

**REPLIES OF THE SPANISH MARITIME LAW ASSOCIATION TO THE  
QUESTIONNAIRE ON THE RULES ON GENERAL AVERAGE**

Madrid, July 29, 2013

**SECTION 1 – GENERAL**

**1. THE BIG PICTURE**

1.1 During the discussion leading up to the 2004 Rules some parties advocated the "abolition" of General Average.

a) Would you support this approach?

*No, we do not support the abolition of General Average.*

b) If so,

i) How would this be achieved, given that the York Antwerp Rules are incorporated as a matter of contract and their principles are embedded in the national law of maritime nations?

ii) How, and to which parties, would you allocate the expenses and losses now dealt with as General Average?

*Not applicable.*

1.2 The current edition of Lowndes

a) Looking at the big picture, are there areas of the maritime adventure where the York-Antwerp rules are an impediment rather than a help to commerce?

*We deem that the York-Antwerp Rules could become an impediment rather than a help to commerce in incidents or disputes involving a multiplicity of cargo interests. For instance, in liner traffic if the incident affects a container vessel carrying cargo corresponding to hundreds of different interests. In such circumstance, general average adjustment would prove to be too costly and time consuming.*

b) Alternatively, are there new areas where the "general average" approach could usefully be applied?

*No, we do not envisage new areas.*

**2. ROTTERDAM RULES**

a) The IWG invites your general comments as to whether the YARs need to be changed in any way to accommodate the new approach that the Rotterdam Rules bring to contracts of carriage.

*We do not deem that the YARs need to be changed in any way to accommodate the new approach that the Rotterdam Rules bring to contracts of carriage. YARs are not intended to rule on carrier's liability, but only on the adjustment of general average. Further, according to the article 84 of the Rotterdam Rules the Rotterdam Rules clearly established that general average is not governed by said Rules.*

- b) Is there anything that the YARs can or should try to do in resolving these practical issues?

*Not applicable.*

### **3. DEFINITIONS**

- a) Should the YARs include a section of definitions?

*The YARs should not include a section of definitions. The fact that in a specific case in 2000 an English judge has rejected that the terms "voyage" and "common adventure" have the same meaning is not sufficient by itself to insert a section of definitions. We understand that the essential terms are similarly interpreted in the different jurisdictions and have not given room for discrepancy.*

- b) If so, what terms need to be defined?

*Not applicable.*

### **4. SCOPE**

Do you consider the existing approach should be maintained, or should the YARs, at the expense of brevity, provide a more self-contained and complete code that needs less knowledge of external practice or law?

*We do not consider that the YARs should provide a more self-contained and complete code. In practice, the intervention of courts in filling the gaps by reference to established law and practice is so occasional that this exercise would not be justified.*

### **5. FORMAT**

The 2004 Rules introduced several "tidying up" amendments, including a more extensive numbering system.

Do MLA's consider this should be maintained?

*Yes, provided that the average adjusters are happy with the 2004 "tidying up" amendments.*

### **6. DISPUTE RESOLUTION**

Many codes or contracts include provision for arbitration in the case of disputes. CMI is accepted as the custodian of the YARs, should it also 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, we do not deem that the 2016 Rules have to establish the CMI as the arbitration or mediation facility on dispute resolution relating to the application of the YARs.*

## **7. ENFORCEMENT**

The York Antwerp Rules have never touched on areas relating to the legal basis for contributions, cost of exercising liens, the terms of security documents etc. Bills of Lading may incorporate terms dealing with some of these matters, but often they are left to the law governing the contract of affreightment or the Courts at the ports of discharge.

- a) Could additional provisions in the YARs offer greater uniformity and certainty in these areas?

*No, these matters shall remain left to the corresponding applicable law. Further, the commented additional matters would fall beyond the purpose of the YARs, which is the adjustment of general average and the rules to be applied on that respect, establishing which expenditures or sacrifices are to be allowed under general average and which not.*

- b) Should CMI consider offering, or including in the YARs, a recommended standard version of key documents such as the Average Guarantee and Average Bond?

*No, we do not consider it as necessary.*

## **8. ABSORPTION CLAUSES**

Absorption Clauses (whereby Hull insurers pay GA in full up to a certain limit) are now found in almost all Hull Policies, and have played a significant role in reducing the number of smaller uneconomic collections of security and contributions from cargo.

Are there any changes that might be made to the York Antwerp Rules that might further assist in this process?

*We deem there are no changes to be made to the YARs that further assist in the process played by absorption clauses in reducing the small number of uneconomic collections of security and contributions from cargo.*

## **9. PIRACY**

- a) Do you consider that express wording in YARs would be desirable to deal with the general principles or regulate specific allowances?

*We deem that this issue is already properly governed under the relevant charterparties, not being needed to consider an express wording in the YARs.*

- b) To build up a general picture it would be useful if MIAs could advise whether in their jurisdictions there are statutory or other restrictions on the payment of ransoms, or other related expenses.

*As a general rule, payment of ransoms would not be admitted and could be considered as a criminal offence (cooperation with pirates). However, particular*

*circumstances should be taken into account as, for instance, the payer's state of necessity which would exclude the criminal behavior.*

## **10. COSTS**

Are there any areas of the General Average process where the costs could be avoided, reduced or controlled, including:-

- a) Adjusters fees
- b) Costs of collecting security
- c) Format of adjustments
- d) Involvement of legal and other representatives

*Considering recent experience in the last years, we understand that general average adjustments are often too time consuming and costly, being adjusters fees the bulk of the costs which are borne in a general average adjustment. Therefore, we would not disregard that some further thought is made on this respect.*

## **11. OTHER MATTERS**

It is open to all parties receiving this questionnaire to raise questions or points that are not already covered by the questionnaire.

*No other questions or points to be raised.*

## **SECTION 2 – INTRODUCTORY RULES**

### **1. RULE OF INTERPRETATION**

This Rule makes the lettered rules subservient to the Rule Paramount and the numbered rules. However, in practice although Rules A, C and G are subordinated to the numbered rules, the matters treated in Rules D, E and F are in effect paramount because they deal with matters which are not conflicted by the numbered rules.

Should this Rule be re-worded to reflect the above?

*We deem it could be reasonable to re-word the Rule of Interpretation to reflect the existing practice referred in the explanatory note contained in the questionnaire.*

### **2. RULE PARAMOUNT**

Should this rule be re-worded so that those interests who are innocent of the unreasonable conduct are not denied their right to contribution?

*No, we deem that this rule should not be re-worded, as the aim of YARs is not to rule on liability. This should be an issue to be discussed by the parties under the law governing the contract of carriage.*

### 3. RULE OF APPLICATION

The draft wordings put forward by CMI at Beijing included for the first time a Rule of Application. The IWG has proposed that this rule be inserted as the first provision of the YAR before the Rule of Interpretation. The proposed rule had the following wording:

*These York Antwerp Rules (2012) shall be considered to be an amendment or modification of previous versions of the York Antwerp Rules. Notwithstanding the foregoing, these York Antwerp Rules (2012) shall not apply to contracts of carriage entered into before the formal adoption of the Rules.*

Should the 2016 Rules contain a similar provision?

*Yes, it would add certainty.*

## SECTION 3 – LETTERED RULES

### 1. RULE A

*Not applicable.*

### 2. RULE B

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

*We consider the current wording satisfactory.*

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?

*We understand that no further provisions would be needed to deal with allowances under Rules X and XI relating to tug and tow at the port of refuge. The first two paragraphs of Rule B would sufficiently cover the application of Rules X and XI to tug and tow at the port of refuge.*

### 3. RULE C

3.1 The general exception of "loss of market" is considered by some commentators to be unfair in that it denies the owner of cargo a claim in general average for financial loss suffered due to loss of his market consequent upon a general average detention during the course of a voyage.

Is this an issue that should be revisited?

*Yes, it should be considered if and when such "loss of market" has been duly evidenced by the cargo owner.*

3.2 Should the second paragraph of Rule C:-

a) include express reference to the exclusion of liabilities (see Lowndes C.37 attached)

- b) make it clear that "in respect of" includes preventative measures

*We consider that an express reference to the exclusion of liabilities should be added, and also to make it clear that "in respect of" includes preventative measures.*

#### 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?

*Yes, we consider that the current 12 months period is long sufficient.*

- 5.2 In the existing wording of paragraph three, does a request for (say) cargo claims by the adjuster re-start the clock for the 12 month period? If so, should the period in all cases be from the date of the casualty?

*In our opinion, periods should be calculated as from the date referred to in the first paragraph of the Rule E (termination of the common maritime adventure) but not since the general adjuster's request.*

#### 6. RULE F

- 6.1 Since 1974, substituted expenses are allowed wholly to GA "without regard to savings to other interests." Previously, English Rules of Practice dealing with specific types of substantiated expense (cargo sold at a port of refuge, towage and cargo forwarding from a port of refuge) provided for the expense (up to the savings) to be divided in proportion to the saving in expenses thereby occasioned to the parties to the adventure.

The 1974 change was made in the interest of uniformity and simplicity, however do you consider this issue should be revisited?

*No, it must be maintained the current wording in the interest of uniformity and simplicity.*

- 6.2 The wording of Rule F refers only to any extra "expense" and the drafting committee in 1974 rejected the proposal that the words "or loss" should be included, following the English Rule of Practice F17

- a) Do you consider this Rule should be amended to include "loss"

*Yes, as per our comment to question 3.1 above, we consider that reference to "loss" should be included.*

- b) If not, do MLA's consider that additional wording is required to define more clearly (perhaps along the line of the above Rule of Practice) the limits of what constitutes an expense?

*Not applicable.*

- 6.3 It has been suggested that the most common Rule F allowances for towage to destination and forwarding of cargo are of such clear general benefit to commercial interests that they should be allowed as General Average (subject always to the Rule Paramount) without having to consider savings, which may often involve difficult or artificial calculations.

Do you consider this should be looked at further?

*Yes, it is an important issue that must be considered further.*

## 7. RULE G

- 7.1 The Rule sets out "non-separation allowances" and specifies that such allowances (removal to and whilst at a repair port) can only be made "for so long as justifiable under the contract of affreightment and the applicable law".

Whilst 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?

*It could be considered to establish a specific period; however, it is our opinion that it should maintain the current wording which refers to the particular contract and/or applicable law any discussion on this matter.*

- 7.2 With regard to "non-separation allowances" there is variation in practice as to whether allowances can continue after repairs are completed while the vessel regains position, with many adjusters taking the view that, once available for trading, allowances should cease.

Do you consider this requires express provision in the Rules or can this be left to the discretion of the Adjuster?

*It would be convenient an express provision in Rule G on this particular issue.*

- 7.3 Do you consider that the requirements for notification should be retained, or does it give rise to difficulties in practice?

*It should be maintained the notification's requirement.*

- 7.4 Where a voyage is frustrated by reason of delay (e.g. the damage is serious and requiring lengthy repair but is not so costly as to make the vessel a commercial total loss), 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.

*In our opinion, it should continue up to the point at which the delay becomes sufficient to frustrate the voyage.*

- 7.5 Deciding how long is "justifiable under the contract of affreightment and the applicable law" has proved controversial in some cases. Given that the decision is often "fact sensitive" and subject to differing criteria according to national laws, is there a better way of establishing an equitable cut-off point for such allowances?

*See our comment to point 7.1 above.*

## **SECTION 4 — NUMBERED RULES**

### **1. RULE I**

*Not applicable.*

### **2. RULE II**

*Not applicable.*

### **3. RULE III**

*Not applicable.*

### **4. RULE IV**

The use of the terms "wreck" and "carried away" sounds rather archaic and Lowndes (para 4.18/4.19 - see attached) finds other grounds to criticize the rule.

Assuming the principle needs to be retained, can it be expressed in a clearer and more contemporary way?

*In our practice, these words have not created any trouble, but if its replacement by a clearer and more contemporary way is considered and adopted by the majority of the national associations, we would not oppose to such replacement.*

### **5. RULE V**

*Not applicable.*

### **6. RULE VI**

6.1. The debate regarding the inclusion or exclusion of salvage where the law or contract already provides for a means of distribution between the parties (for simplicity we suggest this is referred to as LOF salvage, although other contracts/jurisdictions achieve the same effect) was unresolved after Beijing. The arguments for and against were set out in the Report by the CMI International Subcommittee on General Average which can be found in the CMI Yearbook 2003 at pages 290-292 on the CMI website. In 2012 a compromise version of Rule VI was put forward by a CMI IWG (which can be found on the CMI website under Work in Progress, York- Antwerp Rules) which provided for exclusion of LOF salvage from GA if it constituted more than a fixed percentage of the total general average.

Some adjusters have commented that it is already their practice to approach the parties if it seems likely that the effect of re-apportioning salvage will be disproportionate to the time and cost involved. Adjusters have also pointed out that if salvage payments are

excluded from GA they still rank as an extra charge incurred in respect of the property subsequent to the GA act and therefore should be deducted from the Contributory Value (see Rule XVII). The saving in procedural cost of excluding salvage would therefore not necessarily be that significant.

Looking to 2016 the current options would appear to be:-

- i) Retaining the 1994 position
  - ii) Adopting the 2004 position
  - iii) Adopting a compromise position as put forward by CMI in Beijing which would also involve deciding on the percentage figure.
  - iv) Continuing as in (i) but encouraging adjusters' "ad hoc" approach wherever possible.
  - v) Continuing as in (i) and (iv) but including an express provision obliging the adjuster to consider the possibility of not including salvage, perhaps linked to the Rule Paramount.
- a) Which option(s) do you support?
  - b) Are there other options that should be considered?
  - c) If options (ii) or (iii) are supported should an amendment to Rule XVII be made so that salvage payments are not deducted from contributory values when salvage is not allowed as GA?

*We would support option ii), to adopt the 2004 position.*

6.2 At present Rule VI makes no reference to legal and other costs incidental to a salvage operation and subsequent award. Such costs are customarily allowed by adjusters under Rule C, as a direct consequence of the GA act of engaging salvors.

- a) Should the allowance for legal and other costs be expressly recognized in Rule VI?
- b) Would it encourage co-operation amongst salvaged property interests and early negotiated settlements if legal costs were expressly excluded?

*We do not see the need of including an express provision on that respect.*

## **7. RULE VII**

Should the word "ashore" be replaced by "aground"?

*If it adds certainty and avoids misinterpretation, we would not oppose. However, we do not see the relevance of this question.*

## **8. RULE VIII**

- a) Should the word "ashore" be replaced by "aground"?

- b) The word "reshipping" is capable of mis-interpretation; should it be replaced by "reloading"?

*Same reply as in relation to Rule VII above. In any case, the word "reloading" is already used in Rule XI (d) (iv), rule that was introduced in the YARs 1994, so it could be more consistent to use the same word in Rule VIII.*

## 9. RULE IX

*Not applicable.*

## 10. RULE X

- 10.1 In the second para of X(a) should the words in italics be inserted "...is necessarily removed to another port or place of refuge because repairs *necessary to complete the voyage* cannot be carried out at the first port of refuge."

in order to confirm the line taken in the "*Bijela*" [1992] 1 Lloyds Rep 636 (see Lowndes para 10.36 attached)

*Yes, we agree with the insertion of such sentence. It may add clarity.*

- 10.2 With regard to X(b) should express wording be introduced 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 from some reason?

*We would not object to include such wording, although we deem that it is implicitly understood.*

## 11. RULE XI

- 11.1 Wages and maintenance of crew are allowed in GA while detained at a port of refuge for the common safety or to effect repairs necessary for the safe prosecution of the voyage, under the YARs 1994 (XI(b)) but not in YARs 2004. Both sets of Rules allow wages during the deviation to a port of refuge, and some have suggested that no crew wages should be allowed in General Average at all. What should be the position under YARs 2016?

*We deem that YARs 2004 should be followed.*

- 11.2 In the "*Trade Green*" [2000] 2 Lloyds Rep 451, the judge decided that the term "port charges" relates only to the charges a vessel would ordinarily incur in entering a port, and went on to say:

*"I do not think that r.XI(b) can be construed so as to cover all sums' charged by the port authority regardless of the circumstances; in my view it is much more limited in its scope. It is true that in the present case the services of the tugs and the charges for those services were imposed on the vessel by the port authority, but they were imposed in response to an unusual situation and were not imposed in the common interests of the ship and cargo. In these circumstances, I do not think that they can properly be regarded as port charges within the meaning of r.XI(b)."*

Most adjusters would regard this view as being against both principle and practice. For example, the cost of a standby tug if required by the port authority is commonly allowed as a port charge.

Does this point now need to be covered expressly by the Rules either by amendment to Rule XI or by inclusion of a definitions section (see Section 1-3 above)?

*We do not see the need of covering this point expressly. This is an issue that would have to be examined by GA adjusters on a case by case basis.*

- 11.3 With regard to the phrase "until the ship shall or should have been made ready to proceed upon her voyage", Lowndes (para 11.34-5 attached) refers to examples of delays caused by ice conditions or strikes.

Is express wording needed to deal with such contingencies and/or to clarify the situation when a delay arises from a second accident or the condition of cargo?

*We do not see the need of covering this point expressly. This is an issue that would have to be examined by GA adjusters on a case by case basis.*

- 11.4 Rules X(b) and XI(b) contain the provision excluding allowances "when damage is discovered at a port or place of loading or call without any accident or other extraordinary circumstances connected with such damage having taken place during the voyage."

Does the wording of this provision (added in 1974) fulfill its intended purpose?

*Yes.*

- 11.5 The introduction of Rule XI(d) was the most significant feature of the 1994 Rules.

- a) Is there any need to change the overall basis of the compromise between property/liability insurers reflected in the XI(d)?

*No.*

- b) Have you encountered any difficulties in the application or wording of XI(d)?

*No.*

- c) Do the words "actual escape or release" need to be qualified as in Rule C with the words "from the property involved in the common maritime adventure", or in any other way?

*We would not oppose to it, although this provision and Rule C should be read jointly, and it could be implicitly understood that the words "actual escape or release" are referring to "the property involved in the common maritime adventure".*

- d) Should sub-paragraph (iv) include reference to bunkers as well as cargo?

*We would not oppose to it.*

## 12. RULE XII

*Not applicable.*

### 13. RULE XIII

*Not applicable.*

### 14. RULE XIV

14.1 The 1994 and 2004 Rules deal with temporary repairs for the common safety and for sacrificial damage in the same way. The 2004 Rules adopted a different approach which gives priority to Particular Average savings.

Do you consider the 2004 version should be retained?

*Yes, we think that the 2004 should be retained.*

14.2 The House of Lords judgment in the "*Bijela*" [1992] 1 Lloyds Rep 636 was handed down only shortly before the Sydney Conference on 1994. Have you encountered any practical difficulties regarding the application of Rule XIV, there having been no reported litigation since 1994?

*No.*

### 15. RULE XV

*Not applicable.*

### 16. RULE XVI

This Rule provides for cargo sacrifices to be determined "at the time of discharge". Modern transportation involves cargo being carried under one contract of carriage from the port of shipment by sea to a port of discharge and thence by road or rail to an inland destination for delivery to the consignee under a through Bill of Lading. The commercial invoice referred to in the Rule and Rule XVII will include the freight and insurance cost of the whole journey and will not normally be shown broken down between the different sea and land transits. For practical reasons average adjusters have normally, since such multimodal transport became common, adopted CIF values at the time and place of delivery in terms of the invoice; this is frequently the inland destination. They acknowledge that this practice is not strictly in accordance with the wording of the Rules. The practical reasons for its adoption are the great difficulty and consequent cost of determining in these circumstances what the value "at that time of discharge" is.

Should the relevant wording be changed to "*at the time of delivery under the contract of carriage*", or should both phrases be included, allowing the adjuster to decide the most equitable basis?

(The point also arises with regard to the same wording found in Rule XVII.)

*We deem that both phrases should be included, allowing the adjuster to decide the most equitable basis on a strict case by case basis.*

### 17. RULE XVII

17.1 Clause 15 of LOF 2011 LSSA Clauses expressly allows the Arbitrator to disregard low value cargo when "the cost of including such cargo in the process is likely to be disproportionate to its liability for salvage."

Adjusters have similarly excluded low value cargo when appropriate as a matter of good practice, but would it be useful to have an express sanction for doing so in the Rules?

*Yes.*

17.2 Claims for deductions from contributory values of cargo may be made because of loss of a seasonal market or (for example) losses caused by the need to purchase a replacement item for a time sensitive contract. Rules C refers to losses by delay but only in the context of making allowances, not the calculation of contributory values.

Is this an area where clarification is required?

*Yes.*

## **18. RULE XVIII**

*Not applicable.*

## **19. RULE XIX**

*Not applicable.*

## **20. RULE XX**

In the discussions at the Vancouver Conference (2004) it was argued strongly that payment of commission could no longer be justified under modern banking practices, and the 2004 Rules no longer provide for such allowances.

Do you consider that the 2004 position should be maintained in 2016?

*Yes, we think that the 2004 position should be maintained.*

## **21. RULE XXI**

21.1 It appeared to be common ground at the Vancouver Conference that a fixed rate of interest was too inflexible over the life of a version of the YARs and that a variable rate, set annually by CMI, should be preferred.

Do you remain of this view?

*Yes, we support such view. Maintaining a fixed rate would only create unnecessary inflexibility.*

21.2 The Vancouver conference agreed guidelines for the CMI International Working Group responsible, essentially that the rate should be "*interest applicable to moneys lent by a first class commercial bank to a shipowner of good credit rating.*"

While agreeing with the principle of flexible rates, some shipowners have expressed concern that the rates adopted are unrealistic in the current climate when bank lending is

extremely tight and sentiment is against the creditworthiness of the shipping industry, however reputable individual owners maybe.

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

*No, we agree with the principle of flexible rates and with the above guidelines agreed at the Vancouver conference.*

## **22. RULE XXII**

Due to the difficulty in setting up joint accounts, sometimes in a foreign currency, it has become the practice of adjusters to hold deposits in trust accounts in their own name. Should this practice be recognised by the YARs?

*We do not think this is a matter to be treated or included in the YARs, as the practice on this regard varies from one jurisdiction to another.*

## **23. RULE XXIII**

The 2004 Rules introduced the time bar provisions for the first time. While recognizing possible difficulties in certain jurisdictions, do you consider these provisions should be retained and, if so, are there any areas needing improvement?

*We think that these provisions should be retained.*