

Section 1 General

1. The Big Picture

1.1 No.

1.2 a) If properly applied and interpreted, with fairness and professionalism, and a timely execution of all the procedures, the YAR can be definitely be a help to commerce. However, studies show that GA can be a slow, expensive and unfair exercise. Therefore, cargo insurers emphasise, it should not be extended and the application of YAR 2004 should be promoted. On balance it is a beneficial system.

b) Taken the peculiarity of General average, it would be very difficult to apply, in a savvy manner, its approach to other areas.

2. Rotterdam rules

a) Notwithstanding the fact that, given the actual situation, it is unlikely to see the RR in force before 2016, it must be considered that, with the exception of the issues related to unseaworthiness, the RR have little involvement in the regulation and development of General Average. It is therefore not necessary, at this stage, to take steps in order to accommodate YAR to the potential impact of RR. In a second moment, if and when RR will be in force and practical issues may arise, it could be interesting to reconsider this position. It is useful according to cargo interests, to consider a Rule requiring all parties to provide documentation and other evidence in order to reduce losses and expenses and speed up the process of GA situations.

b) No.

3. Definitions

a) Trying to delineate punctual definitions it is very difficult and it may give more troubles than positive effects. In fact, the idea of the rules

themselves is to produce uniformity but also to be adopted by the widest range of players possible. In this view, it is therefore hard to find definitions that can be satisfactory for all Countries and all systems of law. Adopting a precise list of definitions could lead to the exact opposite of the result sought, with an increase of additions and/or further explanations left in the hands of the freedom of the parties, while drafting the relevant contracts.

b) In consideration of the above answer, no terms need or should be defined.

4. Scope

In order to see the Rules widely adopted and applied uniformly, it is advisable to keep the actual approach. Trying to provide a more detailed and complete code could not be

seen by Courts and practitioners as a viable and helpful solution, provoking instead more controversies and disputes, in the application and use of the rules. The nature of the Rules, as an instrument to be adopted within the frame of the freedom of the parties in the contract, even though conditioned by a long established practice and application, must always be kept in mind. Any attempt to provide a more punctual and ‘complete’ code would probably result in a minor degree of flexibility and in a compression of the discretionary choices of the Adjusters, in their effort to achieve the optimal solution for the parties, while assessing a claim.

5. Format

The 2004 format proved to be a good solution. The numbering system, being in use for long time, should therefore be maintained, in order also to avoid potential confusion and misunderstandings, in case any major modification would be put into existence.

6. Dispute Resolution

This is another delicate point in which the need for uniformity could ‘clash’ somehow with the freedom of the parties in choosing and drafting their contracts. It seems very unlikely that a proviso envisaging an arbitration,

lodged possibly in an administrative body to be designed or created within CMI, could be welcomed openly and without resistance in the commercial world. A general use of arbitration clauses, however, is already widely spread and adopted in the contracts of affreightment. A mediation facility on disputes resolution, in the application of the Rules, should be theoretically an interesting solution, but it could hardly produce sensible results in the short and mid-terms. The International Association of Average Adjusters has implemented a Mediation possibility, this avenue should be explored

7. Enforcement

a) No. Any attempt to enter in details would potentially lead to some resistances in certain jurisdictions, leading at the end to more differences in the application of the Rules, rather than more uniformity.

b) The adoption of recommended standard versions of General Average Guarantees and Bonds documents has to be seen as a useful tool to eliminate misunderstandings, expediting at the same time the ‘paper work’ in the procedure. The use in practice of similar, but not exactly equivalent, documents is nowadays time-wasting and not producing any positive outcome. Thus providing templates and recommended standard versions would probably result in more clarity and faster procedures.

8. Absorption Clauses

No. The players in the market have already dealt broadly with the issue. The extent and the wording of such clauses have to be left to the freedom of the parties.

9. Piracy

This matter deserves an extensive discussion on its own, as it raises interesting aspects in the General Average doctrine, in consideration also of the increasing incidence of piracy casualties in the recent years.

To be brief, it must be pointed out that, according with the classic definition of General Average, the General Average act should be ‘intentionally and reasonably’ made.

The extent of a free resolution can be obviously questioned, when a decision has to be taken after a threat to life (namely the crew) and, subsequently, property (the vessel and cargo) is posed, as in a piracy act. Thus, to follow a strict interpretation, it should not be allowed to include the payment of ransom in the GA allowances. On the other hand, for practical and moral reasons, to exclude this disbursement would equal in an unfair result and the established practice of the recent years has gone in the direction to consider ransom as a legitimate expense, even in the absence of an express proviso in the Rules.

- a) There is a practical aspect that has arisen and that can still be controversial. Recently, especially in West Africa cases, pirates have taken control of the vessel, and then took part or the totality, of cargo. Shipowners, in this case, are ‘saving’ the vessel and crew, in some cases without even suffering significant delays or deviations to the planned voyage, but the expenses suffered by cargo Owners are not included in those allowed as valid General average expenses. This leads to an unfair and disproportioned application of the allowances, definitely pending in favour of Shipowners. CMI should try to tackle the issue and provide an appropriate and equitable solution to this matter.

However, the Royal Belgian Shipowners Association (RBSA) 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.)

Cargo interests point of view is that the ‘flexibility’ shown for the Piracy Ransom cases, namely not dispute the GA in such situations, should be met with the same ‘flexibility’ when cargo is ‘sacrificed’ as in the mentioned West Africa cases.

The position of the Belgian Association of Maritime Law representing a large panel of legal professionals, would not take any position on this subject

b) In Belgium payment of ransom will in principle be organized in close consultation with the European Union.

10. Costs

Indeed costs in General Average proceedings should be monitored and kept under control.

a) Fees need to be kept within reasonable amount and applied fairly. This however is more an issue that has to be dealt by the professional associations, rather than through explicit provisions in the Rules.

b) This tool should be also kept under strict control. In the long term, it could also be possible to rethink it, in order to reduce sensibly this part of the costs. Costs exposed by cargo interests should also be taken into consideration.

The RBSA underlines that the use of the BIMCO Average Bond Clause should be promoted

c) Nothing to say on this point.

d) It seems very difficult to limit or compress the involvement of legal and other representatives through a direct formulation in the Rules. Again, this is more a matter for the parties involved and, in a certain extent, it pertains to the ‘craftsmanship’ of the Adjusters. Implementing Rule ad hoc could not solve the problem. Cargo interests submitted that only costs of this nature that are made to avoid or minimize the liabilities of the parties to the common adventure should be allowed.

11. Other matters

At the present stage, and in consideration of the amount of issues already tackled by the present questionnaire, there are no other issues to add.

Cargo interests, however, refer to GA’s involving large container vessels: it could be investigated if small value cargo could be ignored when the inclusion of this cargo would only have negative effects on the Adjustment (time, more expensive to find and collect than the actual contribution etc...).

See also 17.1 Rule XVII. On the currency of the Adjustment it is arguable to state that each and every adjustments should be done in a single widely accepted currency.

Section 2 –Introductory rules

1. Rule of Intepretation

An appropriate re-wording reflecting the issues, as evidenced, should be considered, with prudence and paying attention not to conflict with long established applications or interpretations, widely accepted in practice, of the Rules.

2. Rule Paramount.

No need to re-word the Rule in the prospected direction. It is a defense already available in the actual framework.

3. Rule of Application.

It seems, at the moment, that such hypothesis is not viable and would not produce any relevant improvement, if the final outcome of the Rules will not be balancing in a fair, and economically wise, way the interests of all the major players involved in the matter. As seen with YAR 2004, any abstract formulation could simply lead to a non implementation of the version of the Rules, by some ‘key’ players, rendering the Rules themselves of little avail.

Section 3 – Lettered Rules

1. Rule A

2. Rule B

2.1 Yes.

2.2 No.

3. Rule C

3.1 No

3.2

a) The Rule is sufficiently clear, even though a punctual and well circumscribed express reference could be inserted.

b) A clarification could be useful, bearing always in mind that the new wording needs not to raise additional problems of interpretations or definitions of terms.

4. Rule D

The YAR rules should deal exclusively with issues strictly related to General Average.

5. Rule E

5.1 The actual limit of 12 months is fair and should not be changed.

5.2 No, the rule is working fairly as it is.

6. Rule F

6.1 The actual formulation is assuring uniformity and simplicity and does not need to be changed.

6.2

a) No.

b) This is a matter that should be left to the competence and professional skills of the Adjusters, as it is indeed part of the peculiar set of evaluation a good professional should be able to deal with.

6.3 No

7. Rule G

7.1 It is very difficult to determine a better formula. The actual one is guaranteeing sufficient efficiency, in its application.

7.2 We are of the opinion that, except for exceptional circumstances, left to the discretion of the Adjusters, once the vessel is available for trade the allowances should cease.

7.3 They should be retained, as per latest formulation.

7.4

a) It appears difficult to make a decision on the basis of the data given.

b) It seems that the difference between 'apparent' and 'sufficient' is too artificial and theoretical and of difficult application.

7.5 Not at the present stage.

Section 4 – Numbered rules

1. Rule I

2. Rule II

3. Rule III

4. Rule IV

It is, of course, to be preferred the use of modern and understandable terms, rather than those archaic and of difficult comprehension, in the drafting of the Rules in their entirety. On the other hand, it must be pointed out that any change in the use of terms needs to leave unchanged the ratio and the purpose of the rule it pertains. On the specific point, it is not clear what difficulties the term “wreck” is posing and with which word it could be substituted. “Carried away”, as well, does not constitute a difficult term to understand, contextualize and apply to practical situations.

5. Rule V

6. Rule VI

6.1

a) It has been a positive progress the decision, in 2004, to separate Salvage from General Average. Different parties are involved in the processes and it is better to keep the situations divided, in order to minimize the “paper work” and speed up both procedures. Thus the 2004 position is the one that should be implemented. It has also to be pointed out that LOF is one of the options available, not the only one, therefore it should not be emphasized excessively the role of this instrument, within the YAR.

b) No.

c) Yes, it is a practical and efficient solution.

6.2

a) Yes, they must be allowed. The RBSA think this would not appear to be necessary.

b) It would be very difficult to see such a proviso really implemented and used. It has, in addition, not a large practical impact. It is a matter that should be dealt with by the adjusters, in relation to the specific situation

7. Rule VII

a) 'Ashore' is a term widely understood and adopted in practice, there is no need to modify it.

8. Rule VIII

a) Supra.

b) 'Reloaded' should be adopted, as in fact, in actual practice, it has a more stringent and sound meaning than the old fashioned 'reshipping'. The RBSA state that 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.

Cargo interest agree, if 'reloading' is used, it should be made clear that this can also include transshipment operations unless the voyage is abandoned.

9. Rule IX

10. Rule X

We do not consider it a real issue, but we do not find anything against the insertion of the proposed words.

11. Rule XI

11.1 A logical introduction it is necessary. A crew is a prerequisite in order to properly manage a vessel and it is not possible to encounter a vessel without its crew. Thus it would be unfair to eliminate totally any allowance in regard to wages and maintenance of crew. On the other hand, especially in certain situations (i.e. vessel dry-docked) it would be unfair to keep a vessel fully crewed, when a limited amount of personnel would be enough to keep the ship properly manned. Thus, the Adjusters should be able to evaluate, in each case, which is the correct amount of expenses to allow. It could be possible to set a proviso that requires that the expenses allowable are only those for “minimum crew necessary in order to man safely the vessel, in the specific situation”.

The RBSA support the position of YAR 1994 in this view.

Cargo interests prefer the YAR 2004 on this point, but are of the opinion that the compromise under 11.1 first paragraph is fair.

11.2 No. It should still be left to the discretion of the Adjusters, and applied to each case, without a general abstract proviso. If other changes are made to YAR 1994, the RBSA 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.

Cargo interests likewise feel a clarification should be made that standard and exceptional port charges are recoverable in GA but only if those are incurred for the common benefit.

11.3 General Average should terminate at the moment in which the vessel is ready to be put in an equivalent position, as if the casualty would have never occurred. If other accidents or problems will happen, external to the

causative chain that stems out of the General average casualty, they need to be considered as a part of the entrepreneurial risk for Shipowners, that would otherwise be “over-protected” in respect to the other interests in the maritime adventure.

11.4 It does.

11.5

a) No.

b) No.

c) No. The rule, applied with logic, it is self-explanatory.

d) It should.

12. Rule XII

13. Rule XIII

14. Rule XIV

14.1 As a general rule, according with the ratio of General Average, no temporary repairs that form part of subsequent permanent repairs should be allowed. On the other hand, every temporary repair that permits the prosecution of the voyage, without indirectly ‘helping’ the eventual permanent repair, should be allowed under YAR rules. So the answer is ‘yes’, cargo interests emphasize, i.e. the amendment to this Rule as per YAR 2004 should be retained for them.

14.2 No.

15. Rule XV

16. Rule XVI

Yes, both phrases should be included and it is advisable to allow Adjusters to assess and apply the most equitable solutions.

The RBSA favour the retention of the present wording, though no firm position at this stage.

17. Rule XVII

17.1 It could be useful to have an express proviso, on this regard, without expressly stating a minimum threshold or quantity, rather pointing out the necessity to make a decision that would be money-wise and time saving. The RBSA think this is a practical approach which is best left to the average adjuster.

17.2 It is not requiring further clarifications.

18. Rule XVIII

19. Rule XIX

20. Rule XX

It would be reasonable and equitable to take the payment of such commissions out of the frame of General average. YAR 2004 abolished commission on GA disbursements, thereby removing the incentive for the shipowner to initially fund GA cases. Shipowners have commented that the position under YAR 1994 should be maintained.

Cargo interests underline that whereas interests (at high percentage – see also 21 Rule XXI) and costs are already allowed in GA, such commissions form an unjustified duplication of costs and a reason for time consuming disputes.

21. Rule XXI

21.1 Indeed a fixed rate it is not reflecting the reality of the interests trend, making the rate itself very often disproportioned and unfair.

21.2 As it happens in other commercial branches, it should be found a system of indexation, that could dynamically follow the trends in the credit market. The interest rate, applied to General average, cannot become an undeserved method of enrichment for the beneficiary party (normally Shipowners). The interest rate determination, cargo interests state, should take into account the currency of the Adjustment and the set standard interest rates such as LIBOR etc...

The RBSA are of the view that if there is an 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 real cost of borrowing money and the availability of funds are taken into account.

22. Rule XXII

The rule as such is outdated and not practically applied. Nowadays, holding deposits in trust accounts in the name of Adjusters it is widely accepted in practice and nobody advances particular complaints about it, even though a margin of risk exists, in case of fraudulent adjusters. It is therefore possible to formalize this commercial custom and find a correct formulation, in order to sanction formally this practice within the framework of the YAR.

In order to limit the risk described above, cargo interests believe that the use of trust accounts should be limited to Sworn Adjusters accepted by and member of the International Adjusters Association (and why not guaranteed and/or insured by them).

23. Rule XXIII

These provisions should be retained, without further expanding the scope of their effects.

Final considerations:

It is without a doubt an important job the one conducted by the IWG, in the perspective of revising YAR. This questionnaire, as a part of it, represents a good instrument to have a direct feedback from the operative players.

However, a more 'hands-on' approach, trying to tackle the main issues that have arisen in practice, limiting the revision to the major points, could be probably more productive and time saving.

The idea of revising all the rules en bloc, including in this process also changes related to terminology or other minor aspects, may somehow lead to a dispersion of energies and time, without producing relevant and incisive improvements of YAR. It should therefore never be forgotten the goal of the rules, that are in fact extremely practical and that deal with a specific, and rather peculiar, branch of the commercial world, in which the final result must be always 'money oriented' and time is of the essence.