the English Rule of Practice F17 – cross reference to Rule C above.]

6.3 [*Should the most common Rule F allowances be allowed as General Average without having to consider savings, which may often involve difficult or artificial calculations?*] Subject to further review and consideration of the issues and implications, allowing substituted expenses as GA without having to consider savings could remove uncertainty and help to speed up POR time.

7. RULE G

7.1 [*Non-separation allowances can only be made “for so long as justifiable under the contract of affreightment and the applicable law”. While frustration by reason of damage may be easy to determine, frustration of a voyage by reason of delay is a much more uncertain matter. Is there a better formula to determine a reasonable cut off point for such allowances?*] There is a risk that any attempt to establish a test or formula would create its own uncertainties.

7.2 [*Can it continue to be left to the discretion of the Adjuster whether allowances can continue after repairs are completed while the vessel regains position – many Adjusters take the view that once available for trading allowances should cease.*] This can be left to the discretion of the Adjuster.

7.3 [*Do you consider that the requirements for notification should be retained, or does this give rise to difficulties in practice?*] ICS and BIMCO note that the requirement to give notification to cargo interests is qualified by “if practicable”.

7.4 [*When a voyage is frustrated by reason of delay, should non-separation allowances continue:-*

a) *Only up to the point at which it becomes apparent that the voyage is frustrated.*

b) *Up to the point at which the delay became sufficient to frustrate the voyage.*] As noted in 7.1 above, frustration of a voyage by reason of delay is an uncertain matter. To avoid assessments of when frustration has taken place, shipowners have commented that allowances should continue up to the point when the cargo is discharged at destination or, in case of temporary storage, released to the cargo owners.

7.5 [*Is there a better way of establishing an equitable cut-off point for non-separation allowances?*] As with 7.1, there is a risk that any attempt to establish a test or formula would create its own uncertainties.

SECTION 4 – NUMBERED RULES

1. RULE I

[*No known issues.*] Shipowners have commented that there can be differences of opinion regarding “recognised custom of the trade”.

2. RULE II

[*No known issues.*]

3. **RULE III**
[No known issues.]
4. **RULE IV**
[Primarily a drafting question, though note: “Assuming the principle needs to be retained...”] There should be no change to the underlying principle which must not be lost in any drafting changes.
5. **RULE V**
[No known issues.]
6. **RULE VI**
6.1 [Inclusion or exclusion of salvage where the law or contract already provides for a means of distribution between the parties i.e. LOF salvage.]
a) ICS and BIMCO support retaining the 1994 position while encouraging adjusters’ ad hoc approach wherever possible.
b) No suggestions.
c) -
6.2 a) [Should the allowance for legal and other costs be expressly recognised in Rule VI?] This would not appear to be necessary.
b) [Would it encourage co-operation amongst salvaged property interests and early negotiated settlements if legal costs were expressly excluded?] Such costs are customarily allowed by adjusters under Rule C as a direct consequence of the GA act of engaging salvors; ICS and BIMCO do not support any change to this custom or amendment of Rule VI.
7. **RULE VII**
[Should the word “ashore” be replaced by “aground”?] This proposed amendment is not essential but if it is agreed that other amendments should be made to YAR 1994 then ICS and BIMCO would have no objection to this drafting suggestion.
8. **RULE VIII**
a) [Should the word “ashore” be replaced by “aground”?] This proposed amendment is not essential but if it is agreed that other amendments should be made to YAR 1994 then ICS and BIMCO would have no objection to this drafting suggestion.
b) [The word “reshipping” is capable of misinterpretation; should it be replaced by “reloading”?] No. It is possible that the cargo will not be reloaded on the same ship, but on another ship. Therefore “reshipping” seems to be the correct word.
9. **RULE IX**
[No known issues.]
10. **RULE X**
10.1 [Should repairs “necessary to complete the voyage” be added to paragraph (a)?] If the proposed wording was to be included,

consideration would also need to be given to prescribing how “necessary” would be determined, and by whom. It is difficult to reconcile the referenced decision in *The Bijela* with the proposed additional wording. In any event, the proposal would create uncertainty and change is not therefore supported.

10.2 [*Should express wording be introduced in paragraph (b) to say that the cost of discharge is not GA if the voyage is frustrated or voluntarily terminated, or if repairs are not carried out for some reason?*] No, this would be too broad and potentially restrict or exclude recovery otherwise allowable in general average.

11. RULE XI

11.1 [*Wages and maintenance of crew?*] ICS and BIMCO support the position in YAR 1994.

11.2 [*“Port charges”?*] If other changes are made to YAR 1994, ICS and BIMCO agree that the meaning of “port charges” should be clarified so that it accords with principle and practice, and that all of the port charges which the vessel actually incurs on entry into port should be included.

11.3 [*“until the ship shall or should have been made ready to proceed upon her voyage”. Is express wording needed to deal with delays caused by e.g. ice conditions or strikes and/or where delay arises from a second accident or the condition of the cargo?*] The preferred option is to maintain the current position. Nevertheless, if new wording is deemed to be appropriate, it must reflect the principles applied by adjusters and not be capable of narrow construction or unexpected results.

11.4 [*X(b) and XI(b) contain the proviso excluding allowances “when damage is discovered at a port etc without any accident or other extraordinary circs connected with such damage having taken place during the voyage”. Does the wording of the proviso fulfil its intended purpose?*] ICS and BIMCO consider that the wording is clear and that this assessment should be left with the average adjusters.

11.5 [*Rule XI(d) costs of preventive measures.*]

a) [*Change the basis of the compromise between property/liability insurers?*] No.

b) [*Difficulties in the application or wording of XI(d)?*] No.

c) [*Is it necessary to clarify that “actual escape or release” must be “from the property involved in the common maritime adventure” (as in Rule C)?*] No.

d) [*Should XI(d)(iv) include a reference to bunkers as well as cargo?*] Yes (if it is agreed that other amendments should be made to YAR 1994).

12. RULE XII

[*No known issues.*]

13. RULE XIII

[*No known issues.*]

- 14. RULE XIV**
 14.1 [*Costs of temporary repairs - YAR 1994 version or YAR 2004 version?*] ICS and BIMCO support the YAR 1994 version.
 14.2 [*Any practical difficulties regarding the application of Rule XIV given no reported litigation since THE BIJELA in 1992?*] Not to our knowledge.
- 15. RULE XV**
 [*No known issues.*]
- 16. RULE XVI (and RULE XVII)**
 [*The amount to be allowed for cargo sacrifices (the contributory value of cargo) is based on the value of the cargo “at the time of discharge”; should this be changed to “at the time of delivery according to the contract of carriage”; or should both phrases be included leaving it to the adjuster’s discretion?*] If it is agreed that other amendments should be made to YAR 1994, this amendment could be supported.
- 17. RULE XVII**
 17.1 [*Should express wording be included to permit the exclusion of low value cargo?*] No, this is a practical approach which is best left to the average adjuster.
 17.2 [*Calculation of contributory values – claims for deductions – is clarification required - should deductions be made for losses by delay?*] No.
- 18. RULE XVIII**
 [*No known issues.*]
- 19. RULE XIX**
 [*No known issues.*]
- 20. RULE XX**
 [*Commission?*] The position under YAR 1994 should be maintained. Commission on GA disbursements is necessary if parties wish to avoid delay, as it provides an incentive for the shipowner to initially fund GA cases.
- 21. RULE XXI**
 [*Interest on losses allowed in GA*]
 21.1 [*Is a variable rate set annually by CMI preferable to a fixed rate?*]
 21.2 [*Note the Vancouver Guidelines for the CMI IWG. Shipowners have expressed concern that the rates adopted since 2004 have been unrealistic etc. Any proposals to assist with the setting of the annual interest rates?*]

If there is agreement to have a variable interest rate, determined each year by the CMI Assembly, consideration should be given to amending the Guidelines for the CMI Assembly for fixing the rate of interest to

ensure that the commercial rate of borrowing money and the availability of funds are taken into account.

22. RULE XXII

[Average adjusters' practice is to hold deposits in trust accounts in their own name rather than set up joint accounts in the names of the shipowner's and cargo interests' representatives. Should this be expressly recognised in the YARs?] The issue could be considered if it represents a problem for practitioners.

23. RULE XXIII

[Should the 2004 time bar provisions be retained?] If it is agreed that other amendments should be made to YAR 1994, ICS and BIMCO would have no objection to the inclusion of the 2004 time bar provisions, which are intended to achieve greater certainty regarding applicable time bar periods. However, it is noted that a contractual time bar might not be recognised in some jurisdictions.

3 July 2013