



## **CEFOR RESPONSE TO CMI QUESTIONNAIRE: GENERAL REVIEW OF THE RULES ON GENERAL AVERAGE**

### **SECTION 1 – GENERAL**

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#### **1. The Big Picture**

1.1 We do not agree to an abolition GA, and also do not consider this to be a practical solution. This more than 2000 years old system is today incorporated into the legislation of most countries and into most contracts for the carriage of goods by sea. To obtain agreement on a new International Convention from all countries across the world would be insurmountable and would take at least 20 years to get into law.

GA is in particular considered beneficial when it comes to dealing with problems of getting cargo to destination following the arrival of a vessel to a port of refuge, and in avoiding the need for time-consuming and costly argument between ship and cargo about the apportionment of expenses. Some amendments to further improve the system are suggested in the responses below.

1.2

a) YAR are balanced and offer a foreseeable solution to perilous situations for ship and cargo, and we do not agree that the rules are an impediment rather than a help to commerce.

b) No suggestions.

#### **2. Rotterdam Rules**

The scope of the YAR should not be extended to address the Rotterdam Rules. However, we would encourage the MLA to consider a Rule requiring all parties to the common maritime adventure to co-operate in the production of documents and other evidence to each other to reduce losses and expenses arising out of the voyage. The aim

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of such a Rule would be to assist in reducing the overall financial consequences of a GA incident.

### **3. Definitions**

a) We support the inclusion of definitions in YAR, as this will enhance a common understanding of the terms used. Whereas many textbooks on GA offer definitions, these textbooks may not necessarily be accepted in all jurisdictions and the definitions may vary between them.

b) We suggest including the following expressions that could be usefully defined:

- *Port Charges* - (See YAR Rule XI).
- *Wages* - (See YAR Rule XI).
- *Voyage and Common Adventure* - (See YAR Rule G).
- *Delay* - (See YAR Rule C).
- *Indirect Loss* - (See YAR Rule C).
- *Peril* - (See YAR Rule A).
- *Extraordinary* - (See YAR Rule A).
- *Expenses of Entering... Port or Place* - (See YAR Rule G).
- *Machinery and Boilers* - (See YAR Rule VII).
- *Prolongation of Voyage* – (See YAR Rule X(a)(ii)).
- *Expenses* – (See YAR Rule F).

### **4. Scope**

No need for change. The benefits of brevity outweigh those of “a more self-contained and complete code”. The YAR will not be able to cover all situations, and much must nevertheless be based on law and practice and merits of each case.

### **5. Format**

Yes, Cefor supports the numbering system in the 2004 Rules.

### **6. Dispute resolution**

There are few arbitrations and forums that offer such arbitration are already in place. It should be up to the parties involved to agree where and how to arbitrate.

### **7. Enforcement**

- a) No need for change.
- b) We support the inclusion of a recommended standard version of Average Guarantee and Average Bond.

## **8. Absorption clauses**

The Absorption Clause is a commercial agreement between the shipowner and the hull underwriters and does not require any regulations in YAR.

## **9. Piracy**

No changes required to the YAR, as it is nevertheless each jurisdiction's law that will apply.

## **10. Costs**

- a) Adjusters' fees:  
No proposed changes.
- b) Costs of collecting security:  
The costs of collecting security are usually included in the fee of the adjuster. No proposed changes.
- c) Format of adjustments:  
The format of adjustments is adequate as today. There must be a balance between on the one hand explaining all events and all recoverable items, and on the other hand not making it too elaborate and voluminous to digest.
- d) Involvement of legal and other representatives:  
Legal costs that relate to items allowable in GA may be included. The Rule Paramount should be a safeguard that the costs are reasonable.

## **11. Other matters**

- a) Low value cargoes:  
Discarding of low value cargoes should be considered in line with what was introduced in Lloyd's Open Form in 2011. This would ease the work of the adjuster, and low value cargo owners, often without insurance, will not be exposed to GA.
- b) The currency of the adjustment:

The uncertain question of the currency of the adjustment causes underwriters difficulty in predicting their exposures to GA contributions. It may today take months or years from the time expenditure is converted to the time the parties are asked for their proportionate contributions.

One possible solution would be to introduce a reform where all adjustments are stated in one currency unless otherwise agreed. Although this could lead to an increased exposure (depending on how exchange rates develop), this is outweighed by making the insurers able to predict what their exposure would be and take the necessary steps to protect their position. Cefor would thus urge the Norwegian MLA to recommend such a change to the YAR.

## **SECTION 2 – INTRODUCTORY RULES**

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### **1. Rules of Interpretation**

No proposed amendment.

### **2. Rule Paramount**

Cases of innocent loss and no allowance in GA should be solved outside of GA by the use of other applicable law.

### **3. Rule of Application**

The new YAR should not contain such a rule as it must be up to the parties to decide which version of YAR they agree to use.

## **SECTION 3 – LETTERED RULES**

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### **1. Rule A**

No proposed amendment.

### **2. Rule B**

2.1 Are the provisions relating to common safety situations involving tug and tow satisfactory?

We find Rule B's wording unclear when determining whether a GA situation arises if a tug casts off a tow in order to save itself, and propose that the drafters of YAR 2016 look to how such cases have been solved in previous years and seek some clarification on this issue.

2.2. Are further provisions needed?

No further suggestions.

### **3. Rule C**

3.1 Should cargo owners be able to claim "loss of market" in GA?

No, "Loss of market" should not be recoverable under GA as this would give rise to payments in circumstances where it otherwise would not be covered. "Loss of market" is not usually covered under cargo policies.

3.2 Second paragraph:

No need for change.

### **4. Rule D**

See Section 1 Para. 2 on the Rotterdam Rules above. No need for change.

### **5. Rule E**

5.1 Are the time limits for giving adjusters documents in support of GA claims etc. sufficient?

Yes, we have not seen evidence that this provision is not working properly.

5.2 Does a request by the adjuster for (say) documents in support of claims for GA allowances by cargo interests re-start the clock for the 12-month period? If so, should the period in all cases be from the date of the casualty?

Yes.

### **6. Rule F – Substituted expenses**

No change required to this Rule.

### **7. Rule G – Frustration of the voyage**

The rules and practice on frustration of voyage varies from jurisdiction to jurisdiction. Hence, this is better left to be considered on a case to case basis, and we suggest no change to this Rule.

## **SECTION 4 – NUMBERED RULES**

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### **1-5 Rules I – V**

More contemporary wordings should be considered under Rule IV.

### **6. Rule VI – Salvage**

#### **6.1 Inclusion or exclusion of salvage:**

a) Cefor recommends the adoption of option i), alternatively option iv), as there are cases where it will be uneconomical to redistribute.

b) No.

#### **6.2 Legal and other costs:**

a) Yes.

b) No.

### **7. Rule VII**

Yes, we generally favour replacing the word “ashore” with the word “aground”.

### **8. Rule VIII**

a) Yes.

b) Yes, but it will also have to be made clear whether reloading can include loading onto another transshipment vessel or not.

### **9. Rule IX**

No comment.

### **10. Rule X**

10.1 We support the proposed insertion of the words in italics in the Questionnaire.

10.2 Yes, this also reflects the current legal position.

## **11. Rule XI – Port of Refuge Allowances**

11.1 Ideally no crew wages should be allowed either while at or deviating to or from the port of refuge. However, in order to secure the adoption of new Rules we will recommend to reinclude allowance for wages at port of refuge.

11.2 This could be solved by introducing definitions as already suggested.

11.3 Foreseeable delay has often been allowed in GA and must be considered on a case by case basis.

11.4 No change is required to Rules X(b) and X1(b).

11.5 Rule XI(d)

a) No changes are required to the wording of Rule XI(d).

b) No.

c) The suggested additional wording of “from the property involved in the common maritime adventure” may lead to the conclusion that if there is escape or release from other property than those involved in the maritime adventure, then allowance must be given in GA. An example would be if a vessel hits and damages a pipeline with the result of escaping oil. Hence, we recommend keeping the current wording.

d) We find it logical to also include bunkers in this rule.

## **12&13 Rules XII and XIII**

No comment.

## **14. Rule XIV Temporary Repairs**

14.1 Should the amendment to this Rule made by YAR 2004 be retained?

This is against the principle in Rule F that no savings are to be taken into account. We therefore recommend to use the 1994 solution.

14.2 We have not encountered any practical difficulties regarding the application of Rule XIV after the *Bijela*.

## **15. Rule XV**

No comment.

## **16. Rule XVI – Cargo Values**

No proposed amendment.

## **17. Rule XVII – Contributory Values**

17.1 We recommend using the same wording as that included in LOF 2011.

17.2 No need for change.

## **18&19 Rules XVIII and/or XIX**

No comment.

## **20. Rule XX – Commission**

This rule must be considered in connection with Rule XXI. Commission could be excluded if the interest level is high enough to act as an incentive for parties to pay the costs and not suffer economically if for instance a bank loan is necessary to fund the expenses.

Alternatively the commission could be kept at 1% if interest is kept at a low level.

## **21. Rule XXI – Interest**

21.1 Should a fixed rate of interest (as found in YAR 1994 and its predecessors) be replaced by a variable rate of interest fixed by the CMI annually as in YAR 2004?

Yes, a variable interest rate system as introduced by the YAR 2004 should be maintained.

21.2 Do you have any proposals to assist with the setting of annual interest rates?

We propose to maintain the guidelines issued with YAR 2004.

## **22. Rule XXII – Treatment of Cash Deposits**

Rule XXII is outdated and needs to be replaced with a more practical solution. We agree that the new YAR should recognise that cash deposits may be kept in trust accounts in the name of the adjuster. This is also the current practice adopted by adjusters due to the difficulty with joint accounts.

### **23. Rule XXIII – Time Bar**

The time bars introduced by Rule XXIII YAR 2004 should be retained and be incorporated into the 2016 Rules. The difficulty pointed out by some jurisdictions due to their law time limits being a matter of public order that cannot be altered by contract, could possibly be solved by a minor amendment. Regardless, it will be important to insert time bars that are enforceable in common law countries and some civil law countries and possibly could assist others, in order to produce adjustments more quickly and ensure that claims are not left open indefinitely.

5 June 2013

A handwritten signature in blue ink, appearing to read 'Helle Hammer', with a horizontal line extending to the right.

Helle Hammer  
Managing Director  
Cefor

From accompanying email 16 June Erik Rosæg to Stuart Hetherington:

The Norwegian Maritime Law Association supports the views of CEFOR expressed in their response to the questionnaire, which is attached here and also send separately to you by CEFOR. In respect of question 9b, we would like to add that there are no particular prohibitions of paying ransom in Norwegian law, even if the receiver may be affiliated with an international network of terrorists.