

## **Reply to CMI Questionnaire**

### **Answers:**

#### **SECTION 1**

##### **The Big Picture**

- 1.1 The BMLA would not support the abolition of General Average. It is a long established principle with which all interests are familiar.
- 1.2(a) It is recognised that the costs and time associated with the process of the declaration of GA and the application of the York Antwerp Rules can be perceived to be a problem. One unsatisfactory aspect of this process is the incidence of delay in delivering cargo pending the provision of GA bonds and guarantees. This raises issues both for GA adjusters and underwriters. The extent of such issues can be best illustrated by casualties on containerships.
- 1.2(b) Not in the opinion of the BMLA.

##### **Rotterdam Rules**

- 2(a) It is the view of the BMLA that there will be time for reflection about any changes to the York Antwerp Rules which might be necessary to accommodate the Rotterdam Rules if and when the Rotterdam Rules come into force.
- 2(b) The issues raised are certainly noted. The difficulty with resolving the practical issues raised is that different cases will raise different issues. A solution of sufficiently broad application is not easy to identify.

##### **Definitions**

- 3(a) On balance the BMLA does not favour the introduction of a section containing definitions. Whilst there are certainly terms which could usefully be defined, there would be a concern that so doing would have unintended consequences. Further adjusters and practitioners have encountered few problems in practice in applying commercial common sense to generic words such as “port charges” or “wages”. Introducing definitions might also bring with it disputes as to what falls within the definition.
- 3(b) See 3(a) above. The BMLA has noted, however, that the role played by the GA adjuster is not well understood and it might be helpful to find a mechanism at international level to remedy this defect.

##### **Scope**

- 4 In principle a wider and more detailed self-contained code would be helpful. However the view of the BMLA is that the brevity of the York Antwerp Rules is to be commended and the maintenance of such brevity probably outweighs the advantages of a more elaborately drafted self-contained code.

## **Format**

5 Yes.

## **Dispute Resolution**

6. In practice the agreement to adjust GA in accordance with the York Antwerp Rules is contained in a contract of carriage which will often contain express provision for dispute resolution. The drafting of a reservation to CMI to adjudicate disputes as to the meaning of the York Antwerp Rules is an interesting idea. Shipbuilding contracts often reserve to Class the power to adjudicate on disputes between a builder and a buyer as to compliance with Class during the construction process. The BMLA has an open mind on this issue and will be pleased to consider any ideas which other MMLAs might bring forward. A practical issue would be what provision would be made for the costs involved in such an adjudication.

## **Enforcement**

7(a) The BMLA would be concerned that, in so far as judicial or other remedies would be sought, care should be taken not to interfere with the procedural or other substantive remedies available under the law of the relevant state.

7(b) The BMLA considers the settling of a standard form of average guarantee and average bond as a constructive idea. It is recognised that jurisdiction agreements in particular in Guarantees have raised practical issues in the past. However the BMLA supports the concept of recommended forms of average guarantees and bonds.

## **Absorption Clauses**

8 The scope of GA absorption clauses are, in the opinion of the BMLA, matters for property underwriters and their insured and not the York Antwerp Rules.

## **Piracy**

9(a) As a general comment, the BMLA would point out that individual adjustable losses are not presently defined in the Rules and doubts whether it would be appropriate for such a route to be adopted at this stage. So far as concerns English law, there is authority confirming that ransom payments are a legitimate expense which can be adjusted in GA. In the event, therefore, BMLA does not consider it would be desirable to introduce express wording.

9(b) Whilst it is understood that, in some jurisdictions, the payment of a ransom might be illegal, the BMLA is unaware of any law which stipulates that a pirate attack is not a GA event.

## **Costs**

10(d) Although, as noted above, there would be potential costs benefits in the relevant processes involved in GA and adjustment under the York Antwerp Rules could be streamlined, the BMLA is unaware of any strong held views in the London Market concerning the costs of adjustments.

## **SECTION 2**

### **Rule of Interpretation**

- 1 In the opinion of the BMLA no change is needed.

### **Rule Paramount**

- 2 The practice described is now well established and, whatever its defects, understood by all interests. It is by no means clear to the BMLA how the provision could be amended to provide a more satisfactory answer.

### **Rule of Application**

- 3 The BMLA considers it premature to offer an opinion on this question.

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### **Answers:**

## **SECTION 3**

### **Rule A**

1. Not applicable.

### **Rule B**

- 2.1 The BMLA considers the position in relation to the tug and tow satisfactory. It does not appear to have given rise to any difficulties to date.
- 2.2 In view of the answer to 2.1 above, the BMLA does not consider any further revisions are required in Rules X and XI.

### **Rule C**

- 3.1 The BMLA does not favour revisiting the “loss of market” exception. To do so would alter the nature of the risk insured by cargo underwriters. It is not a risk insured under Institute Cargo Clauses.
- 3.2(a) The BMLA does not consider it necessary to include an express reference to the exclusion of liabilities. Pollution clean-up costs would be captured by the word “expenses”.
- 3.2(b) For the reasons given in 3.2(a) above, the BMLA considers the existing wording sufficient to include pollution prevention measures.

### **Rule D**

4. As noted in the answers to Section 1, 2(a), the BMLA considers there will be sufficient time to consider the impact of the Rotterdam Rules if and when they come into force.

### **Rule E**

- 5.1 The existing time limits are considered to be sufficient.
- 5.2 The view of the BMLA is that no change is necessary.

### **Rule F**

- 6.1 The BMLA does not believe this issue should be revisited. It favours uniformity and simplicity, as is presently reflected in the 1974 wording.
- 6.2(a) This raises a difficult issue. Whereas expenses are concrete, losses may be speculative. The view of the BMLA, therefore, is that, on balance, no change is necessary.
- 6.2(b) For the reasons given in Section 1, 3(a), the BMLA does not think that the introduction of definitions would be of assistance.
- 6.3 The BMLA has no objection to this subject being considered further. It would note, however, that there are dangers in being prescriptive. Although there are differing views in the BMLA on this subject, the consensus is that there should be a calculation on a case by case basis to determine what mechanisms provide the best outcome in respect of savings.

### **Rule G**

- 7.1 The BMLA recognises that the issue of frustration is a difficult one which introduces uncertainty. In particular the word “justifiable” is opaque as it blurs financial and legal issues. Nevertheless, adjusters advise that this provision does not, in practice, give rise to particular problems.
- 7.2 The BMLA is unaware of any significant divergences in practice on the issue of non-separation allowances. If insofar as there are divergences, the general view is that it should be possible to rely on the discretion of the adjusters.
- 7.3 The existing practice in relation to notification is considered satisfactory, as the provision itself allows for different circumstances to be accommodated.
- 7.4(a) & (b) The BMLA’s view is that the current system does not appear to be creating any real practical difficulties. That said the issue could, in its view, be profitably further debated by the IWG. The BMLA’s view is that the preferable approach would be for allowances to continue until the point at which the delay became sufficient to frustrate the voyage.
- 7.5 Whilst this might perpetuate the uncertainties, the BMLA’s view is that fact sensitive matters should best be dealt with by the courts, reflecting the legal regimes and disciplines applicable.

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### Answers:

#### SECTION 4

##### Rule I

1. Not applicable.

##### Rule II

2. Not applicable.

##### Rule III

3. Not applicable.

##### Rule IV

4. The BMLA is not convinced that the existing language is inappropriate

##### Rule V

5. Not applicable.

##### Rule VI

- 6.1 The BMLA represents a number of interests. Unfortunately there are widely divergent views on this issue and there is no consensus. The BMLA is therefore unable to offer any comments at this stage but will study any proposals or suggestions made by the IWG with interest.
- 6.2(a) The BMLA considers that the text of Rule C suffices. The obvious danger associated with expressly recognising certain costs is the Latin maxim “inclusio unius exclusio alterius”.
- 6.2(b) The BMLA’s view is that the exclusion of the right to costs is unlikely materially to promote settlement.

##### Rule VII

- 7 The BMLA agrees that the word “ashore” could usually be replaced by “aground”.

##### Rule VIII

- 8(a) See 7 above.
- 8(b) The BMLA would be cautious about replacing “reshipping” with “reloading” as the word “reloading” might be open to the construction that it refers only to loading on the original ship and, therefore, exclude loading into lighters or other ships.

### **Rule IX**

9. Not applicable.

### **Rule X**

10.1 The BMLA takes the view that the second para of Rule X(a) is well enough understood by average adjusters in its present form and does not support the suggested change. It would seem undesirable to introduce yet another category of repair (“necessary to complete the voyage”) in addition to others already mentioned in the Rules (“necessary for the common safety” and “ necessary for the safe prosecution of the voyage”). The introduction of this wording to the Rule might suggest a wish to confine general average allowances to those resulting from a shipowner effecting - with the benefit of 20/20 hindsight - the minimum necessary repairs required to bring the voyage to its conclusion.

10.2 The BMLA takes the view that this aspect of Rule X(b) is well enough understood by average adjusters in its present form and does not support the suggested change.

### **Rule XI**

11.1 The BMLA cannot reach a consensus on this issue. It is noted, however, that the conceptual logic would be that all or none of the crew wages would be allowed.

The BMLA would, however suggest the insertion of the word “detention” between the words “that” and “necessary” in Rule XI(b).

11.2 The BMLA considers that port charges should be recoverable insofar as they arise in connection with matters necessary for the common benefit. Amendments to achieve this can usually be made.

11.3 For the reasons noted in several places, the BMLA can see no reason to be prescriptive and considers being so undesirable. Its view is that the resolution of the issue as to the causes of delay in proceeding with the voyage are best determined by the appropriate Court. It does not favour any change.

11.4 The BMLA believes the proviso achieves its intended purpose.

11.5(a) No change is considered to be necessary.

11.5(b) See below.

11.5(c) No change is necessary.

11.5(d) The BMLA does not consider a reference to bunkers is necessary, the issue in each case being safely left to the interpretation and implementation of Rule A. The Rule could, however, be usefully clarified by inserting words such as “handling on board” to cover the situation where cargo may be moved on board but not discharged.

### **Rule XII**

12. Not applicable.

### **Rule XIII**

13. Not applicable.

### **Rule XIV**

14.1 The BMLA supports the retention of the 2004 Rule.

14.2 The BMLA notes that average adjusters report no particular difficulties with interpretation of Rule XIV since the decision in the “Bijela”.

### **Rule XV**

15. Not applicable.

### **Rule XVI**

16. The amendment suggested it seems appropriate to the BMLA. The BMLA is also aware of a suggestion by the AAA that a further amendment be made to the effect that the commercial invoice shall be deemed to reflect the value of the cargo at the time of discharge irrespective of the place of final delivery under the contract of carriage. The BMLA considers this a sensible proposal.

### **Rule XVII**

17. Not applicable.

### **Rule XVIII**

18. Not applicable.

### **Rule XIX**

19. Not applicable.

### **Rule XX & Rule XXI**

20. The BMLA’s view is that the issue of commission on disbursement and interest & 21. could be usefully merged, the objective being to provide fair compensation for the funding GA expenditure. Although there are differing views, the BMLA agrees, on balance that a fixed rate of interest may be too inflexible. However, if there is to be a variable rate set annually, the BMLA considers that the criteria to be applied in determining any composite rate and the body charged with the task of so doing, are matters which need to be reviewed and debated.

### **Rule XXII**

22. The BMLA agrees this practice should be reflected within the Rules.

### **Rule XXIII**

23. The BMLA has no objections to the time limits presently specified in the 2004 Rules.

