

CMI Standing Committee on General Average

Report – September 2022

Reference is made to the report and draft G/A security documents presented to the on-line Assembly in September 2021. After the Assembly the CMI Members were given the opportunity to comment on the drafts, although the SC asked to restrict comments to crucial points in order not to disturb unnecessarily the pre-approval that had already been obtained from IUMI and ICS. Four Members (Italy, Japan, The Netherlands, and the UK) did submit comments.

Before reporting our considerations in this respect two changes in the SC's composition should be mentioned: Nick Coleman (Norway) is the new Chair of the IUMI Salvage Forum and replaces Daniella de Lint, and Karen Schandy (Uruguay) was added to the SC.

Structured by topics, the major issues were identified and discussed as follows:

1. New YAR as to role and conduct of adjuster

This was a proposal from the Dutch MLA (DTLA) who suggested (sub their No. 2) that such a new rule should be included in the YAR, saying "that the average adjuster has to act independently and impartially."

The SC concluded that it is a problematic concept to use contractual rules such as the YAR for putting an obligation on someone who is not even a party of the contract (i.e. the contract of carriage); probably all such a rule could say is that the parties must ensure that the adjuster is instructed to act as desired. But in any event, as the Dutch deposition stated itself, some jurisdictions do have own rules or laws about the average adjuster, and it may be difficult to interfere with them. For these very reasons a similar proposal had been dismissed in the run-up to the YAR 2016 already.

2. Chapter 6 of the Guidelines „Salvage under LOF“

should, as per the DTLA, be kept more neutral (no „marketing for the LOF“).

The SC members were unanimous in their view that a clear reference to Lloyd's Open Form was useful. LOF does directly concern some of the biggest G/A cases and the security procedure at Lloyd's is a peculiarity. It was already stated in the draft Guidelines that this was one example of a salvage contract, but the SC agreed that an attempt could be made to make this even clearer, and respective changes were made to the draft to put it into perspective.

3. (No) Standard security form for the ship

The DTLA was concerned about the absence of a standard security form for the ship.

When preparing the other forms the SC had discussed this point at some length but concluded that no such form should be offered for the following reasons:

- (a) It is not usually required because in most cases the shipowners are the main party disbursing funds for the GA community and therefore creditors in the adjustment.
- (b) If it is needed it is usually difficult to use standard forms; mostly tailormade solutions will be needed. This was also the ICS' position.
- (c) Producing such form was strongly rejected by some MLAs.

4. Container security

The British MLA proposed that the security forms prepared for cargo should be restricted to cargo in the stricter sense, while the form for bunkers and freight would be more suitable for including container shells ("other property and interests").

None of the average adjuster members of the SC had ever found this problematic in practice; in their experience either the cargo forms were simply used (if necessary with an attached list of container numbers), or container underwriters used their own forms anyway. Also, the SC considered that at least from the ship's perspective container shells clearly are cargo. And finally, the heading of this proposed form, "other property and interests", was deemed problematic because it was unclear from what the distinction was to be made ("other than what"?).

5. Particular clauses

Comments on several particular clauses were received and considered as follows.

5.1. Definitions clause

A clause offering definitions was suggested by the BMLA.

The SC deemed this not only unnecessary but even dangerous as it might not be in line with some applicable local law.

5.2. Clause 3 – Limitation

The BMLA suggested that the cap should include salvage already paid for the secured property (if not readjusted in GA), the limitation then being the contributory value less salvage.

The SC considered this change unnecessary and incorrect because such salvage payments reduce the contributory value in GA (as per Rule XVII of the YAR: "... deduction being also made from the value of the property of all extra charges incurred in respect thereof subsequently to the general average act, except such charges as are allowed in general average...").

5.3. Clause 5. a) (last sentence) – Counter-security

The BMLA voiced concerns that the demand of counter-security might require the ship-owner to put up a bank guarantee which would not make sense as he could then better bear the expenses himself, claim GA interest for it and use that to pay loan interest to his bank.

However, the prototype situation the SC had in mind when drafting the clause was that counter-guarantee would usually be given by way of a P&I Club letter. The SC concluded it should be kept, also for political reasons as inclusion of the clause had been triggered by an IUMI request.

5.4. Clause 5. c) – The law & jurisdiction clause

A clause meant to unify both the applicable law and the forum was, in principle, welcomed by the respondents. However, a couple of issues arose in this respect.

(a) The DTLA opined that it should include an option for arbitration.

The SC concluded that this was a valid point though perhaps difficult to put in writing. However, arbitration is always an option, it can simply be written into the forms as drafted (and could even be agreed later).

(b) The DTLA questioned the fall back on England in case no other choice is made.

This had been discussed at length within the SC in the drafting process but no better solution was found. Also the Dutch deposition did not contain a practical suggestion although favouring the existence of a default solution, and in the end also in the DTLA committee apparently the majority seemed to support the draft as it was.

(c) The BMLA found the final sentence of clause 5. c) problematic, considering it possible that the phrase "without prejudice to the law and jurisdiction governing the contract of affreightment" might render the choice of jurisdiction invalid. After additional explanation and discussion the SC unanimously agreed that such risk should be avoided and that the safest way to this aim was to delete the sentence in question (which had been meant to be nothing more than a clarification anyway).

(d) In its permanent strive to improve the drafts the SC itself found that clause 5. c) ii) could be slightly simplified.

5.5. Clause 5. e) – Non-separation agreement

In connection with the non-separation agreement, both Japan and The Netherlands requested inclusion of the so-called Bigham Clause.

The SC had to confess that this had simply been overlooked. The Clause has been in common use since decades and is part of the YAR since 1994 (in Rule G, fourth para-

graph) – a CMI standard one could say. It is not strictly necessary if the forms are used in cases referring to the YAR 1994 or younger, but it should still be included for the sake of safety and clarity.

(5.6. Clause 6

was reported by the BMLA to be partly lost, but that was just a layout issue – lines had slipped over on to page 2 which was not part of the submitted PDF.)

Concluding remarks

The amended Guidelines and security documents are attached.

This week the SC received confirmation of the drafts' formal approval from IUMI and ICS. With this step, these texts represent an equilibrium that has been arrived at during long discussions with the stakeholders on the cargo / underwriting and the shipowning sides, and we recommend that these Guidelines and the security forms be adopted at the CMI's Antwerp Conference in October.

Bremen, 17th September 2022
Jörn M. Groninger
Chair