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International Working Group on General Average –
Answers to the questionnaire dd March 15, 2013 provided by the
Association Suisse de Droit Maritime

Dear Bent,

I am very much looking forward to meeting you and your colleagues of the International Working Group on General Average in the coming autumn. It is a great honour for me to form part of the respective working committee.

I am pleased to providing you with the following input:

Section 1 - General

1. The Big Picture
1.1 a) No. It should only be envisaged to abolish General Average in case:
a) the benefits of the institute/procedure are generally outweighed by the required efforts to bring the adjustment about.
b) the institute/procedure is predominantly used in a malicious way, e.g. by owners of substandard tonnage declaring General Average very soon after having left port in an attempt to have their "ordinary maintenance cost" funded by cargo contributions.

1.2 a) Yes, particularly in container carrier casualties, where a multitude of cargo interests are involved (think about less than container loads, LCL in particular) the application of the rules leads to lengthy and work-intense adjustments.
Moreover, the collection of none-separation agreements, average guarantees and bonds is very work-intense as well.

1.2 b) What about other means of transport? In land transportation, by sharing loss prevention cost in the same manner as under GA, e.g. the sharing of cost of extinguishing a railway wagon which caught fire and could have led to the explosion of a series of other wagons.

What about wreck removal cost (the decisive criteria for the cost to fall on H&M or P&I insurers of whether a ship is a ATL or not to determine who pays seems relatively random): could the countries of the ports of call of the casualty-stricken voyage be asked to contribute in some way based on e.g. what part of GDP is generated through imports by sea?

2. Rotterdam Rules
Yes, the depicted situations where carriers collect average guarantees "for nothing" given that they are now more likely to be responsible for the casualty under the RR and that hence no contribution is ultimately due from cargo is highly ineffective.

In light of the
a) deletion of the "error in navigation" defense
b) continued duty of seaworthiness, successful subrogation/recovery claims by cargo interests under the Rotterdam rules are indeed likely.

The carriers must hence make quick judgment calls on whether to collect security or not.
What could the YAR do? Why not have a "best practice" section – where these three cases are depicted, encouraging the carriers to take responsibility to advance salvage (salvage scenario) or not collect (excessive) average security too quickly at all (collision, fire). This obviously comes at the risk that the P&I clubs would not compensate carriers if the cargo interest defaulted.

The following could be a solution:
If the CMI were to introduce a dispute resolution body, it could help assessing such questions. Such a dispute resolution body would not just handle
a) issues arising from the YAR rules but,
b) recourse claims against carriers as well (e.g. Article 77 of the Rotterdam Rules would allow for agreement by the parties on e.g. such an arbitration body - ex post) as well as
c) recourse claims of ship owners against liable cargo interests (e.g. arising out of mis-declared cargo). This latter aspect might prove difficult in practice given that malicious cargo interests are probably going to be reluctant to join an arbitration of the described nature.

Having said the above, given that the determination of liability of carriers takes time and that they want their potential claims to be secured, the collection of security is unavoidable, unless commercial credit insurance is taken out by carriers (with the passing on of the premium to cargo interests). Thanks to the dispute resolution body, security would have to issued for lower amounts and a shorter period of time.
The cost of credit insurance could actually be cheaper than collecting the securities. This would also do away with the problem that carriers do not accept guarantees from non-classed insurance companies.

In the context of large container ship casualties, the "Landmark Policy" concept (see attachment) would do away with the problem.

3. Definitions
a) Yes
b) YAR 1994:
Rule Paramount: reasonably
Rule A: extraordinary

4. Scope
To achieve uniformity in practice, I suggest that the most salient and complex issues in which average adjusters used to fill the gaps should be better defined.

5. Format
Yes

6. Dispute Resolution
Yes, similar to the Lloyd's Salvage Arbitration Branch

7. Enforcement
a) Yes, I however ignore whether this is required
b) Yes, this would be to the benefit of emerging markets and inexperienced shippers.

Awards of the proposed dispute resolution/arbitration body could then easily be enforced based on the New York Convention.

8. Absorption Clause
No, I do not think so. The carrier currently has to make the judgment call, whether collection of security and contributions from cargo is economically viable. One way to handle the issue as depicted is the GA absorption clause. Another one would be the Landmark concept (as attached). It is better to leave the market react to such trends as opposed to re- or overregulate.

9. Piracy
a) No (the peril has been shifted to the war market anyway)
b) No, none: to pay ransom is legal under Swiss law, however not to claim for it or e.g. concealment of the funds obtained ("Hehlerei" according to Article 160 StGB). Pls note however that sanction/ITC legislation may apply.

10. Costs
a) This should be left to the forces of the market.
b) Down to the owners to decide what is deemed useful security. What currently drives cost is the prevalent request for security issued by a *rated* insurance company (as opposed to just a properly registered insurance company).
c) Setting out a required format for adjustments will do away with the freedom of adjusters to present in whatever way suitable and ultimately increase the cost.
d) No.

11. Other Matters
Throughout the years, the number of average adjusters has drastically diminished. In light of the importance of this function for the industry, this is of great concern.
How does the CMI intend to tackle this problem?

Section 2 – Introductory Rules

1. Rule of Interpretation
Yes

2. Rule paramount
In principle: yes, whereas owners should be held accountable for acts of other persons in the spirit of the Rotterdam rules (i.e. relatively broadly).

3. Rule of application
Yes

Section 3 – Introductory Rules

2. Rule B
2.1 Circular reference: the rule defines the common maritime adventure which is required for a GA act. There is a common maritime adventure if the "disconnection is itself a general average act". This should be unwound.
2.2 No

3. Rule C
3.1 No
3.2 a) Yes
b) Yes

4. Rule D

5. Rule E
5.1 Why not shorten the timeframe to 6 or 3 months ?
5.2 If it is the intention to speed up the process, it should be from the date of the casualty.

6. Rule F
6.1 Yes
6.2 No particular opinion at this time.
6.3 No particular opinion at this time.

7. Rule G
7.1 No knowledge of better cut-of point.
7.2 Yes
7.3 No particular opinion at this time.
7.4 a)
7.5 No knowledge of a better way of establishing an equitable cut-off point.

Section 4 – Numbered Rules
4. Rule IV using Lowndes and Rudolf's words: There shall be no sacrifice of what is valueless, or doomed anyway.

6. Rule VI
6.1a) Option iii (but clarification iro the percentage required – double negation to be avoided when stipulating a maximum – hence stipulation of a minimum required percentage would be more straight forward.)
b) No
c) I am not sure why such a deduction would be required

6.2 a) Yes
b) No, not appropriate – see 6.2 a)

7. Rule VII
Yes

8. Rule VIII
a) Yes
b) Yes

10. Rule X
10.1 Yes
10.2 Yes

11. Rule XI
11.1 To ensure consistency, wages should be allowed.
11.2 In light of the fact that the provision was misinterpreted by even English courts it should expressly be covered.
11.3 Yes
11.4 No – I find the provision superfluous
11.5 a) Yes
b) No known difficulties at this stage.
c) Yes, for the sake of clarity
d) Yes

14. Rule XIV
14.1 No particular opinion at this time.
14.2 No

16. Rule XVI
This should be changed to "the time of delivery under the contract of carriage" only.

17. Rule XVII
17.1 Yes
17.2 Yes

20. Rule XX
Yes

21. Rule XXI
21.1 Yes
21.2 Adoption of interest rate as determined by CMI General Assembly to represent a meaningful average of a basket of long term borrower interest rate of main global financial centres (e.g. Frankfurt, Singapore, London, New York and Zurich).

22. Rule XXII
Yes, advantageous from inter alia a compliance perspective.

23. Rule XXIII
The one year timeline is fine whereas the six year absolute time limit should be re-discussed in a greater context with regards to the future of General Average in the context of large and complex General Avarage.

Yours sincerely,

Andreas Bach