



York-Antwerp Rules – CMI Questionnaire

Position Paper of the International Union of Marine Insurers (“IUMI”)

This paper has been prepared by the IUMI Salvage Forum (“the Forum”) at the request of the Executive Committee of IUMI; It represents the views of IUMI who speak for Marine Property Underwriters (“MPUs”) and responds to the Questionnaire drafted by the Comité Maritime International’s (“CMI”) Working Group (“WG”) on General Average (“GA”) which was sent to the presidents of National Maritime Law Associations (“MLAs”) on 15 March 2013.

This is an important topic for MPUs because they pay nearly all GA claims (save cargo’s proportion of GA which is not recoverable due to a breach of contract by the carrier which the Owner will usually collect from his P and I insurers). MPUs are the paymasters of the GA system and so their views should be accorded special weight in any debate concerning amendments to the York-Antwerp Rules (“YAR”).

This memo will follow the numbering of the Questionnaire itself and will, in addition to offering IUMI’s views, try to explain the background to some of the issues under consideration from IUMI’s point of view.

Section 1 - General

1. The Big Picture

1.1 Do you support the “abolition” of General Average?

If MPUs were establishing a system of maritime insurance law from scratch today GA might very well not find a place in it. However GA is over 2000 years old and is incorporated into the legislation of most countries and into most contracts for the carriage of goods by sea. The practical difficulty of abolishing GA would be insurmountable and would involve obtaining the agreement of all countries across the world to an International Convention which would take at least 20 years to get into law. Accordingly “abolition” is not a practical option.

Even if GA was abolished a substantial number of the allowances currently incorporated into the YAR would probably be allowable as a matter of general law under the equitable principles of unjust enrichment in English law and probably in a similar way in many civil law countries. The abolition of G.A. would therefore lead to a number of very



“interesting” legal cases which, after much expensive litigation over a lengthy period of years, would establish a set of precedents something along the lines of G.A. as it existed prior to the YAR which might then be reduced to writing with a view to achieving uniformity of law and practice in the same way that the YAR first came into existence in 1860.

In short there is little to be gained by debating the question raised in paragraph 1.1 of the questionnaire.

Having said all this, the question does not ask whether MPUs should continue to insure G.A. liabilities: this is a question entirely outside the scope of the questionnaire and will not be addressed in this memorandum.

1.2 Are there areas of the maritime adventure where the YAR are an impediment rather than a help to commerce?

There has been a huge amount of criticism of the institution of G.A. for over 150 years and this was well set out in a paper by Nick Gooding entitled “General Average – Time for a Change” dated September 1996 which contained the following passage:

“Moving onto 1915 Mr N.C. Harrison of the United States of America presented a very hard-hitting paper entitled “The Abolishment of General Average”. He suggested that: “Commerce by sea has been fettered by this growing land barnacle for nearly 3000 years. It was useful prior to the introduction of marine underwriting, but has served its time, and should not be allowed to remain as a drag upon the interests of mankind”. He was most certainly not sitting on the fence! In presenting his arguments and his plan he gave three reasons that demanded abolishment of the system completely:

“First – the majority of the parties interested in the maritime adventure of the present day did not understand the system of General Average, and it is so intricate and cumbersome that, in the nature of things, it is not possible for them to gain, in ordinary channels of commerce, even a fair understanding of its workings.

Second – the amount of work required by those interested parties is getting too great.

Third – the expense is enormous”



A detailed analysis of over 1,700 adjustments was carried out by Matthew Marshall (Technical Director, Institute of London Underwriters) in the 1990s which added support for these arguments. Mr Marshall's report revealed that GA was:

- Too expensive: The annual cost of GA claims to insurers was approximately US\$300 million. 10% (US\$30m.) was made up of adjusters' fees and a further 12% was comprised of interest and commission;
- Too slow: Almost two-thirds of adjustments were published in the first two years after a casualty but these accounted for only one third of the money apportioned in GA. Even after seven years only 95% of GA adjustments had been published; and
- Too inequitable: 80% of GA cases were acknowledged to have been caused or were likely to have been caused by the fault of the shipowner or his crew. Nevertheless 60–65% of the total cost of GA claims is charged to innocent cargo interests.

Other criticisms have also been levelled at the system; One that was very commonly heard in the 1980s was that it was used by unscrupulous ship owners as a way of detaining cargo fraudulently so as to extort agreements not to pursue claims for damages for breach of contract and/or to get cargo interests to pay money for the release of the cargo on the vessel to its rightful owners. It was perhaps with this sort of practice in mind that Mr Joseph Hillman, one of the representatives of Lloyd's at the Antwerp Conference of The Association for Reform and Codification of The Law of Nations in 1877, wrote a letter to the Times to describe the system of G.A. as "*a nest of fraud and abuses, a lurking place for peculation and waste. It was in its origin a cumbrous form of partial insurance but the necessity for its use is rendered obsolete by modern underwriting*". He concluded by saying that the chief interest of the subject for the general public lies in the fact that the waste and unproductive outlay incidental to a system which violates the soundest principles of the economy are, in the long run, at the charge of the consumer.

Having said all this there are a number of advantages of a mature G.A. system as well. These include:

- GA encourages ship owners to incur expenses and liabilities for the good of both ship and cargo in the event of a G.A. incident which otherwise they might be reluctant to do in view of the expense involved and the uncertain prospects of recovery from hull and cargo insurers.
- G.A. avoids the need for time-consuming and costly argument between ship and cargo about the apportionment of expenses incurred in the common interest in the aftermath of a GA incident at a port of refuge.



- GA particularly assists in dealing with the problems of getting cargo to destination following the arrival of a vessel at a port of refuge either where it needs repairing so as to continue the voyage or the cargo needs transshipping to destination in another vessel.
- Although the majority of GA sacrifices are made by the owners it should not be forgotten that sacrifices for the common benefit by cargo (e.g. by jettison or by wetting in an attempt to extinguish fire in one or more of the ship's holds) are allowed in GA too.
- Some systems of law (e.g. Spain and the Netherlands) allow a salvor to recover all his salvage remuneration from the shipowner. GA allows the owner to recover cargo's proportion and if GA did not exist then the owner might find it difficult to enforce this right.

On balance therefore G.A., despite its many downsides, is beneficial but should not be extended.

2. Rotterdam Rules

The YAR are designed to govern the allocation of expenses incurred following a GA incident. By YAR Rule D the rights of the parties between themselves arising out of the contract of carriage are expressly excluded from the scope of the Rules. This is largely what the Rotterdam Rules deal with. It is in the interest of all in the maritime community that generally the scope of the YAR is not extended and therefore great caution should be exercised when considering whether and how the Rotterdam Rules should be addressed in the YAR.

However IUMI would like the WG to consider including a new 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 and the economic consequences of the G.A. incident. Such a Rule might, for example, oblige a ship owner to assist cargo interests with evidence to defend a salvage claim which either he had settled or is not concerned with as the ship has a zero salvaged contributory value. Likewise such a Rule could oblige a cargo owner to provide evidence regarding the contents of containers on the vessel which had perhaps caught fire unexpectedly. The introduction of a Rule along these lines should assist in reducing the overall financial consequences of a GA incident.



3. Definitions

This question asks whether definitions should be included in the YAR and, if so what terms should be defined.

Uniformity and clarity is important but a definition section would be difficult to achieve without:

- (a) Analysing all occasions on which the relevant expression or word appears in the YAR; and then
- (b) Thinking of examples of situations involving each Rule in which the word appears and, from this exercise, deriving a common set of characteristics of the word concerned which should then form part of the definition.

It would be a big task to include a definition section for the WG but if it is felt to be worthwhile then words which could perhaps usefully be defined include:

“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



IUMI believes the benefits of brevity outweigh those of “a more self-contained and complete code”.

5. Format

The wording of the YAR should be as easily understood as possible and so it is therefore in everyone’s interest to “tidy up” the wording as was done in the 2004 Rules.

6. Dispute Resolution

The Average Adjusters Association in the UK already offers an opinion service inexpensively and with reasonable speed but only receives a handful (less than five) of references each year. The demand for a GA dispute resolution service would probably not justify the trouble and expense involved in establishing it.

7. Enforcement

IUMI would support any scheme which simplifies the collection of General Average security. GA security from cargo interests usually comprises a GA guarantee signed by the cargo insurer and a GA bond signed by the receiver. The GA guarantee usually provides a guarantee to the shipowner that sums properly payable in GA by the cargo covered by the insurer will be paid when the adjustment is completed. The bond acts not only as additional security but also as a declaration that the signatory will pay, whether or not it is legally liable to do so, because it owns the cargo at the time the maritime adventure terminates. It usually also states a provisional cargo value. Both bonds and guarantees may also deal with non-separation agreements (see Section 3, paragraph 7 below) and may make provision for other issues as the case demands (e.g. which YAR will apply to the adjustment where the bills of lading incorporate different sets of YAR).

The Questionnaire suggests consideration be given to the drafting and inclusion of standard form GA guarantees and bonds in the YAR: IUMI believes this idea should be approached with caution and will very much depend on the precise wording proposed but have no strong objection to the principle of such a proposal.

John McDonald (a well-known London average Adjuster with MacDonald Hebditch – tel: +44 (0)1428 715 533) came up with a suggestion a few years ago which, if fully implemented, could do away with the need to collect GA bonds and guarantees from cargo interests in most cases. This could yield very substantial savings in the cost of handling GA claims especially in those cases where there are many bills of lading. His concept involves the following:



- (a) All bills of lading issued by the shipowner or bareboat charterer (if any) contain a clause by which the parties agree inter alia that the receiver will be liable for all sums properly payable in GA by the cargo described in the B/L. With this in mind BIMCO approved and published a clause for inclusion in Bs/L in 2005 as follows:

“BIMCO Average Bond Clause

On presentation of this bill of lading and payment of any freight due it is agreed that, in consideration of the delivery of the cargo described on the face of this bill of lading (“the cargo”) to the presenter of the bill of lading, or to order, without providing an average bond, the party or parties which present(s) this bill of lading, or their assigns, shall:

(a) pay the proper proportion of any salvage and/or general average and/or special charges which may be ascertained to be properly due from the cargo or the shippers or owners thereof,

(b) where appropriate, contribute to salvage and/or general average and/or special charges in accordance with an adjustment prepared pursuant to the non-separation wording contained in Rules G and 17 of the York-Antwerp Rules 1994,

(c)(i) at the time of presentation of the bill of lading, furnish a copy of the commercial cargo invoice rendered to the receiver, and the identity and contact details of the insurer of the cargo together with such details of the policy as will enable the insurer to identify the cover, and;

(c)(ii) as soon as is reasonably practicable following delivery of the cargo, notify the Carrier, their Agent or appointed average adjusters of the nature and value of any damage to or loss of the cargo.

(d) following delivery of the cargo make a payment on account of such sum as is certified by the average adjusters to be properly due from the cargo and is payable in respect of such cargo by the shippers or owners thereof. Except when the adjustment is made in accordance with the York-Antwerp Rules 2004, rights to claim under this Clause shall be extinguished, unless an action is brought by the party claiming within a period of six years from the date of issue of the general average adjustment.”



- (b) All cargo insurers worldwide agree to assume a direct liability for GA contributions for the cargo they insure (subject to any policy defences of which they might be aware at the termination of the common maritime adventure). This could be done by the inclusion of suitable policy wording with a clear intention that shipowners and other parties to the common adventure should benefit from this undertaking which could be enforced under English law direct against the cargo insurer by virtue of The Contract (Rights of Third Parties) Act 1999. However such a mechanism may not be effective under other legal systems.

This is clearly where the problem with the concept arises as it is quite unclear how this could ever be achieved on a sufficiently wide scale. It might be thought that this is an area where the leading cargo markets could take a lead by producing a new cargo policy wording and IUMI could support this effort by encouraging its widespread adoption. However, such a view would almost certainly be incorrect as marine property insurance markets are very diverse and disunited and would be resistant to the concept of having to issue cargo policies which all included a direct liability clause in it. For this reason the proposal has virtually no prospect of widespread adoption. Having said that, the MacDonald proposal would require no amendment to the YAR as they currently stand as they do not address GA security (except in the form of cash deposits).

8. Absorption Clauses

IUMI can think of no changes which require amendments to be made to the YAR to deal with Absorption Clauses.

9. Piracy

Ransoms are recoverable in General Average only when the payment is legally made under all applicable laws. The laws applicable are usually that of the carrier's/ship owner's principal place of business and the place where payment is actually made. Some countries make ransom payments illegal either totally or for the purpose of procuring the release of crew (as opposed to the ships or their cargoes). Most countries impose restrictions on payments to criminals and terrorists (e.g. money laundering legislation) so that permission from the relevant authorities must be obtained before such payments can be made legally. If the payment is illegal or made illegally then it will not be "reasonable" within the meaning of Rule A or the Rule Paramount in the YAR 1994 or 2004 and will therefore not be recoverable in GA from cargo or hull insurers due to the implied warranty of legality (Marine Insurance Act 1906 Section 41).



There is nothing that can go into the YAR that will override national criminal laws and it would therefore be inappropriate to deal with this aspect of piracy specifically in the Rules. However having said this IUMI can see no real harm if the MLAs advise whether, in their jurisdictions, there are statutory or other restrictions on the payment of ransoms or other related expenses as requested in Section 1, Para. 9(b) of the Questionnaire.

The Belgian Association of Marine Law's response to the Questionnaire raises an interesting issue: where pirates remove all or part of a ship's cargo and then release the ship and crew should the parties to the common maritime adventure treat the removal of cargo as a GA sacrifice in the same manner as a ransom? Morally IUMI feels this issue has considerable force but as a matter of law the cargo interests would have considerable difficulty in arguing their case as the YAR are currently drawn; Because the removal of a cargo will usually be theft it may be unreasonable and outside the Rule Paramount and Rule A. IUMI would therefore be in favour of a new numbered piracy rule which brings takings of cargo by pirates into GA.

10. Costs

(a) Adjusters' fees:

At present adjusters' fees are universally allowed in GA. In the run-up to the debate which led to the adoption of the YAR 2004 IUMI proposed that the adjuster's fees should be paid by whoever appointed him and IUMI remains of the same view.

(b) Costs of collecting security:

Currently the costs of collecting GA security are normally allowed in GA as part of the Adjuster's fee. There is nothing in the YAR or the Rules of Practice adopted by the Association of Average Adjusters which sanctions this practice but IUMI understands it is almost never questioned. IUMI takes no position on this issue.

(c) Format of adjustments:

IUMI can see no reason to regulate the format of adjustments done under the YAR in the Rules themselves. There is however one innovation which would make reading adjustments a great deal simpler: this is that for every allowance made in GA the adjuster should be required to state precisely under what Rule the expense is allowed so that MPUs and their advisers who have to go through these documents do not have to try and second guess why the expense is



included. This is a requirement which would best be introduced through a Rule of Practice rather than an amendment to the YAR themselves.

(d) Involvement of legal and other representatives:

In principle IUMI does not see why such costs should be allowed in GA unless they avoid or minimise the liabilities of the parties to the common maritime adventure arising out of or connected with the GA incident (one example of such costs is the legal costs of the ship and cargo interests in defending a salvage claim).

11. Other Matters

(a) Large Container Ships

The Questionnaire does not identify what is contemplated under this heading but at the CMI Conference in Beijing the debate identified the problems posed by the large volume of cargoes on container ships for adjusters as being an issue which may need to be addressed in the new YAR. This issue is of increasing importance in relation to large container ships where some cargo is of low value and often uninsured and where the cost of collecting security exceeds the cargo's contribution in G.A.. In a paper on LOF Salvage prepared in December 2007 Richard Cornah of Richards Hogg Lindley pointed to the rapid growth in the capacity of large container ships and the problems which this posed for adjusters as well as salvors and continued:

“.....Discarding Low Values

Starting from an adjuster's viewpoint, it is a common practice in dealing with General Average adjustments to consider excluding low value interests from a security collection, or even at the settlement stage, on grounds of economy. Clearly, there is little point in spending US\$200 in fees to collect a contribution of US\$190.

A recent container vessel general average illustrates the point. The total cargo value was an unusually high one of US\$437 million, made up of 3,084 separate interests. (the number of interests is different from the number of containers or TEU on board. It refers to the number of separately owned items of cargo). If values of less than US\$10,000 are omitted the total value drops marginally to US \$435 million, but 484 interests are taken out of consideration. On a 2% general average their contribution would have been only US \$40,000, so the potential savings are clear.



A more radical approach of excluding values below US \$30,000 cuts out no less than 1,100 interests, while reducing the total values by only US\$16,000,000, or 3.6%.

An example with more modest values involved a General Average and Salvage case on an East/West mainline vessel that suffered a fire. The total cargo value is around US\$180 million, made up of 3,898 interests. Omitting values of less than US\$10,000 removes 880 interests but the fund drops by only US\$4 million. The contribution of those 880 interests to a 10% salvage would be around US\$400,000. If they were taken out of consideration, other interests would in theory be paying US\$132 extra each, but if those interests had been excluded ab initio considerable savings would have resulted in adjusters/solicitors/Lloyd's costs in:

- collecting security*
- obtaining information regarding damage/claims etc.*
- calculating salvaged values*
- ascertaining representation*
- notices regarding arbitration and awards*
- collecting settlements*

Our experience shows (and I am certain Lloyd's and solicitors personnel would agree) that lower value cargoes absorb a disproportionate amount of time that also extends the arbitration process. They are more likely to be uninsured or part of a consolidated box or are simply unfamiliar with the commercial procedures. In cases where their presence has a minimal effect on the salvaged fund and the eventual award, is it necessary or sensible to insist that they are brought in, only to gum up the works and increase costs?

The problem of low value cargo in 4,000 TEU vessels may be an irritant that is bearable, but our topic is vessels of twice or three times that size. Even the best systems for handling security would expect to see situations in which the release of higher value cargo will be delayed by the sheer volume of low value cargo competing for attention.

LOF already excludes from consideration personal effects (box 2) and extends this to accompanied motor cars (LSSA Cl. 3.2), for obvious practical reasons. However, if a salvor were to exclude other low value cargo in a container vessel case on the basis that it made practical sense to do so, his decision would be open to attack by other interests at the arbitration. The arbitrator would be obliged to consider his award on the basis of



all the cargo, high and low value, on board the vessel and the salvor would be left with a shortfall. If it is accepted that excluding low value cargo is the right way to proceed when dealing with super-size vessels, it seems inequitable that the salvor should be penalised for an approach that is beneficial to all interests.

If the contractual freedom offered by LOF can be used to exclude personal effects and accompanied motor cars (the York-Antwerp Rules 1994 and 2004 do likewise, but there is no equivalent provision that I can find in the Salvage Convention), then consideration should surely be given to create an option to exclude cargo below a specified value, in appropriate cases.

Having an agreed sliding scale based on size of vessel would be simple if inflexible, and an alternative would be a box to fill in when the LOF is signed by the parties. Entitlement to fall within the exclusion and to be released without security would be demonstrated by producing the CIF invoice for the goods, which is frequently a customs requirement in any event.

The Values Problem

Salvors face some difficult dilemmas when it comes to deciding on the amount of security to demand and the extent to which they use the power given them by LOF, the Salvage Convention and many jurisdictions. Sometimes one encounters a “belt and braces” approach that may be appropriate with a single interest bulk carrier, but does not recognise the difference in exposure when dealing with one interest amongst thousands.

Nonetheless the problems are very real. Too little security demanded or an overly relaxed attitude towards arrest may leave the salvors exposed. Too high a demand will raise the temperature in dealing with salvaged interests and prompt abandonment of cargo. Much of this difficulty is to do with values.

If we examine the container vessel cases that we have on record covering the past 21 years the average value per container comes to around US\$25,000 per TEU. Our average figure has been given wide circulation and often appears in the press, but it needs to be viewed with caution.

Of particular interest is the fact that the average value has changed little during that period, whereas the effects of inflation should have pushed it well over the US\$50,000 mark. The explanation lies in the significant reductions in unit freight costs during that period due to the efficiency of the modern shipping and logistics industries, without which the process of globalisation of trade would never have got off the ground. In the early



days it was only viable to ship relatively high value goods around the world – for example electronic goods from Japan – but now everything from cane furniture to T-shirts can be sent at a profit. The relative uniformity of values from one ship or trade to another has therefore gone and we are faced with radical variations. The highest value we have seen for one container is in excess of US\$20 million (encryption software) and containers of US\$1 million values (e.g. pharmaceuticals, blood plasma) are not uncommon. At the other end of the scale, items are sent that have minimal value other than the cost of the pre-paid freight.

Looking at values on a per vessel basis we have seen average values of US\$75,000 per TEU at the higher end of the scale and US\$11,000 per TEU at the lower. It is therefore important to understand the particular trade in question.....

Cargo Insurers

Given the relatively low cost of cargo insurance (0.2% of CIF value for door to door cover on "All Risks" terms is a commonly quoted indication) it is surprising how much cargo is found to be uninsured. On a recent fire case involving an East/West mainline service there were over 750 uninsured cargo interests on board, roughly 18.75% of the total. We thought this was high, but looking back at six previous cases we found that the average is just over 12%.

If cargo is uninsured it is necessary to obtain a cash deposit, which invariably comes as an unpleasant surprise to the receiver. If the security demand is a high one, their reaction may often be to consider abandoning their cargo; if a cash deposit is forthcoming the costs of the administrative process are often out of proportion to the values involved. During the lengthy and sometimes acrimonious telephone conversations that ensue, it often emerges that receivers have little idea of the modest cost of cargo insurance, perhaps basing their expectations on their latest motor insurance renewal. If the figures regarding annual container movements are correct, 12% of that total surely presents a tempting marketing target for cargo insurers. Although the majority of uninsured cargo is usually of low value, this is not always the case, and we have seen shipments valued in the millions.

Container Operators

Many consortium agreements and slot charterers show little attention to possible issues that may arise in the event of a casualty. Whilst this is understandable in the context of container vessels suffering serious casualties only infrequently, it is something that could be looked at by the industry bodies with a view to producing recognised procedures and



protocols. Typical areas in which one often seems to be re-inventing the wheel each time a casualty occurs include:

- Responsibility for holding cargo in relation to a general average lien by the shipowner or a salvor's lien.
- responsibility for port of refuge expenses, such as handling, storing or forwarding cargo.
- agreement to provide an ISU 2 undertaking to salvors.

Consortium operation often leads to a clash of interests once a casualty has occurred, as consortium members seek to prove that one of their number brought (for example) the spontaneously combusting container on board. Separate legal representation then follows and the developing disputes can slow down the effective management of the casualty and its aftermath.

Although not exactly comparable, the oil industry has developed offshore fields on a consortium basis for many years. Liabilities are effectively pooled by extensive "hold harmless" clauses which often embrace the main contractors. Should a similar regime be appropriate for the modern container operation, so that the focus remains on client service rather than attributing liabilities?

Consolidators

Not all shippers wish to send a complete container load and a separate branch of the industry has grown up to serve their needs. Various referred to as freight forwarders, Non Vessel Owning Common Carriers and consolidators, specialist companies ship their containers under an ocean bill of lading, and then issue their own documents to the owners of goods they consolidate into that container.

At present the responsibility to provide salvage security rests with the individual owners of the goods rather than the consolidators. This creates a number of significant practical problems:

- the owner of the goods is one step further removed in the communication link following the casualty.
- a container cannot be released until all cargo in it has been secured, so that interests that provide security promptly will be held up by those that do not.



- *those shipping goods in consolidated containers typically fall within the lower bands of values referred to above.*

I am sure that Lloyd's Salvage and Arbitration branch and all solicitors regularly involved in such matters would confirm our experience that consolidated cargos involve time and trouble that is wholly disproportionate to their contribution to the salvaged fund and ultimate award. Figures from six recent cases showed that on average only some 5% of boxes were consolidated, but consolidated cargo interests (i.e. separate receiving parties) formed 30% of the total number on board, which gives a clear indication of the imbalance between the costs of collecting security and eventual contributions.

At present, we seek a partial solution by obtaining special undertakings on a case by case basis. These allow the consolidator to take delivery of the containers without security being provided; the consolidator can then unstuff the container in his premises and release parcels of cargo as and when these are secured. If any cargo is released without security the consolidator becomes liable for the relevant salvage payment. This is at best a partial solution – the terms of the agreement have to be agreed by salvors and if, as often happens, an ISU 2 form has been signed, by the issuer of the ocean bill of lading. The situation would be improved if such undertakings were built into the contract between the consolidator and the carrying line, but the cleanest solution would undoubtedly be for consolidators to assume, and insure, the liability of "their" cargo for general average and salvage.

Summary

The current system has the potential flexibility to adapt to the demands of the super-size vessels. However, steps need to be taken to explore and utilise the insurance options that are available, at the same time recognising that collection of security in order to "pass around the hat" will still be necessary in some cases, and that the systems for doing this need to be reviewed. Such a review should be a matter for all parts of the salvage community to be involved in, to ensure that a rational and commercial system is maintained."

The Lloyd's Special Salvage Arbitration Clauses 2011 have now partially addressed some of the problems caused by large container ships in LOF salvage arbitrations by introducing clauses 13 – 15 which (in their recently revised form) read as follows:



“13. Where an Owner of salvaged cargo has not appointed an agent or representative on his behalf to receive correspondence and notices but security has been put up on behalf of that Owner of salvaged cargo, service of correspondence and notices upon the party or parties who have provided such salvage security shall be deemed to constitute proper notification to such Owner of salvaged cargo.

14. Where any agreement(s) is/are reached between the Contractors and Owners of salvaged cargo comprising at least 75% by value of salvaged cargo represented in accordance with Clause 7 of these Rules, the Arbitrator shall have the power to take into account the terms of any such agreement(s) and to give it or them such weight as seems to him to be appropriate as regards the Owners of all salvaged cargo who were not represented at the time of the said approval.

15. Subject to the express approval of the Arbitrator, any salvaged cargo with a value below an agreed figure may be omitted from the salvaged fund and excused from liability for salvage where the cost of including such cargo in the process is likely to be disproportionate to its liability for salvage.”

As the YAR stand Adjusters are bound to apportion G.A. expenses over all the parties interested in the common maritime adventure even if this is not economic. The practice of Adjusters of ignoring low value cargoes has no legal basis and is consequently open to challenge (although it is hard to comprehend why any party would go to this trouble and expense). Since the practice is plainly in everyone's best interests it should be explicitly sanctioned in the YAR themselves. IUMI is therefore in favour of a change in the Rules allowing the practice of ignoring small value cargo in the adjustment if the increase in the rest of the parties' contribution to G.A. disbursements would be outweighed by the reduction in the cost of including the small value cargo in the Adjustment.

11. (b) The Currency of the Adjustment

The currency of a GA Adjustment under English law is chosen in the same way as a claimant chooses his currency of claim in a tort case. This was summarised by Wilberforce L.J. in *The Folias* [1979] A.C. 698; [1979] 1 Lloyd's Rep. 6 as follows:

“A Plaintiff has to prove his loss: if he wishes to present his claim in his own currency, the burden is on him to show to the satisfaction of the Tribunal that his operations are conducted in that currency and that in fact it was his currency that was used, in a normal manner, to meet the expenditure for which he claims or that his loss can only be appropriately measured in that currency (this would apply in the case of a total loss of a



vessel which cannot be dealt with by the ‘expenditure’ method). The same answer can be given to the objection that some companies, particularly large multi-national companies, maintain accounts and operate in several currencies. Here again it is for the Plaintiff to satisfy the court or arbitrators that the use of the particular currency was in the course of normal operations of that company and was reasonably foreseeable.”

In practice the majority of GA adjustments are done in US Dollars. Expenditure is converted at the time it is incurred at the applicable exchange rate and some months or years may elapse before the parties to the common maritime adventure are asked for their proportionate contributions. During that time exchange rates can move both for and against those claiming in GA and those contributing. This has, in the past, led, in extreme cases, to situations where underwriters have had to pay more than 100% of the insured value of the contributing interest in GA, particularly in the case of cargo underwriters in countries whose currencies are somewhat volatile. Some cargo underwriters seek counter-security from their assureds in respect of any amount by which the cargo’s contribution, converted into the local currency at the time of payment, exceeds the insured value of the cargo; but this is by no means a universal practice.

The nature of the test used to choose the currency of the adjustment means that it is hard to predict, at the time GA security is given, what currency the adjustment will be in and to hedge accordingly. One obvious way of dealing with this sort of situation would be to put up GA security by way of a cash deposit but this is, for understandable reasons, not a popular solution to the problem amongst cargo underwriters.

The uncertain question of the currency of the adjustment causes underwriters difficulty in predicting their exposures to GA contributions. This has led to a suggestion that all adjustments should be stated in one currency unless otherwise agreed. This would go some way towards removing the uncertainty of the current position and allow MPUs (in particular cargo underwriters) to take steps to protect their position in times of exchange rate uncertainty.

A reform along these lines could increase MPUs’ exposure (in the event that the currency of the adjustment was fixed in a currency which eventually turned out to be stronger than that of the currency in which it might otherwise have been adjusted). But such a reform would mean that MPUs would at least be able to predict with more certainty what their exposure could be and they might thereby be enabled to take steps (such as hedging or providing GA security by way of a cash deposit) to protect their position. For this reason IUMI recommends a change to the YAR along these lines.

Section 2 – Introductory Rules

1. Rule of interpretation



IUMI has received no reports of any problems caused by the wording issue raised in the WG's Questionnaire and in the circumstances can see no real need to reword the Rule of Interpretation.

2. Rule Paramount

IUMI sees no reason to amend the Rule Paramount as set out in YAR 1994 and 2004.

3. Rule of Application

The Questionnaire explains the role of the Rule of Application which, broadly speaking, is to ensure that, wherever possible, the version of the YAR which is under discussion will apply whenever the contract of carriage contains a clause incorporating the YAR of a particular date and "any subsequent amendment or modification thereof" (or similar wording). At present opinion is divided as to whether or not clauses incorporating a particular set of the YAR "or any amendment or modification thereof" (or similar wording) has the effect of incorporating a later set of the Rules. The AAA takes the view that it does not but a substantial number of London lawyers differ on this point. The incorporation of the Rule of Application will avoid arguments like this and IUMI are therefore in favour of the inclusion of a Rule of Application in the 2016 Rules. If the parties to the common maritime adventure wish to incorporate a previous set of YAR into their contract of carriage they can still do so by simply incorporating, for example, the YAR 1994 but omitting words such as "and any subsequent amendment or modification thereof".

Section 3 – Lettered Rules

1. Rule A

No amendment is necessary.

2. Rule B

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

Until YAR 1994 no specific Rule dealt with tug and tow situations. In the USA there are conflicting decisions as to whether or not GA applies to tug and tow situations under the YAR 1974 and its predecessors. The 1994 and 2004 YAR make it clear that they do. The middle paragraph of Rule B states:



“When measures are taken to preserve the vessels and their cargoes, if any, from a common peril, these Rules shall apply”.

The words “if any” were inserted to ensure that a GA could arise in a tug and tow situation even though the tow may be carrying no cargo.

IUMI’s members have come upon this problem mostly in relation to circumstances where the tug, fearing for its safety, casts away the tow which then becomes a total loss. In such circumstances it has effectively sacrificed the tow to preserve the tug. Rule B addresses this problem in the following words:

“A vessel is not in common peril with another vessel or vessels if by simply disconnecting from the other vessel or vessels she is in safety; but if the disconnection is itself a general average act the common maritime adventure continues”.

This begs the question: is the tug acting for the common benefit by casting off a tow in order to save itself? IUMI takes the view that this ought to be a General Average situation whereby the tug interests bear a proportion of the cost of the sacrifice of the tow. At present this is not the effect of the Rule however.

Finally it should be pointed out that this is a problem which is infrequently encountered because many towage contracts (e.g. TOWCON and TOWHIRE) do not incorporate the YAR.

- 2.2 IUMI cannot think of any further provisions which are needed to deal with allowances under Rules X and XI relating to tug and tow at a port of refuge.

3. Rule C

- 3.1 Should cargo owners be able to claim “loss of market” in GA?

“Loss of market” is not usually covered under cargo policies and if it were to be recoverable in GA MPUs would end up paying for it through GA in circumstances when it would not otherwise be covered. IUMI therefore opposes the inclusion of “loss of market” in Rule C.

- 3.2 (a) IUMI adopts a neutral position concerning the Questionnaire’s suggestion that a reference to the exclusion of liabilities in Rule C should be included;



- (b) IUMI agrees that it should be made clear that the second paragraph of Rule C should make it clear that “in respect of” includes preventative measures.

4. Rule D

See comments on Rotterdam Rules in Section 1 Para. 2 above.

5. Rule E

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

YAR 1994 introduced a requirement that all parties claiming in GA had to give the average adjuster written notice in respect of the loss or expense for which they claim contribution within 12 months of the date of the termination of the common maritime adventure. Failing such notification or if, within 12 months of a request to supply evidence in support of a notified claim or particulars of a contributory value the request has not been responded to, the average adjuster may estimate the extent of the allowance or the contributory value on the basis of the information available to him.

The purpose of this amendment was to give the adjuster a way of speeding up the publication of adjustments and has been widely welcomed. IUMI therefore opposes any alteration to this provision at this stage unless compelling evidence that it is not working properly is adduced.

- 5.2 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?

This question is slightly misconceived. The wording of the clause was intentional – cargo interests will be more likely to give information relating to claims if they are asked for it rather than if they just have to volunteer it. It is therefore thought reasonable that no estimate of contributory values should be made by an adjuster until 12 months after a request for information about values has remained unresponded to. If a request is made for information about values then the time logically should be extended so that information in respect of both claims and values have to be provided by the same time. IUMI’s answer to Question 5.2 is “no”.

6 Rule F – Substituted expenses



- 6.1 IUMI believes that there is no need to revisit the section of Rule F referred to in the Questionnaire.
- 6.2 (a) IUMI opposes the proposal to extend Rule F to include “loss” as suggested in 6.2(a) of the Questionnaire.
- (b) It is not thought that this proposed amendment is vitally important but, in the interests of uniformity, a definition of “expenses” could be a useful addition to the Rules in certain limited circumstances.
- 6.3 IUMI considers that the expenses of towing to destination and forwarding cargo should be allowed as GA without having to consider savings. This means that no change to the wording of Rule F is required.

7 Rule G – Frustration of the voyage

- 7.1 The Questionnaire asks whether a better formula than that already in operation could be devised to determine a reasonable cut-off point for allowances in GA in the event of the frustration of the voyage.

The background to this question needs a little explanation. The classic definition of frustration in English law was stated by Lord Justice Radcliffe as follows: “*Frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni – it was not this that I promised to do*”. *Davis Contractors Limited –v- Fareham UDC* [1956] AC 696 at 728 to 729.

The effect of the doctrine of frustration is to excuse the parties from performing any further obligations under the contract although the contract is not void *ab initio*. Thus, in contracts for the carriage of goods by sea, prepaid freight is not returnable when the voyage is frustrated short of the contractual discharge port but freight at risk of the shipowner would not be payable except possibly where the receiver voluntarily takes delivery of the cargo short of destination.

The doctrine of frustration applies when events or circumstances are of such a character that to hold the parties to the contract would be to impose upon them some new and different contract. The test of whether the events or circumstances are of such a character as to produce frustration is objective. Frustration must not result from the fault



of either party. The operation of the doctrine of frustration is not excluded merely by a clause in the contract in which the parties make certain provisions for the subsequent event: *Jackson –v- Union Marine Insurance Co. Limited* [1874] LR 10 CP 125.

Where a ship is not worth repairing at the port of refuge the shipowner is, in a business sense, prevented from carrying the goods to their destination; and if the preventing causes are excepted he is excused from performing his contract. If, however, the ship can be repaired without unreasonable sacrifice on the part of the shipowner, and funds for the purpose can be procured, then he is bound to repair her; and, having done so, is bound to carry on the goods to their agreed destination. He has not, in that case, been prevented, in a business sense, from performing his contract.

The question then is when is a shipowner bound to repair his ship and carry the cargo on to destination? English jurisprudence on this point is confused: the learned authors of Carver on Carriage by Sea 13th Edition Volume 2 Paragraph 1238 suggest that one test would be whether, when repaired, the vessel's value would exceed the cost of the repairs. A test much along these lines was adopted in *Assicurazioni Generali –v- Bessie Morris SS. Co.* [1892] 1 Q.B. 571 where Collins J. (upheld by the Court of Appeal) held that a shipowner was bound to repair and complete the voyage unless the ship was a constructive total loss. In *Kulukundis –v- Norwich Union Fire Insurance* [1937] 1 K.B. 1 the question arose whether the cost of such temporary repairs as were necessary to complete the voyage or the cost of permanent repairs were to be taken into account. The Court of Appeal held by a majority that it was only temporary repair costs that were to be taken into account rather than permanent repair costs (although, in a dissenting judgment, Scott L.J. held that the shipowner was entitled to abandon the voyage only if “a merchant ship employed in his business should be so damaged that as one of his fleet and an asset of his business it would not be worth his while to incur the costs of repair”, and the ship was, therefore, “commercially lost”).

It is also possible that a voyage can be abandoned because of the condition of the cargo (for example see the “*Savona*” [1900] P. 252).

In practice where a voyage is abandoned and the cargo is removed G.A. expenditure remains recoverable up to the time that ship and cargo part company even though this may be some time after notice of abandonment is given.

A not uncommon example is where a vessel puts into a port of refuge for the common safety to repair damage suffered due to an accident or sacrifice which comes within the ambit of the YAR. Cargo is discharged to enable the vessel to be dry-docked and repairs carried out. The time required for these operations is not such as to frustrate the



performance of the contract of carriage nor justify the abandonment of the voyage. The shipowner is therefore entitled to store the cargo ashore in a warehouse while repairs are carried out to the ship and ultimately to reload the cargo and proceed to the contractual destination. These expenses are recoverable under YAR Rules X and XI. However to avoid this delay, the shipowner may decide to tranship the cargo or part of it on another vessel and forward it to the destination port. By taking this course, the shipowner will save time and expense but, if the YAR 1974 or any of its predecessors apply, unless the parties to the adventure agree otherwise, the separation of the ship from the cargo (or part cargo, in these circumstances) could bring the common adventure to an end and thereby prejudice the shipowner's right to recover certain GA allowances particularly under Rules X and XI.

When the shipowner is contemplating transhipping the cargo to a destination in another vessel in circumstances where the YAR 1994 or 2004 do not apply he will probably be advised by his average adjuster to seek Cargo's agreement to a Non-Separation Agreement ("NSA") which is usually attached to the Average Bond and/or Guarantee for signature by the cargo receiver and insurer respectively. This will not be necessary if the contract of carriage incorporates the YAR 1994 or 2004 because an NSA is automatically incorporated into Rule G. Under an NSA, the cost of forwarding cargo to destination up to the GA expenses avoided are allowed in GA and payable by all parties. If no NSA is used, the forwarding expenses incurred can also be allowed in GA but only if they come within the scope of Rule F (substituted expenses).

The form of NSA incorporated into the YAR 1994 and 2004 contains a "Bigham Clause". The Bigham Clause appears at the end of Rule G and reads as follows:

"The proportion attaching to cargo of the allowances made in General Average by reason of applying the third paragraph of this Rule shall not exceed the cost which would have been borne by the owners of the cargo if the cargo had been forwarded at their expense".

The Bigham Clause gives those concerned in cargo a guarantee that, come what may, by signing the NSA or agreeing to YAR 1994 or 2004 they will never be called upon to contribute to GA more than the equivalent of a notional second freight plus the costs of taking delivery at the port of refuge. In other words at the very worst, they would be placed in the same position as if they had taken delivery of the cargo at the port of refuge.

This being the state of English law the question sometimes arises, particularly in circumstances where a ship becomes incapacitated relatively close to its final port of



discharge, whether or not the cargo interests can collect their cargo upon payment of the full freight without having to contribute to ongoing GA expenses after the cargo has been removed. The question was considered by the Canadian Federal Court of Appeal in *Ellerman Lines Limited –v- Gibbs, Nathaniel (Canada) Limited and Others (“the City of Colombo”)* [1986] LMLN 170. Whilst at Montreal “severe” and “extensive” engine damage was discovered requiring repairs which, it was estimated, would last up to eleven months. The appellant shipowners offered to forward the cargo remaining on board to its destination, Toronto, in return for a signed Average Bond incorporating a NSA. The cargo respondents refused to sign an NSA and obtained an interlocutory injunction ordering the shipowners to deliver the Toronto cargo in return for a signed Average Bond only. The dispute centred on two points:

- Whether or not a GA situation existed; and
- If so, whether the cargo respondents were liable to contribute to expenses incurred after the discharge of their cargo since the shipowners had been forced by the injunction to release it.

In a majority decision the Court held that there was a GA detention at Montreal since the repairs were necessary for the safe prosecution of the voyage. The Court was, however, unanimous in deciding that having paid the freight, the cargo respondents were entitled to delivery of the cargo in Montreal and were not liable for GA expenses incurred after the date of discharge. The Court did not address itself explicitly to the question of whether the shipowners could oblige the cargo owners to sign an NSA in the circumstances, but the clear implication of their decision was that they had no right to do so. The result, therefore, was that the Toronto cargo did not have to contribute towards expenditure incurred subsequent to discharge because these expenses were not incurred for the common safety of the ship and the cargo but for the safety of the ship alone.

Now that an NSA has been included in Rule G of the YAR 1994 and 2004, Cargo would have to contribute to such expenses even after they had collected the goods and the question posed by the Questionnaire is really whether this is a desirable situation.

Clearly for cargo insurers the sooner GA expenses stop accruing the better. On the other hand, the longer Cargo contributes in GA to the repairs the better for hull insurers. In these circumstances there cannot be a unified IUMI position.

However it may be worth considering whether a clearer cut off point should be agreed for GA allowances in circumstances where at least the cargo has been removed and the



common maritime adventure has come to an end. This is something that would assist MPUs in circumstances where the law on frustration is relatively unclear as it would add a degree of certainty and predictability to the current rather unsatisfactory situation. However the difficulty in formulating a replacement for the current doctrine of frustration is that what may be suitable for one set of circumstances could be rather unjust in relation to another. Accordingly although more certainty would be desirable, its benefits might be outweighed by the potential injustice that might be inflicted by the introduction of, for example, a rule that the common maritime adventure should be deemed to have terminated if not resumed a fixed number of days after the GA incident.

Finally it must be recognised that many civil systems of law do not recognise the doctrine of frustration and have different tests to English law for the termination of a voyage e.g. force majeure. If any wording were to be included in Rule G to deal with this issue, it would have to recognise that other systems exist and accommodate them in whatever wording was decided upon.

In summary, this is a very difficult issue and probably is not one which should be dealt with in the YAR even though it would be desirable to achieve international uniformity on it.

- 7.2 Should “Non-Separation Allowances” in General Average continue once the vessel has completed its repairs and is available for trading?

IUMI believe that it would be desirable that an express statement is included in Rule G saying that once the casualty is available for trading GA allowances should cease.

- 7.3 IUMI considers that the requirements for notification in Rule G should be retained and are unaware of any difficulties in practice.

- 7.4 The Questionnaire asks where a voyage is frustrated by reason of delay until when should Non-Separation allowances continue? IUMI’s view is that they should continue up to the point at which the delay becomes sufficient to frustrate the voyage (assuming no new test of the termination for GA allowances is introduced – see 7.1 above). Frankly the sooner GA allowances stop the better for MPUs. The alternative test of when it “becomes apparent” that the voyage is frustrated is too subjective to be suitable, especially as only the shipowner will know all the facts.

- 7.5 This question really is a re-statement of the question in 7.1 and the answer is the same: it would be desirable to find an independent and simple set of criteria for establishing an



equitable cut-off point for Non-Separation allowances but IUMI cannot think of how this could be made to work.

Section 4 – Numbered Rules

1 – 5 Rules I to V

No comment.

6. Rule VI – Salvage

6.1 This is the single most important issue for IUMI in this review and so a detailed note of the background to it is justified.

In England in the 19th century salvage was not generally readjusted in GA because it was apportioned over values at the time and place where the services ended rather than at the termination of the voyage. In the 20th century this position slowly changed through Rules of Practice in 1926 and 1942 culminating in Rule VI of the 1974 YAR. This required salvage to be reapportioned in GA in all cases. The allowance of salvage remuneration in GA in all cases has been much criticised as being an over complication leading to significantly higher expense for MPUs. Two sets of security are required to cover the same money and the whole adjustment is prolonged, sometimes for years.

Under the YAR 2004 Rule VI was amended so that salvage contributions and associated expenses would not be readjusted in GA unless one party pays another's proportion. YAR 2004 Rule VI (a) reads as follows:

“Rule VI. Salvage remuneration

7.5.1 Salvage payments, including interest thereon and legal fees associated with such payments, shall lie where they fall and shall not be allowed in General Average, save only that if one party to the salvage shall have paid all or any of the proportion of salvage (including interest and legal fees) due from another party (calculated on the basis of salvaged values and not General Average contributory values), the unpaid contribution to salvage due from that other party shall be credited in the adjustment to the party that has paid it, and debited to the party on whose behalf the payment was made ...”



Opponents of the proposal argued that the inclusion of salvage in GA produced a fairer result in certain types of situation. One example is the case where a second casualty affects the values at the termination of the adventure and thus the apportionment. Although rare in the experience of the IUMI's members it must be acknowledged that a few cases a decade like this do occur and the problem is only partly addressed by GA disbursements insurance. However it is not felt that this occasional event is sufficiently important to justify retaining the Rule in YAR 1974 and 1994.

A few jurisdictions such as Spain and the Netherlands contain laws which entitle a salvor to claim the full amount of the salvage reward from the shipowner allowing him to recover an indemnity in respect of cargo's proportion in GA. However the new Rule recognises this problem and allows the shipowner to recover cargo's proportion in such circumstances.

It was argued in the debate on the YAR 2004 in favour of reapportionment that if one party to the adventure is able to use commercial or other pressures to reach a particularly favourable negotiated settlement with salvors leaving the other parties to pay the full cost of arbitration, the figures are readjusted in GA and some semblance of justice is achieved. Supporters of IUMI's position responded to this by saying that underwriters are content to suffer this occasional loss as it would save them more in incidental adjusting costs.

In some cases the shipowner makes a deal with the salvor and leaves cargo to negotiate a settlement as best he can. The shipowner may then produce no GA adjustment and, even if cargo underwriters are inclined to publish an adjustment of their own in such cases, in practice this very seldom, if ever, happens not least because the adjuster will require the co-operation of the shipowner to do so; so the present system which largely ignores YAR 2004 can produce unfair results from differential salvage settlements too.

The case for reform was put most eloquently by Ian Stevens lately of Lloyd's Claims Office's GA Department shortly after the 1994 YAR were approved:

"For some reason or another, which I cannot readily ascertain, Rule VI – salvage remuneration – never seems to get much of an airing. And yet if there is any Rule which causes aggravation this surely is it.

Prima facie, the wording of the Rule is innocuous, particularly when the shipowner has incurred expenditure in the nature and salvage on behalf of all parties to the common adventure, and thereafter seeks to recover the cargo owners' share or shares in General Average.



What really aggravates me ... are those situations where each party to the adventure provides its own security to salvors and separately settles its proportion of the salvage remuneration. Why in the name of the York-Antwerp Rules, is it necessary to go through what may be a lengthy and costly process of re-apportioning the salvage settlements in General Average, often in instances where the salvaged and contributory values are more or less identical? And why should one or more parties who may have had the expertise and good business sense to settle with salvors for a lesser remuneration than paid by other salvaged interests lose the benefit of their skill, because all payments are thrown into the melting pot of General Average?

All this nonsense only adds to the cost of General Average.

My section has seen a number of adjustments where the General Average expenditures comprised the salvage remuneration and very little else. If the salvage had been excluded the adjustment fees would probably have been of limited amount but the inclusion of the salvage has enabled a considerable inflation of the charges. Not good news for cargo or for underwriters”.

Even if salvage is not allowed in GA it will still be deducted in calculating contributory values and so the adjustment cannot be completed until the final amount of the salvage charges paid by each interest is known. So, it is argued, this amendment will not radically speed up the production of adjustments (although it will make them cheaper and more infrequent). This argument can be addressed by an amendment to Rule XVII as to which see below.

At the Plenary Session of the CMI Conference in Vancouver on 4 June 2004 the motion to remove salvage from GA was carried by 23 votes to 3 (the three dissenting MLAs being Greece, Brazil and the Netherlands).

This is by far the most significant change which was made to the YAR by the 2004 Rules: It is estimated to be worth about 10% to 12% of the sums shifted in GA to MPUs which is more than all the other changes made by the YAR 2004 put together.

The payment of salvage in GA is funded entirely by MPUs and so salvors and shipowners should be indifferent to it, as should their representatives such as the ICS and P&I Insurers since it is something in which they have no financial interest.

Some adjusters say it is their practice to “approach the parties” if it seems likely that the effect of reappportioning salvage will be disproportionate to the time and cost involved. As a matter of English law adjusters are the agents of the party by whom they are



appointed which is normally the shipowner. So in practice, if the adjusters have misgivings they must first ask the owner (and, in practice, usually his P&I insurer too) whether they wish to have an adjustment and only if the owner's answer is positive do the hull and cargo insurers get approached. It is not uncommon for adjustments to be prepared (despite the practice of some adjusters) which are little more than a restatement of the salvage with interest commission and adjusters' fees added on just increasing the cost of the loss. It is true that because Rule XVII requires contributory values to be reduced by their contributions in salvage that not much will be gained in the speed it takes to publish an adjustment. However, in practice little will be lost if an amendment were made to Rule XVII to change this. An example may assist to illustrate how this could work:

(a) A salvage award of US\$10 million is made against ship and cargo;

(b) The salvaged contributory values of ship and cargo are

ship salvaged value US\$30 million pays US\$3,750,000 (37.5%);

cargo salvaged value US\$50 million pays US\$6,250,000 (62.5%);

(c) The GA contributory value would be arrived at by deducting the amount paid by ship and cargo in salvage from their values at the termination of the common maritime adventure. However, assuming that no further damage was suffered by ship or cargo between the time the salvage services terminated and the time the common maritime adventure terminated, the percentage contributions of the parties would not change. The ship's contributory value would be (US \$30 million minus US \$3,750,000) US \$26,250,000 or 37.5% of the fund while cargo's value would be (US \$50 million minus US \$6,250,000) US \$43,750,000 or 62.5%.

So if Rule XVII was amended so as to delete the requirement that salvage contributions should not be taken into account in arriving at GA contributory values, adjustments might well often be produced more quickly.

Page 16 of the Questionnaire suggests five ways of dealing with salvage in GA and, having in mind all the foregoing, IUMI is in favour of adopting the 2004 position (Option (ii)) and (c) (an amendment to Rule XVII) so that salvage payments are not deducted from contributory values and salvage is not allowed in GA unless one party pays another's proportion.



6.2 Legal and other Costs

The working parties' questionnaire proceeds upon the assumption that the "present Rule VI makes no reference to legal and other costs incidental to a salvage operation and subsequent award". In fact Rule VI of YAR 2004 does and it is in MPUs' interest that this should remain the position. Accordingly, IUMI's answer to 6.2 (a) is "yes" and the answer to 6.2 (b) is "no".

7 & 8 Rules VII and VIII

IUMI members generally favour replacing the word "ashore" with the word "aground" which means the same. The word ashore is now almost never used to describe ships but is much more frequently used in the context of describing the location of someone who has been on a ship but who has now gone onto the land.

If the word "reshipping" is to be replaced with the word "reloading" it will have to be made clear whether the expression "reloading" can include loading onto another transshipment vessel and is not confined to loading back onto the casualty itself. This is a relatively simple issue with which the working party should have little difficulty.

9. Rule IX

No comment

10. Rule X

10.1 IUMI believes that the amendment suggested in the Questionnaire would be clearer and increase uniformity of practice and should be supported.

10.2 The statement which the Questionnaire suggests is a reflection of the current legal position in any event. If the voyage is frustrated or voluntarily terminated, the cost of discharging cargo is not allowed in GA so the amendment would change nothing: Cargo usually has to pay discharge costs in full in such circumstances in any event. However, the wording "if repairs are not carried out for some reason" could usefully be included for clarification.

11. Rule XI – Port of Refuge Allowances



- 11.1 IUMI's position on crew wages in the run-up to the CMI Conference in Vancouver was that crew wages, while at or deviating to or from a port of refuge, should not be allowed in GA. IUMI argued that crew wages are a loss caused by delay and that to allow them in GA was contrary to Rule C and discriminated in favour of shipowners against cargo who cannot recover other losses caused by delay such as loss of market.

Allowing the crew wages while deviating to and from a Port of Refuge (but not while at a Port of Refuge) was a compromise wrung out of IUMI's representatives when it appeared that no changes to Rule XI might get through unless the concession was made. Although this issue is worth only about 1% of the monies shifted in GA, it is controversial because shipowners themselves would have to pay the wages if they were excluded from GA, whereas pretty well everything else in GA is funded by insurers. Nevertheless the removal of all crew wages at or deviating to or from a place of refuge remains on IUMI's wish list.

- 11.2 The decision on the meaning of the expression "port charges" in the *Trade Green* [2000] 2 *Lloyd's Rep* 451 should be dealt with either in a definitions section, if one is introduced (see Section 1 paragraph 3(c) above), or in Rule XI. IUMI agrees it would be desirable to clarify what is meant by the term and disagree with the result of the High Court's decision in the *Trade Green* on the meaning of the expression "port charges". Briefly the facts of the case were:

The "*Trade Green*" had carried a cargo of rice in bags from Bangkok to Aqaba under bills of lading providing for York-Antwerp Rules 1974, and while discharging alongside, a fire broke out in the engine room. On the instructions of the port authority the vessel was taken by tugs to an anchorage outside the port where the fire was brought under control by the vessel's crew. The vessel was towed "deadship" back to the berth the following day to complete discharge. The tug charges were the largest part of the general average and were allowed by the adjusters on the basis that the services of the tugs were the consequence of an order to leave the berth and were therefore port charges recoverable under Rule XI(b). Cargo interests challenged the adjustment and amongst four preliminary issues that came before Moore-Bick J. was the meaning of "port charges" in YAR Rule XI(b) on which point he said:

"In this context I think that the natural meaning of the expression "port charges" in r.XI(b) is apt to include any charges which the vessel would ordinarily incur as a necessary consequence of entering or staying at the port in question. That would obviously include standard charges and levies of all kinds and may also extend to charges for standard services such as garbage removal which may or may not be optional but would be regarded as ordinary expenses of being in port. It is unnecessary to decide that point



in the present case, but I note that this is the view put forward by the editors of Lowndes & Rudolf at para 11.32. Ordinary tug charges for assisting the vessel into and out of the port might well fall within r.XI(b), therefore, but it is much more difficult to bring the towage charges in the present case within it. They were not ordinary charges which any vessel using the port could expect to incur and apart from the fact they were levied by the port authority bore little similarity to port charges in the accepted sense. I do not think that r.XI(b) can be construed to 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).”

Lowndes & Rudolf in *General Average and York-Antwerp Rules* (13th Edition, 2008) comment at paragraph 11.29:

“If, by this passage, Moore-Bick J. meant that any charges beyond the standard ones, which any vessel using the port would incur, cannot qualify as “port charges” it is contrary to established practice and it is submitted that it goes too far.”

IUMI respectfully agrees with the learned authors of Lowndes & Rudolf (one of whom, Richard Cornah, is on the CMI Working Party) and reckon the next edition of the YAR should clarify the position. Any amendment should ensure that such charges have to be incurred in the common interest to come within the Rule; if this is done then in fact the decision in the *Trade Green* would remain the same because in that case it was common ground that the tug charges were only incurred for the benefit of the ship and not the cargo too. This suggestion, if implemented, will ensure that, for example, the cost of a stand-by tug required by a port authority at a place of refuge will be allowed as a port charge.

If this is done, it will, in some cases, increase the burden of G.A. contributions on MPUs and directly benefit shipowners who would otherwise have to bear this expense. This concession is offered in a spirit of compromise in the hope that some other allowance such as that suggested in relation to crew wages (see Section 3, paragraph 11.1 above) will be allowed too.

- 11.3 There is a substantial difference in practice regarding the cost of detention of a vessel and cargo following termination of salvage services at a port of refuge or the cost of detention whilst security is being lodged for any other sort of claim (such as pollution or a



cargo claim for example). Some American and European adjusters allow such detention under Rule XI while others, notably in England, tend not to, taking the view that as these issues are not specifically mentioned in Rule XI, they are governed by Rule C which says losses caused by delay are not recoverable in GA.

Clearly uniformity and clarity are desirable and a change in the wording of Rule XI should be made to reflect this.

Since the late provision of security is usually not the responsibility of all parties to the common maritime adventure, but only some, it may be argued that the loss should not fall on all parties equally. How such losses are allocated must be open for discussion: one view is that the owner should secure the cargo then exercise a lien at the discharge port for security for an indemnity; this may however not be possible in some countries. Another view is that the cargo owner who fails to lodge, for example, salvage security, thereby delaying the prosecution of the common maritime adventure, should be responsible to all other parties to the common maritime adventure for such delay unless he was given late notice of such requirement for security and gave security within a reasonable time of learning of the demand. Against this it would be pointed out that this could leave one small cargo interest having to bear the full cost of detaining a large ship and all its cargo which would be disproportionate.

IUMI's view is that all issues caused by delay should be excluded and should not be reintroduced in General Average. This would be consistent with the spirit of ICC "A" clause 4.5 which excludes losses caused by delay.

- 11.4 The question asks whether the wording of the proviso to Rules X(b) and XI(b) fulfil their intended purpose: IUMI believes they do and that they should not be changed.
- 11.5 The 1994 Pollution Compromise made in Sydney between MPUs and P&I insurers is important. Rule C YAR 1994 & 2004 states:

"In no case shall there be any allowance in general average for losses, damages or expenses incurred in respect of damage to the environment or in consequence of the escape or release of pollutant substances from the property involved in the common maritime adventure".

Rule XI(d) acts as a kind of buy-back for the types of pollution loss listed specifically therein. MPUs who cover GA liabilities adjusted under YAR 1974 may find that they cover a portion of pollution liabilities if they fall within Rule A, but under YAR 1994 and 2004 this is not possible except in the very limited circumstances that Rule XI(d)



describes. It is important for MPUs that the balance that was achieved in Sydney is not disturbed and for this reason IUMI believes no change is required to Rule XI(d). The wording is largely trouble free and there is no need to include any reference to bunkers in it.

12 & 13. Rule XII and XIII

No comment

14. Rule XIV – Temporary Repairs

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

Under the YAR 1994 the cost of temporary repairs of a ship at a port of refuge relating to damage suffered for the common safety or caused by a GA sacrifice is allowed in GA. Under the 2004 YAR this does not change. However the position in relation to temporary repairs of *accidental damage* is treated differently. Under the 1994 YAR they are allowed “*without regard to the saving, if any, to other interests, but only up to the saving in expense which would have been incurred and allowed in GA if such repairs had not been effected there*”. To this, YAR 2004 added the following proviso:

“Provided that for the purposes of this paragraph only, the cost of temporary repairs falling for consideration shall be limited to the extent that the cost of temporary repairs effected at the port of loading, call or refuge, together with either the cost of permanent repairs eventually effected or, if unrepaired at the time of the adjustment, the reasonable depreciation in the value of the vessel at the completion of the voyage, exceeds the cost of permanent repairs had they been effected at the port of loading, call or refuge”.

The effect of this amendment is that the recovery of the cost of temporary repairs of accidental damage (but not repairs for the common safety or of damage caused by a GA sacrifice) at a port of refuge is limited to the amount by which the cost of the permanent repairs at the port of refuge exceeds the sum of the temporary repairs plus the permanent repairs actually carried out (or, if none, the depreciation in the vessel’s value at the completion of the voyage).

The capping of the amount allowed as temporary repairs in this manner is sometimes called the “Baily” method. The clause is supposed to address the complaints sometimes voiced by cargo interests that although they have contributed to the cost of temporary repairs at a port of refuge thus enabling the shipowner to repair at a much cheaper repair port than the port of refuge, the cargo interests get no benefit from the saving to hull interests in the reduction of the GA claim.



There will not be very many cases when the proviso will come into operation but in the few cases each year when it will, there will be a significant redistribution of money. It is hard to put an average value on the amount that this amendment gives to MPUs but it will probably be no more than 1%.

IUMI does not believe that any change is justified in the wording of Rule XIV YAR 2004.

14.2 IUMI's members have not encountered any practical difficulties regarding the application of Rule XIV in the aftermath of the House of Lords' decision in the "*Bijela*" [1992] 1 *Lloyd's Rep* 636.

15 **Rule XV**

No comment.

16 **Rule XVI**

The questionnaire raises an important point about the calculation of cargo values on the basis of invoices which increasingly often now cover the cost of carriage before and/or after the sea voyage. The effect of multimodal transport invoices will be that a proportion of cargo values and sums made good are overestimated in some adjustments. However, there seems little that can be done about this in practice as there is no easy way of separating the non-sea voyage carriage costs from the costs of the sea voyage in most invoices. In the circumstances IUMI cannot really see how an improvement can be made to Rule XVI in practice.

17. **Rule XVII – Contributory values**

IUMI is in favour of the removal of the allowance for amounts paid in salvage from the calculation of contributory values of ship and cargo in general average for the reasons described in relation into Rule VI above.

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

No comment.

20. **Rule XX- Commission**

Rule XX(a) YAR 1994 entitles parties to a commission of 2% on disbursements except crew wages and maintenance and fuel and stores not replaced during the voyage. Commission on GA disbursements was abolished in the YAR 2004.



At the CMI's Conference in Vancouver IUMI argued that commission merely duplicated interest and that most administrative costs such as communications, travel, bank charges etc. are already included in adjustments in practice quite often based on an adjuster's estimate. Originally commission was supposed to act as an incentive to the shipowner to put up money for GA disbursements. Then the 1924 YAR introduced interest on GA disbursements for the first time. With the emergence of the practice of allowing administrative costs in addition to interest it was felt that commission was a duplication and had no part to play. This argument met with very little opposition at Vancouver and accordingly Rule XX(a) YAR 1994 was omitted from the YAR 2004.

IUMI believes that the requirement to pay commission should not be included in the next set of YAR.

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?

Interest under YAR 1974 and 1994 is charged on GA expenditure, sacrifices and allowances at the rate of 7% per annum. Under the YAR 2004 the interest rate is fixed each year by the Assembly of the CMI and published on their website at www.comitemaritime.org. Between January 2005 and December 2013 the rate has varied between 2.75% (2013) and 6% (2009) averaging 4.3125%. Accordingly this represents an average saving of 2.6875% each year between 2005 and 2013 on sums moved in GA. For this reason it is clearly in the MPUs' best interests to maintain the variable interest rate system introduced by the YAR 2004. Clearly this benefit will disappear should interest rates climb above 7%. IUMI nevertheless wishes to maintain the treatment of interest introduced by the YAR 2004.

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

There is pressure to increase the rate of interest on GA disbursements by calculating it in another way on the grounds that shipowners often pay more to borrow money than borrowers in other lines of business. The Assembly of the CMI is obliged to fix the rate in accordance with guidelines. Briefly they should start from one year US Dollar loans but if the rate of interest for one year loans in Sterling, Euros or Japanese Yen differs substantially from the interest rate applying to one year loans in US Dollars this should be "taken into account". IUMI believes the present Guidelines are both logical and fair and wishes to maintain them as they are. Accordingly the answer to Question 21.2 is "no". However if the amendment described in Section 1, paragraph 11(b) (that all G.A.



adjustments should be done in one currency) were to be adopted then regard could be had to that currency's interest rates exclusively.

22. Rule XXII – Treatment of cash deposits

Rule XXII YAR requires cash deposits collected in respect of cargo's liability for GA etc. to be paid into a special account "*in the joint names of a representative nominated on behalf of the shipowner and a representative nominated on behalf of the depositors in a bank to be approved by both...*".

Most UK banks will now not permit joint accounts to be held or make it so difficult that it is impracticable. In the circumstances Rule XXII is outdated and needs to be replaced. The Questionnaire suggests that the current practice adopted by adjusters of holding deposits in trust accounts in their own name should be expressly recognised in the new YAR. It is unsatisfactory that in order to make the YAR operate in practice adjusters have to adopt a method of holding cash security which is not sanctioned by the Rules and could therefore, in certain circumstances, expose them to liability. IUMI accordingly agrees the next edition of YAR should expressly recognise the current practice of holding money in trust accounts but the new rule should expressly state the terms upon which the cash is to be held and released.

23. Rule XXIII – Time bar

IUMI pressed for a time bar in respect of contributions to GA for many years prior to the introduction of the YAR 2004. Hull and cargo insurance is a short tail business and insurers are anxious to speed up the closure of cases whenever possible. Accordingly a new Rule XXIII was introduced into the YAR 2004 as follows:

“(a) Subject always to any mandatory rule on time limitation contained in any applicable law,

(i) Any rights to general average contribution including any rights to claim under general average bonds and guarantees, shall be extinguished unless an action is brought by the party claiming such contribution within a period of one year after the date upon which the general average adjustment is issued. However, in no case shall such an action be brought after six years after the date of termination of the common maritime adventure.



(ii) These periods may be extended if the parties so agree after the termination of the common maritime adventure.

(b) This Rule shall not apply as between the parties to the general average and their respective insurers.”

At Vancouver the representatives of several countries, particularly in South America (but also some provinces in Canada) pointed out that this time bar would be ineffective in their jurisdictions because in their law time limits are a matter of public order and cannot be altered by contract. The German representatives had difficulty with the clause because under their law, a right of action to claim GA contributions does not arise until the adjustment is published. Theoretically therefore if the adjustment was published more than 6 years after the termination of the common maritime adventure the claim would be time barred before the right to sue for GA contributions had even accrued. One suggestion to resolve this problem might be to delete the last sentence of Rule XXIII(a)(i) and insert, after the word “issued”, the following:

“...or after six years after the date of termination of the common maritime adventure whichever is the later.”

IUMI has not sought German legal advice to check whether this amendment would produce the desired result in Germany.

Despite these objections IUMI feels that the clause should be inserted while recognising that in some countries it would not be enforceable. Generally the clause is enforceable in common law countries and in some of the civil law countries; where it is not, the time limit will be of assistance to those countries which are formulating or reviewing their maritime codes.

However the most important functions of the provision are to encourage adjusters to produce their adjustments more quickly and to ensure that claims are not left open indefinitely. Accordingly IUMI’s view is that the time bars introduced by Rule XXIII YAR 2004 should be retained and be incorporated into the 2016 Rules (but possibly with the minor amendment described above).

Ole Wikborg, President of IUMI

Date 30th August 2013

Lars Lange, Secretary General of IUMI

Date 30th August 2013