

**CMI
INTERNATIONAL WORKING GROUP ON GENERAL AVERAGE -
QUESTIONNAIRE**

REPLY PROVIDED BY THE MARITIME LAW ASSOCIATION OF FINLAND

... July 2013

Not all questions are replied to below.

SECTION 1

1. THE BIG PICTURE

1.1 Abolition of GA?

There has been debate for decades concerning this issue, not least in the Nordic countries. The Finnish Maritime Code includes provisions on general average in Chapter 17. It refers to the application of the York-Antwerp Rules 1974, unless otherwise agreed by the contracting parties.

The insurance market through applicable absorption clauses fixes a number of potential GAs itself. An average adjuster receives GA cases in Finland only rarely, whilst particular average cases are much more common.

GA has so far withstood all efforts, if any, to abolish it. It seems that the proper approach to the question is to study whether or not the market involving marine insurers, shipowners and cargo interests acknowledge the need for GA rules. As rightly pointed out in the Questionnaire, the matter, in the end, is contractual. Should the contracting parties agree upon GA, there seems to be no reason for any court or arbitral tribunal to disregard such a contract. It is quite another matter what binding effect in such cases a GA adjustment will have, but even this is primarily a contractual question and secondarily an issue for courts, arbitral tribunals and enforcement authorities.

Therefore, it is neither necessary nor possible to state clearly whether GA should be abolished or not. The market will have to decide on this matter and as long as GA rules are applied, there is reason for the CMI to uphold and, from time to time, reassess the substantive rules within GA. The market will either “suffocate” GA or keep it alive.

1.2.

The GA rules might be an impediment at least outside the application of absorption clauses where the shipowner/his insurer has not properly prepared the documentation. In large cases the necessity to extensively supplement relevant documentation is time consuming and may seriously delay the release of cargo and the final GA adjustment. Another impediment might arise in cases of GA for ro-ro and similar ships. The large number of containers, trailers and other means for consolidating goods creates serious obstacles for speedy solutions. This can possibly be corrected by modernising the YAR. More simple alternatives should be found than what is at present possible under any version of the YAR. Some kind of simplified procedure could be thought of, including a review of what documentation is really necessary for average adjusters.

We have not thought of any completely new areas for GA (though a return to earlier versions of the YAR will be discussed later).

2. THE ROTTERDAM RULES

We do not fully see the problem referred to in this question. Article 84 is all-decisive and the exemptions in article 15 and 16 together with article 17(3)(o) from the carrier’s liability will refer such cases to GA, always provided that the preconditions for GA as such are satisfied.

The word “Notwithstanding” is only intended to take away the carrier’s obligations enumerated in articles 11, 13 and 14 of the RR and to give priority to the provisions in articles 15 and 16. “Notwithstanding” is in reality a U.S. necessity to make it perfectly clear for any judge not to confuse the priority order of the respective provisions in the RR.

Concerning article 84 of the RR, one problem might be the fact that this article is not as extensive as article 24 of the Hamburg Rules. The latter article reads as follows:

“1. Nothing in this Convention shall prevent the application of provisions in the contract of carriage by sea or national law regarding the adjustment of general average.

2. With the exception of Article 20, the provisions of this Convention relating to the liability of the carrier for loss of or damage to the goods also determine whether the consignee may refuse contribution in general average and the liability of the carrier to indemnify the consignee in respect of any such contribution made or any salvage paid.”

The above cited paragraph 2 clarifies the position more than the RR in cases where carrier liability would exist and in relation to GA. It can also be read together with letter D of the YAR. Article 20 paragraph 2 of the Hamburg Rules probably represents the Nordic approach to this matter, even without an explicit codified provision, on the basis of the *Faste Jarl* judgment (Norwegian Supreme Court, Rt. 1993.965).

It might be a possibility to weigh up whether an “article 20.2 - the Hamburg Rules” could be considered as an additional standard clause in contracts of carriage and also in bills of lading or sea waybills or in corresponding electronic transport records now that the RR have omitted to repeat this provision. To include such a clarification in GA rules may or may not be an appropriate solution.

Undeniably, the omission of the “nautical fault” exemption from the Rotterdam Rules might make GA adjustment less necessary or less meaningful than under the Hague and Hague-Visby Rules, but on the other hand it might be that the concept of “nautical fault” is perhaps construed narrowly in many jurisdictions meaning that the difference between old regimes and the new regime (=RR) is not as dramatic as it seems at first sight.

With the above-mentioned Hamburg-interpretation in mind it could in addition well be a correct solution in collision cases with equal blame that the owner could recover 50 % of any GA contribution due from the cargo carried on that owner’s ship. Similarly, loss of or damage to the goods carried is not a GA occurrence, but additional measures might be, such

as the ship taking into a port of refuge. Again, a clarification in the contract of carriage might be a solution, but as above, it might not be totally out of place to consider the YAR to be the clarifying source.

3. DEFINITIONS

It is common practice in international conventions to include definitions, cf. article 1 of the RR. Definitions might be helpful in the YAR as well, but the difficulty will be where to draw the line concerning the number of definitions.

4. SCOPE

As mentioned above, simplified formalities for reaching a GA adjustment are necessary in today's shipping in order to save time and expense. This is particularly true of container and ro-ro ships and consolidated shipments.

6. DISPUTE RESOLUTION

It is recommended that the future YAR should provide for ADR alternatives guided by average adjusters.

7. ENFORCEMENT

This question has partly to do with necessary documentation in the first place. Again, without the possibility at this stage to provide concrete solutions, simplification of procedure is important. The question in subsection b) can be referred to a recommended standard issued by the CMI, but does not have to be included in the YAR.

8. ABSORPTION CLAUSES

There is no need to include specific text in the YAR relating to absorption clauses. GA is based on contract in any case with full freedom for the contracting parties to decide upon the way of risk division and outside the scope of applicable mandatory provisions. That said, an

increased use of absorption clauses could address many of the current complexities related to GA.

9. PIRACY

Piracy, and especially piracy in Somalia, has proven to be a challenge in GA. The ransom amounts and ancillary costs have caused problems for all parties, but in particular for cargo interest who are typically outside any negotiations on these matters.

That said, the concrete situations related to ransom and piracy might vary considerably and it may be dangerous to define some kind of factual standard giving rise to GA. The best solution is probably to decide upon the status of ransom paid in casu and, for that, the general rule describing GA in the YAR is appropriate.

It is another matter that various jurisdictions might consider the payment of ransom as illegal, but it seems not to make much difference once the ransom has been paid. A party that has executed such payment in order to save the common adventure should have the benefit of sharing such a cost through GA, provided that an in casu discretion leads to a true GA in accordance with the YAR.

SECTION 2

1. RULE OF INTERPRETATION

Notwithstanding the priorities, there seems to be settled practice on the hierarchy of different rules. A change would perhaps not be strictly necessary, but it would clearly promote uniformity in application of the YAR.

2. RULE PARAMOUNT

The word “reasonable” would obviously be interpreted in casu, but what is unreasonable would possibly itself be connected with a fairly high threshold. No change is necessary.

SECTION 3

3. RULE C

To cover loss of market is not only a matter of principle, but it is also a matter of practical concern. How would one show “loss of market” in a kind of summary dealing with a great number of issues in a GA adjustment procedure? Loss of market is in general an uncertain concept in liability issues, and it is not any simpler matter in GA. It is not recommended to include loss of market under GA.

SECTION 4

6. RULE VI

Salvage by nature covers both the ship, the cargo and, indirectly, the freight at risk. Salvage remuneration must be divided one way or another. It would seem natural that salvage, which often represents a significant share of the GA costs, is retained as an integral part of the GA system, like in the 1994 YAR. Attention needs to be given to the distribution between the vessel and other interests, though. Could perhaps a Rule Paramount be considered to prevent the disproportionate re-apportioning of salvage in individual cases?

10. RULE X

The proposed additions under 10.1 and 10.2 of the Questionnaire are supported.

11. RULE XI

11.1. The port of refuge concept in the YAR is an integral part of the GA system, much as salvage is. Covering wages and maintenance of the crew in the port of refuge ensures the proper treatment and handling of both ship and cargo. Here again it is proposed that the logic of the YAR 1994 is retained, but perhaps coupled with a review of acceptable costs. Some principles on accepted costs may be necessary to promote efficiency and avoid undue delays.

11.2. There are special circumstances when entering a port of refuge and all appropriate costs would by presumption have occurred for the common safety of ship, cargo and freight at risk. All port charges that are linked to the incident should be covered by the YAR

11.5. No changes are needed.

16. RULE XVI

The proposed clarification is supported. The main thing is that there is a clear rule that also covers multimodal transport and the practical relation to the invoice referring to the respective cargo. The wording “at the time of delivery under the contract of carriage” is as such sufficient and it is understood in this case to cover both liner and comparable trade as well as voyage chartering. It thus covers both single mode sea carriage and multimodal carriage. No equitable addition is necessary, even if there might at times be a slight inappropriate basis for the value.

17. RULE XVII

17.1. It is true that low value cargo might be a problem. One example is sample cargo for receivers that might have a nominal value, but should not contribute. In principle it might be useful to have a specific provision in the YAR on disregarding low value cargo, but how would this be defined. “Low value cargo” as wording might provide a flexible rule to be decided in casu.

20. RULE XX

The commission rule included in the YAR 1994, but not in the YAR 2004, should be retained. There is additional commitment to deal with general average disbursements entitling to commission coverage, in turn, to be considered in GA.

21. RULE XXI

Interest rates are very important economic factors. A reasonable system should be found, but

it is uncertain whether the factual rates indicated in the Questionnaire reflect this. A further study of options to improve this aspect of the YAR would seem necessary.

22. RULE XXII

Average adjusters holding deposits in trust accounts in their own name is not totally unproblematic. It leads in practice to a number of contacts from the cargo side, many of who do not understand the concept of GA and certainly do not understand the long time it might take to reach a GA adjustment. This practical view should be taken into consideration before having a one-way rule on deposits in trust in the adjuster's name. This should in any case not be given as the only solution in the YAR.