13th June, 2013

Mr. Stuart Hetherington,
President of Comite Maritime International

Dear Mr. Hetherington,

Revision of York Antwerp Rules
Response of Japanese Maritime Law Association to CMI's "Questionnaire on General Review of the Rules on General Average" attached to CMI letter of 15th March, 2013

We, Japanese Maritime Law Association, would like to submit the answers and comments on the questionnaire prepared by International Working Group on General Average sent by your letter dated 15th March, 2013 as follows.

Section 1- General

1. Big Picture

1.1 a)
We would not support "abolition" of general average.
As the system of general average still has the vital and indispensable function of adjusting the conflicting interests among the parties to the common maritime adventure, it should not be abolished.

1.1 b)
N/A

1.2 a)
In cases of large container ships where a great number of parties interested in the huge volume of cargoes are involved, the delivery of cargoes at the port of discharge would be considerably delayed due to collecting securities.

1.2 b)
Nothing in particular.

2. Rotterdam Rules

2 a)
We consider that there is no need to revise the current YARs. In cases where the carriers (shipowners) are found to be liable under the contract of carriage and/or applicable law adopting Rotterdam Rules, there will be no way to adjust the conflicting interests among the parties to the common maritime adventure other than the adopting Rule D.

2 b)
There is no need to revise the current YARs. These practical issues should be resolved between carriers(shipowners) and their P&I insurers.

3. Definitions

3 a)

We believe that there has been no serious problem under the current provisions. Although we believe that the meaning of "voyage" was wrongly decided in the "Trade Green" case, such a case in itself does not require a new definition section in the new YAR.

3 b)

N/A

4. Scope

There is no need to alter the current manner. We believe that there has been no serious problem caused under the current succinct provisions of YARs.

5. Format

We favor "tidying up" the YAR's wording as was done in YAR2004.

6. Dispute Resolution

We believe that the demand for the GA dispute resolution services would be probably very limited. Therefore, we do not support the introduction of such services.

7. Enforcement

7 a)

There is no need to include a section dealing with enforcement in the areas illustrated in the questionnaire in the new YAR.

7 b)

We consider that it should be useful if CMI can offer (not in the YAR) recommended standard versions of key documents related to GA.

8. Absorption Clauses

GA Absorption Clauses are the matters in respect of hull insurance policies and/or the practice of hull insurance. Therefore, they have no direct relation to the provisions of YAR.

9. Piracy

9 a)

As the matter of the payment of ransom for the release of the vessel and the cargo on board is an issue related with each state's public policy, it is not appropriate for YAR to deal with this issue. Whether the ransom in the specific case can be allowed in GA or not, should be judged in the light of Rule A.

9 b)

Under Japanese jurisdiction there is no rule or regulation which explicitly restricts payment of ransom or other related expenses.

10. Costs

10 a) & b)

If low value cargoes on board the container ships are excluded from contributory value, the adjustment fees and costs of collecting securities should be reduced considerably.

10 c)
Nothing in particular.

10 d)
If salvage payments where the law or contract already provides a means of distribution between the parties to the common maritime adventure(such as salvage award under LOF) will not be allowed in GA and will not be deducted from contributory value, major part of legal costs which has been allowed in GA can be excluded from GA.

11. Other Matters
Nothing in particular.

Section 2 - Introductory Rules

1. Rule of Interpretation
There is no need to reword the current Rule of Interpretation.

2. Rule Paramount
There is no need to amend the current Rule of Paramount. It is appropriate for the party who is innocent of the unreasonable conduct to claim against the party who is liable for the such a conduct as the matter of the compensation for damages.

3. Rule of Application
We do not consider that it is appropriate to introduce such a rule of application for the following reasons.
(1)We consider that the effectiveness of such a rule is open to doubt.
(2)We consider that the construction of the exiting GA clause in charter party or bill of lading providing for the application of "YAR1994 or any subsequent modification or amendment thereof" or similar wording have been almost unified. If, as indicated in IWG's report dated June 21, 2012, some courts accept the effectiveness of such a rule of application and other courts reject the same, it may cause a new confusion and hurt the right of parties concerned.

Section 3 - Lettered Rules

2. Rule B
2.1
It is not necessary to amend the current provisions. We believe that there has been no practical problem caused under the current provisions.

2.2.
It is not necessary to amend the current provisions. We believe that there has been no practical

problem caused under the current provisions.

3. Rule C

3.1

The current provisions should be retained. "Loss of market" and "loss caused by delay" depend on the conditions of the terms or the contract and they are very difficult to monetarily evaluate. As those losses have been excluded from GA with good reasons for quite a long time, it is not necessary to extend the scope of GA allowance in YAR2016.

3.2 a)

There is no need to reword the current provisions. It is quite clear from the circumstances and the development of the discussion leading to the adoption of YAR1994 at the CMI conference at Sydney in 1994 that the exclusion contained in the wording "losses, damages or expenses" in second paragraph extends not only to physical loss or damage to the environment and to clean-up costs, but also to liabilities incurred to third parties in respect of damage to the environment.

3.2 b)

There is no need to amend the current provisions. It is believed to be clear that the wording" losses, damages or expenses in respect of damage to the environment" includes losses, damages or expenses resulting from the taking of preventive measure to avoid damage to the environment.

5. Rule E

5.1

There is no need to amend the current provisions.

5.2

There is no need to amend the current provisions.

6. Rule F

6.1

There is no need to revisit the section referred to in the questionnaire and to amend the current provisions.

6.2 a)

There is no need to amend the current provisions. Since Rule F was introduced in YAR for the first time in 1924, it has been proposed repeatedly that the substituted loss should be allowed in GA. The proposals have never been approved due to the concerns for abusive use of such provisions and we believe the concerns are still valid today. The substituted loss (especially loss by sale of cargo at a port of refuge) is usually settled among the parties concerned by the special agreement and need not to be allowed in GA.

6.2 b)

There is no need to amend the current provisions. Through the argument mentioned in the above 6.2 a) it is clear enough that "substituted loss" is not included in "substituted expenses".

6.3
There is no need to introduce new provisions. Although it is true that towing to destination or forwarding cargo creates benefits to the parties to the common maritime adventure, the matter is properly stipulated in Rule F where the savings do not need to be considered from the view point of the simplicity of GA adjustment.

7. Rule G

7.1
This is the issue related to the construction of the contract of carriage and/or governing law, and is not one which should be dealt with in the YAR.

7.2
There is no need to amend the current provisions. We believe that the practice among the average adjusters is almost unified.

7.3
We are aware of practical difficulties especially in casualties of large container ships where a great number of the parties interested in the huge volume of cargoes are involved. Paragraph 3 in the current YARs which requires the notification to cargo interests only "if practicable" should be retained. The rights of cargo's interests are protected by paragraph 4.

7.4
As there is no practical problem caused under the current provisions, it is not necessary to amend the current provisions.

7.5
This is the issue related to the construction of the contract of carriage and/or governing law, and is not one which should be dealt with in the YAR.

Section 4 - Numbered Rules

4. Rule Ⅳ

We consider that there has been no problem under the current wordings, but would be prepared to consider the better proposal if it is offered.

6. Rule Ⅵ

6.1 a)
We adopt the position of YAR2004, which excludes salvage payments where the law or contract already provides a means of distribution between the parties (such as salvage award under LOF) from GA. However, it is necessary to improve the wording taking into account the following points.

(1) to make clear the fundamental principle that expenditure in the nature of salvage shall be allowed in GA.
(2) to include the contents of Association of Average Adjusters' probationary rule of practice "Salvage Payments-Rule Ⅵ of the York-Antwerp Rules 2004".
(3) to include the contents of XXII of rules of practice of The Association of Average Adjusters of the

United States "Salvage Settlements under York Antwerp Rules 2004-Allowance for Interest"(Adopted – October 5, 2005).

6.1 b)
N/A

6.1 c)
From the view point of the simplicity of GA adjustment, it is appropriate not to deduct salvage payments such as LOF salvage award from the contributory value. Therefore, Rule XVII should be amended accordingly.

6.2 a)
Legal costs related to the salvage are currently allowed in GA not by RuleVI but by Rule C. It is appropriate to amend RuleVI to make clear that those costs shall be allowed in GA under this Rule.

6.2 b)
We do not consider that it would encourage co-operation among salved property interests and earlier negotiation with the salvors if legal costs are expressly excluded from GA.

7. Rule VII
No. We believe that there has been no problem under the current wordings.

8. Rule VIII
8 a) & 8 b)
No. We believe that there has been no problem under the current wordings.

10. Rule X
10.1
No. We believe that the word "repairs" is correctly interpreted to mean the permanent repairs or the temporary repairs which are necessary to complete the voyage and there is no problem under the current wordings.

10.2
No. There is no need to amend the current provisions.

11. Rule XI
11.1
We support the position in YAR2004.

11.2
No. As we understand the practice among the average adjusters has been established, there is no need to amend the current provisions.

11.3
No. As we understand the practice among the average adjusters has been established, there is no need to amend the current provisions.

11.4
We consider the wordings of the provisos to Rules X(b) and XI(b) fulfill their intended purpose and they should not be changed.

11.5 a)
No. The current Rule XI(d) is the part of the so-called "Sydney compromise" adopted at the 1994 CMI Conference at Sydney based on the carefully negotiated and well-balanced compromise between property underwriters and liability underwriters. It is not appropriate to amend a part of the so-called "Sydney compromise" without the compelling need.

11.5 b)
No.

11.5 c)
No. As it is clear that the wordings "an actual escape or release" should be interpreted consistently with the wordings of Rule C, there is no need to include the wordings "from the property involved".

11.5 d)
No. It is not appropriate to amend the only one section of so-called "Pollution compromise" between property underwriters and liability underwriters as mentioned in 11.5 a) above.

14. Rule XIV
14.1
As the saving of costs of the permanent repairs are purely shipowners' benefit, such a saving should be dealt as particular average (namely hull underwriters should pay such a saving).We consider that it is appropriate to retain the position in YAR2004.

14.2
We have not encountered any practical difficulties regarding the application of RuleXIV in the aftermath of the House of Lord's decision in the "Bijela"[1992]1 Lloyd's Rep 636.

16. Rule XVI
We understand that the amount to be allowed as general average for damage to or loss of cargo sacrificed has been practically based on the value at the time of the delivery under the contract of carriage without exception. Therefore, it would be appropriate to change the relevant wordings ("at the time of discharge") to "at the time of delivery under the contract of carriage" in RulesXVI and XVII.

17. Rule XVII
17.1
If low value cargoes shall be excluded from contributory value in casualties of large container ships where a great number of parties interested in the huge volume of cargoes are involved, time and costs necessary for the adjustment including those to be taken for collecting GA securities will be reduced considerably. Therefore, we support the suggestion in the questionnaire. However, it is necessary to consider how to provide for in details.

17.2
"Loss of market" and "loss caused by delay" depend on the conditions of the terms or the contract and they are very difficult to monetarily evaluate. Provisions in YAR1994 and YAR2004 should be retained.

20. Rule XX
The position of YAR2004 should be retained.

21. Rule XX Ⅰ
21.1
We still consider that a fixed rate of interest is too inflexible and a variable rate should be preferred.

21.2
We have no proposal to assist with the setting of annual interest rates, but would be prepared to consider the better proposal if it is offered.

22. Rule XX Ⅱ
As it is related to very detailed practical issue of procedural aspect, there is no need to amend the current provisions of YAR.

23. Rule XXⅢ
We do not consider that it is appropriate to introduce the time bar provision in YAR, because of the following reasons. The second and third paragraphs of Rule E which were introduced in YAR1994 and YAR2004 are suffice to expedite general average adjustments.
(1)Since YAR is a part of the private contract, the issue of time bar should be left to national laws.
(2)Since applicable law or jurisdiction is not clear under the current wording in YAR2004, it will be necessary to specify the jurisdiction and the applicable law and to investigate whether the time bar provision in YAR is compatible with a mandatory statute in each jurisdiction. The time-bar provision simply creates new problem and leads unnecessary "forum shopping".

Yours Sincerely,

Subcommittee on General Average
Japanese Maritime Law Association