

General Average & Overview of York Antwerp Rules-2016

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A new version of York Antwerp Rules (YAR) was approved on 6th May 2016, at a conference convened in New York by Comité Maritime International (CMI). The new Rules are culmination of a drafting process which began in 2012 CMI Conference held at Beijing by setting up an International Working Group.

INTRODUCTION

On 6th May 2016 a new version of York Antwerp Rules, the contractual regime governing the ascertainment of general average contributions was adopted at a conference convened by Comité Maritime International. The new Rules entitled were York Antwerp Rules-2016, which were culmination of a drafting process that began in 2012 at the CMI conference in Beijing following the failure of 2004 Rules which were last updated and adopted at Vancouver conference of CMI. The purpose for new Rules to be drafted was to solve the impasse which has prevented a general acceptance of YAR-2004. These Rules have been unacceptable to many shipowners including BIMCO (Baltic and International Maritime Council) which had issued circulars to its members recommending against the use of the Rules and had refrained from incorporating the Rules in their standard documents. As a result, YAR-2004 are very rarely incorporated into shipping contracts and, therefore, are rarely used.

Widespread uniformity of general average adjustments exists today on the basis of YAR-1974 & YAR-1994. Generally, it should be noted that there have been few Court cases in the recent years concerning the interpretation and application of the version of these Rules, implying that the balance achieved in the tried and tested fundamental principles that have prevailed must continue to be applied.

An International Working Group (IWG) was set up to carry out general review of York Antwerp Rules and to draft a new set of Rules to meet the requirements of ship and cargo owners and their respective insurers. A detailed questionnaire was sent out by IWG seeking feedback from Maritime Law Association, International Chamber of Shipping, BIMCO and leading Association of Average Adjusters. The challenge before International Chamber of Shipping (ICS) and the International Union of Marine Insurance (IUMI) was to find a durable compromise on the issues that proved to be contentious between the cargo interests and ship owning community, following the adoption of York Antwerp Rules-2004.

York Antwerp Rules-2016 makes very few changes to the principles based on which general average is presently adjusted. Rather the changes are mostly concerned with improving the processes by which general average is adjusted and contributions collected from the perspective of time involved and expenses incurred. These Rules stand a good prospect of

being adopted in place of York Antwerp Rules-1994 which are at present most commonly incorporated by reference into charter parties, bills of lading and contract of affreightment.

For the first time, the new Rules are also accompanied by a guidance document entitled 'CMI Guidelines relating to General Average'. These guidelines are not intended to be binding but provide information as to the basic principles of general average adjustment and collection of security. As detailed herein it also explains the role of an Average Adjuster and General Interest Surveyor.

WHY GENERAL AVERAGE

Suppose, a ship carrying valuable cargo consigned to a number of consignees strands on a reef and the Master orders for part of the cargo to be jettisoned, as a result of which the vessel refloats and, after repairs, is able to complete her voyage with rest of her cargo. It is apparent that the Master would have other alternatives, such as, engage tug assistance to tow the vessel off the reef, risking additional damage to the vessel's bottom and, consequently, to the cargo through leakage; or he might have tried forcing her off the reef using main engines and ground tackles only with similar risks as well as probable damage to such machinery and equipment, or he might have jettisoned cargo of other consignees, etc. Each of these alternatives might give rise to loss, damage or prejudice owners of different property involved in the maritime adventure.

In a situation of peril following marine casualties, a conflict of interest will often arise naturally from the need to choose from the various means available for saving the situation. To revert to the specific example, the owner of cargo jettisoned might well have preferred the Master to choose one of the other alternatives mentioned or, for that matter some cargo other than his own to have been selected for jettison/sacrifice. General average owes its origin to that conflict of interest and is a device whereby, as far as possible, the conflict is eliminated. Through general average the owner of the cargo jettisoned has his loss shared by all the other interests involved whereby the owner of the property sacrificed is placed as nearly as possible in the same financial position as the owners of the property saved by that sacrifice. In accordance with Master's judgement as a seaman, as to what is best for the ship and cargo as a whole, without regard to the conflicting rights and interest of the various owners of the property is accepted as one of the cardinal

principles of general average from over many centuries. Master takes the best action he can in the circumstances without regard to question of general average at all.

TYPES OF EVENTS THAT GIVES RISE TO GENERAL AVERAGE

General average system is a valuable means of dealing with losses and expenses following a marine casualty where sacrifices have been made or expenses incurred for common safety. The following are examples which frequently give rise to general average and of type of general average sacrifices and expenditure which are likely to be involved. The list below is not exhaustive and there can be other situations which can give rise to general average:-

- Jettison of cargo or ship's parts, such as, sails and mast in order to lighten the ship either to ride the storm, or to refloat a grounded/stranded ship.
- Damage to vessel and abuse to machinery arising through efforts to refloat a stranded ship.
- Damage caused to ship and cargo by efforts undertaken in extinguishing/quenching shipboard fire.
- Heavy weather, collision, machinery breakdown or other accident involving damage to ship and resort to or detention at a port.
- Expenses of bearing up for port of refuge damage due to incident, either for carrying out repairs necessary for safe prosecution of voyage, or for common safety, or at times due to shifting of cargo in heavy weather.
- Vessel immobilized at sea after main engine breakdown and subsequent towage to port of refuge.

One or more of the above occurrences may give rise to a claim for salvage and payment made towards salvage charges is also treated as general average in accordance with Rule VI of York Antwerp Rules-1974.

HOW WOULD THESE INCIDENTS BE RESOLVED WITHOUT GENERAL AVERAGE?

The system of general average is important as it gives the Master freedom of action in a crisis, knowing that any loss would be met by equitable contribution, whichever course he might choose. Had the mechanism not been in place there could be a possibility of Master's action being questioned or conflict of interest in making an alternative choice, or Master being prejudiced to save the ship rather than cargo whilst choosing from the various alternative present before him in given set of

circumstances. Due to this, general average has been an established feature of marine commerce for many hundreds of years before shipowners and merchants first conceived the idea of protecting themselves from the financial risks involved in that commerce by means of insurance. Thus, general average exists and must be considered quite independently of marine insurance.

PRINCIPLES OF GENERAL AVERAGE

General average though not a doctrine forming part of the Law of Insurance, Section 66 of Marine Insurance Act-1906, contains a definition on general average loss.

66(1) A general average loss is a loss caused by or directly consequential on a general average act.

(2) There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperiled in the common adventure.

Rule-A of YAR introduced in 1924 is very closely modeled on the English statutory definition which defines general average as 'there is a general average act when and only when any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety, for the purpose of preserving from peril the property involved in common maritime adventure'.

Essential Elements of General Average

1. **Extraordinary Sacrifice or Expenditure** - Ordinary expenses incurred, or losses suffered by the shipowner in fulfilment of the contract of affreightment are not admitted as general average. Specific example of the application of this principle is evident in Rule VII of the York Antwerp Rules, which deals with damage to vessel's machinery. Working the engines of the ship where the vessel is aground and in peril is considered to be an 'abuse' of the machinery and, therefore, extraordinary, whereas working the engines when the vessel is afloat, however much the adventure may have been in peril and the ship and cargo may have received benefit from the action taken, is considered as part of normal function of the machinery and any resultant damage is not admitted as general average. Thus, consumption of extra fuel to take resort to a port of refuge following warning of a storm is usually not admissible in general average. The question normally asked is, was the sacrifice or the expenditure truly extraordinary and out of the usual course, or was it encompassed within the shipowner's obligations under and in performance of the contract of affreightment?

2. **Intentional, Deliberate & Voluntary** - The Act must be intentional or voluntary and not inevitable and it should be noted that the property cannot be said to have been 'sacrificed' if it was already lost at the time of the so called sacrifice. The word 'intentional' is to distinguish the resultant loss from the one that is entirely accidental in origin. Thus, if a vessel strands and rips open her bottom, the damage to the ship and to the cargo in any affected hold is the direct and immediate result of an accident, and the respective owners of the ship and the damaged cargo will each bear their own losses without contribution. But if, in order to refloat the stranded vessel and her cargo –

- cargo is jettisoned, and/or
- lightened/off loaded into another vessel, and/or
- salvage tugs are employed to refloat her, and/or
- ship's engines are damaged when working them aground,

Each of these losses, although having its origin in the initial accidental stranding, is really the result of an intentional act and will generally be admissible as general average. Rule IV of York Antwerp Rules illustrates this principle, which states that 'loss or damage sustained by cutting away of the wreck or parts of the ship which have been previously carried away or are effectively lost by accident shall not be made good as general average'. Whereas, Rule V of York Antwerp Rules provides that loss or damage consequent upon intentionally running the ship on shore or voluntarily beaching the ship for common safety shall be allowed in general average.

3. **Common Peril** - There must be a real and substantial peril whereby the common safety of the adventure is threatened. Peril can exist only after some accident or other extraordinary circumstances has operated and caused damage which impairs the seaworthiness, maneuverability or general ability of the ship to withstand the normal maritime perils. The distinction between action taken for common safety in time of peril and precautionary measures taken is very fine and the distinction can be explained with an example. A vessel adrift without motive power in mid ocean would be held to be in peril, even if the weather is calm at the time and there is no immediate risk of further loss or damage. Whereas, where a Master seeks shelter for a sound vessel in an anchorage because of reports of an approaching cyclone, this would not normally be regarded as giving rise to general average.

4. **Common Safety** - The sacrifice or expenditure incurred for the safety of one interest alone can never be general average; the peril sought be avoided must affect all interests. Action taken must be for common safety and not merely for safety of part of the property involved e.g. a

vessel carrying refrigerated cargo taking resort to a port of refuge following breakdown of refrigerating machinery is not general average. This is because threat of loss or damage is limited to the refrigerated cargo and, as far as the ship and the remaining cargo which is not in peril, the voyage would continue safely. Thus, the deviation to port of refuge for repairs of refrigerating machinery would not give rise to general average.

5. **Reasonable** - Sacrifice made or expenditure incurred must have been reasonably made. In practice, the word 'reasonably' is probably used more as an earnest hope, rather than as a mandatory expectation. In the case of sacrifice, one hopes for instance that it will be the lower valued cargo in the lower hold which will be selected for jettison rather than the valuable general cargo in the tween deck, though by its very stowage and the greater ease with which it can be lifted out of the hold, the valuable general cargo is likely to be the first to be jettisoned. The Master, as the person on the spot and in the agony of movement, should be and generally is credited with the benefit of any doubt as to the wisdom of his actions, provided a real peril exists; hind sight and the superior wisdom of the desk bound operative should be ignored.

YORK ANTWERP RULES AND ITS VARIOUS REVISIONS

General average varied in its development in different leading maritime countries, so that by the later part of 19th century substantial difference existed in the Law and Practice throughout the world. This led to confusion and at times injustice amongst the chief maritime countries. In view of the international character of shipping, the disadvantages of this were obvious and, thus began the quest for uniformity and same principles of general average, which resulted in adoption of York Antwerp Rules following Conferences in York and Antwerp in 1864 and 1877 respectively. These Rules were further revised in 1890, 1924, 1950, 1974, 1994, 2004 & 2016 to keep abreast of developments in trade and commerce and changes in Law. Universal application of the York Antwerp Rules in cases of general average has come about by them being incorporated by reference into bills of lading, contract of affreightment and marine insurance policies.

The background of development of these Rules can still be seen in the present layout of the Rules, in which the general principles are stated in the lettered Rules (A to G) and the specific matters in the numbered Rules (I to XXIII). Rule of Interpretation which defines the relative weight to be given to lettered and numbered Rules respectively and, the effect of local Law and Practice on the interpretation of Rules as a whole was prefaced in the York Antwerp Rules-1974. Rule Paramount was introduced in 1994 and the effect was that in no case shall there be any allowance for sacrifice or expenditure unless reasonably made or incurred. This was following the reaction to English

case 'The Alpha' (1991) 2 Lloyd's Rep 515 [Corfu Navigation Co. and Bain Clarkson Ltd. v. Mobil Shipping Co. Ltd.] where it was held that Rule VII of YAR does not use the word 'reasonably'. In the same version, Rule of Interpretation was also amended to provide that Rule Paramount and the numbered Rule shall take precedence over the lettered Rules.

OVERVIEW OF YORK ANTWERP RULES-2016

The new York Antwerp Rules-2016 approved by CMI and supported by both International Chamber of Shipping/BIMCO and IUMI included number of minor changes, amended numbering system and greater consistency in the terms used. More significant changes and additions are discussed below alongwith the non-binding guidelines drawn up by the International Working Group to assist commercial interests who might be coming across general average matters for the first time. The focus of changes was primarily on retaining the general average system as a valuable means of dealing with losses and expenses following a marine casualty, while ensuring that costs and delays involved in the process were minimized wherever possible.

The changes and addition to the York Antwerp Rules is shown below in italics alongwith brief explanation in italics bold.

Rule of Interpretation: No changes

In the adjustment of general average, the following Rules shall apply to the exclusion of any Law and Practice inconsistent therewith.

Except as provided by the Rule Paramount and the numbered Rules, general average shall be adjusted according to the lettered Rules.

Rule Paramount: No changes

In no case shall there be any allowance for sacrifice or expenditure unless reasonably made or incurred.

Rule A – Definition of General Average: No changes

1. There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure.
2. General average sacrifices and expenditures shall be borne by the different contributing interests on the basis hereinafter provided.

Rule B – Tug and Tow General Average

1. There is a common maritime adventure when one or more vessels are towing or pushing another vessel or vessels, provided that they are all involved in commercial activities and not in a salvage operation.

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

2. *If the vessels are in common peril and one is disconnected either to increase the disconnecting vessel's safety alone, or the safety of all vessels in the common maritime adventure, the disconnection will be a general average act.*
3. *Where vessels involved in a common maritime adventure resort to a port or place of refuge, allowances under these Rules may be made in relation to each of the vessels. Subject to the provisions of paragraph 3 and 4 of Rule G, allowances in general average shall cease at the time that the common maritime adventure comes to an end.*

A specific Rule dealing with a tug and tow situation was first added in 1994. Such cases give rise to difficult question of principles and interpretation bearing in mind the fact that such charges are generally governed by specific terms in towage contract that have no equivalent in conventional shipping. The changes in 2016 provides greater clarity on tug and tow GA cases arising from 'disconnection' as well as, new provision on port of refuge expenses for all vessels involved in such cases.

There have been legal cases giving rise to difficult questions of principle reflected in the very different approaches taken by the Courts in USA (*J P Donaldson 1897 and S C Loveland Co. v. USA, 1963*), Canada (*Northland Navigation Co. Ltd. v. Patterson Boiler Works Ltd., 1983*) and Scandinavia (*The Alppi v. The Bjorn Eskil, 1989*) on the vexed question of community of interest between tug and tow, on what constitutes a situation of common peril and the requirement that the disconnection constitutes a general average act. The 2016 revision to the Rule B gives more clarity on these questions.

Rule C – Causation and the Rule as to Consequences: No changes

1. Only such losses, damages or expenses which are the direct consequence of the general average act shall be allowed as general average.
2. 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.

3. Demurrage, loss of market, and any loss or damage sustained, or expense incurred by reason of delay, whether on the voyage or subsequently, and any indirect loss whatsoever, shall not be allowed as general average.

Rule D – The Effect of Fault: No change

Rights to contribution in general average shall not be affected, though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the common maritime adventure, but this shall not prejudice any remedies or defences which may be open against or to that party in respect of such fault.

Rule E – The Onus of Proof

1. The onus of proof is upon the party claiming in general average to show that the loss or expense claimed is properly allowable in general average.
2. *All parties to the common maritime adventure shall, as soon as possible supply particulars of value in respect of their contributing interest and, if claiming in general average, shall give notice in writing to the Average Adjuster of the loss or expense in respect of which they claim contribution and supply evidence in support thereof.*
3. *Failing notification, or if any party does not supply particulars in support of a notified claim within 12 months of termination of the common maritime adventure, or payment of the expense, the Average Adjuster shall be at the liberty to estimate the extent of allowance on the basis of information available to the Adjuster. Particulars of value shall be provided within 12 months of the termination of common maritime adventure, failing which the Average Adjuster shall be at liberty to estimate the contributory value on the same basis. Such estimates shall be communicated to the party in question in writing. Estimates may only be challenged within 2 months of receipt of the communication and only on the grounds that they were manifestly incorrect.*
4. *Any party to the common maritime adventure pursuing a recovery from a third party in respect of sacrifice or expenditure claimed in general average, shall so advise the Average Adjuster and in event that a recovery is achieved, shall supply to the Average Adjuster full particulars of the recovery within 2 months of receipt of the recovery.*

The Adjuster on IWG had identified delays in providing information as a key area in which improvements could be made with resultant cost saving. Two principal changes have been made with the aim of reducing the time taken in adjusting general average and collecting contributions. In the 1994 Rules, Rule E had afforded the Adjuster the power to make assumptions as to the amounts of allowances and contributory values in order to fill in the gaps with the information available. The time limit which must elapse

before this power arises has been tightened up in the new Rules i.e. particulars of value and particulars in support of a claim to GA contribution must be provided within 12 months failing which the Adjuster shall be at liberty to make such estimation.

Paragraph 4 of Rule E is a new provision whereby there is now an express obligation on part of contributory interests to supply to the Adjuster full particulars of any recoveries from third party within 2 months of receipt of the recovery. This inclusion was intended to speed up the adjusting process by providing a clearer timeline for documents and evidence.

Rule F – Substituted Expenses: No change

Any additional expenses incurred in place of another expense which would have been allowable as general average shall be deemed to be general average and so allowed without regard to the saving, if any, to other interests, but only up to the amount of the general average expense avoided.

Rule G – Contributory Value & Non-Separation Agreement

1. General average shall be adjusted as regards both loss and contribution upon the basis of values at the time and place when and where the common maritime adventure ends.
2. This Rule shall not affect the determination of the place at which the average adjustment is to be prepared.
3. When a ship is at any port or place in circumstances which would give rise to an allowance in general average under the provisions of Rules X and XI, and the cargo or part thereof is forwarded to destination by other means, rights and liabilities in general average shall, subject to cargo interests being notified if practicable, remain as nearly as possible the same as they would have been in the absence of such forwarding, as if the common maritime adventure had continued in the original ship for so long as justifiable under the contract of carriage and the applicable law.
4. *This limit shall not apply to any allowances made under Rule F.*

In 1994 Rules and 2004 Rules the 4th paragraph read as ‘the proportion attaching to cargo of the allowances made in general average by reason of applying the 3rd 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’.

These are essentially the wordings of old ‘Bigham Clause’ and the inclusion of which results in operation of a cap on cargo’s contribution to general average allowances made under Non-Separation Agreement (NSA) in Rule G of the York Antwerp Rules. Whilst the NSA has the advantage of permitting cargo owners promptly to recover their cargo in circumstance where delay might otherwise ensue, whilst at the same time obliging

them to contribute to general average for as long as it would otherwise be owing. The 'Bigham Clause' places a cap on cargo's contribution to such allowances by providing that it 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.

In the working papers produced for the CMI meeting at Istanbul in June 2015, an issue was raised requiring clarification on whether the cap should only apply to allowances made under the Non-Separation Agreement, or else whether it should also apply to allowances under Rule F, e.g. as to the expenses of forwarding cargo to destination aboard a substitute tonnage i.e. cost of transshipping cargo in another vessel.

By way of example, suppose a ship has put into a port of refuge, and it is estimated that repairs necessary for the safe prosecution of voyage will last for considerable number of days. Instead of the cargo languishing during the period of repairs, it is decided to forward it to the destination. By virtue of the NSA in Rule G, the cargo owner will be obliged to contribute to general average as though the cargo remained in-situ; such allowances could include detention expenses and cargo handling cost at the port of refuge. In addition, the forwarding expense would also be allowed in general average under Rule F, in so far as they avoid general average expenses which would otherwise have been incurred at the port of refuge e.g. storage of cargo, reloading expenses and detention costs. A question was whether the amount of cargo's contribution to allowances made under Rule F and under the NSA in Rule G should be aggregated before applying the cap or else whether the cap should only apply to cargo's contribution to allowances made under the NSA of Rule G. In the new wording, it has been confirmed that the cap should apply only to the latter endorsing the view, which had been held by most of the British Adjusters.

Thus, the additional words added in paragraph 4 are intended to resolve an area of uncertainty, controversy and differences in adjusting practice on the interpretation of Rule G.

Rule I – Jettison of Cargo: No change

No jettison of cargo shall be allowed as general average, unless such cargo is carried in accordance with the recognized custom of the trade.

Rule II – Loss or Damage by Sacrifices for the Common Safety: No change

Loss of or damage to the property involved in the common maritime adventure by or in consequence of a sacrifice made for the common safety, and by water which goes down a ship's hatches opened or other opening made for the purpose of making a jettison for the common safety, shall be allowed as general average.

Rule III – Extinguishing Fire on Shipboard: No change

Damage done to a ship and cargo, or either of them, by water or otherwise, including damage by beaching or scuttling a burning ship, in extinguishing a fire on board the ship, shall be allowed as general average; except that no allowance shall be made for damage by smoke however caused or by heat of the fire.

Rule IV – Cutting Away Wreck: No change

Loss or damage sustained by cutting away wreck or parts of the ship which have been previously carried away or are effectively lost by accident shall not be allowed as general average.

Rule V – Voluntary Stranding: No change

When a ship is intentionally run on shore for the common safety, whether or not she might have been driven on shore, the consequent loss or damage to the property involved in the common maritime adventure shall be allowed in general average.

Rule VI – Salvage Remuneration

- a) Expenditure incurred by the parties to the common maritime adventure in the nature of salvage, whether under contract or otherwise, shall be allowed in general average provided that the salvage operations were carried out for the purpose of preserving from peril the property involved in the common maritime adventure and *subject to the provisions of paragraphs (b), (c) and (d).*
- b) *Notwithstanding (a) above, where the parties to the common maritime adventure have separate contractual or legal liability to salvors, salvage shall only be allowed should any of the following arise:-*
 - i) *There is a subsequent accident or other circumstances resulting in loss or damage to property during the voyage that results in significant differences between salvaged and contributory values,*
 - ii) *There are significant general average sacrifices,*
 - iii) *Salvaged values are manifestly incorrect and there is a significantly incorrect apportionment of salvage expenses,*
 - iv) *Any of the parties to the salvage has paid a significant proportion of salvage due from another party.*
 - v) *A significant proportion of the parties have satisfied the salvage claim on substantially different terms, no regard being had to interest, currency correction or legal costs of either the salvor or the contributing interest.*

- c) Salvage expenditures referred to in paragraph (a) above shall include any salvage remuneration in which the skill and efforts of the salvors in preventing or minimizing damage to the environment such as is referred to in Article 13 paragraph 1(b) of the International Convention on Salvage, 1989 have been taken into account.
- d) Special compensation payable to a salvor by the shipowner under Article 14 of the International Convention on Salvage, 1989 to the extent specified in paragraph 4 of that Article or under any other provision similar in substance (such as SCOPIC) shall not be allowed in general average and shall not be considered a salvage expenditure as referred to in paragraph (a) of this Rule.

One of the major objections and unwillingness of the ship-owning community to adopt 2004 Rules was Rule VI of the revised Rules.

It has been an especially vexed question whether, or not to allow salvage remuneration in general average, which was generally allowable until 1994 Rules and was radically curtailed under the 2004 Rules. Whilst salvage has been the quintessential general average expense, there is a concern that if ship and cargo have already paid salvage separately, particularly under Lloyd's Open Form of salvage agreement based on salved values at the place of termination of salvage services, the allowance of salvage in general average requiring re-apportionment over contributory values assessed at the termination of the adventure, may only give rise to additional costs and delay.

The arguments for exclusion of Salvage from General Average and, for inclusion of the same were set out in the Working Party Report that was presented at the Vancouver Conference.

Some of the arguments for excluding salvage from general average were:-

- *Unnecessary duplication of apportionment of salvage remuneration between contributing interests when included in general average;*
- *Generally, the proportions are not changed significantly but the cost of readjustment may be relatively high;*
- *Basically, to cover same money, two sets of security are collected viz. general average and salvage security;*
- *Prolongs and delays the whole operation;*
- *Additional work for cargo underwriters;*

Arguments for inclusion of salvage in general average:-

- *Produces an equitable and fairer outcome at the end;*

- *To leave salvage where it falls may result in serious injustice especially in cases where the sacrifice is added back in general average in computing the contributory values;*
- *A second casualty can materially reduce the values at the end of the adventure and thus the apportionment;*
- *To expedite salvage settlement many a times salvage remuneration is assessed on the basis of approximate figures and final apportionment may be done in general average after fine tuning the amounts;*
- *Where salvage has been paid in full by the shipowner and cargo's proportion to be collected in general average;*
- *In some serious casualties, general average security will still be collected to protect shipowner's likely financial exposure which may not be fully known and the possible extent of cargo's sacrifices which cannot be determined at that stage without delaying the release of cargo;*
- *In case where one of the parties to the adventure are able to reach a favourable negotiated settlement with the salvor, inclusion of salvage in general average redresses the balance with the salvors;*

In 2016 Rules an attempt has been made to reach a compromise. If the parties to the adventure have a separate contractual or legal liability to salvors such as, under LOF or under the common law, but not under e.g. Wreckhire '99 where payment is made solely by the shipowners, salvage remuneration will only be allowed in general average, if one or more of certain stipulated criteria [as specified in the revised Rule VI(b) as above] is fulfilled, and if they are significant. Paragraph (b) therefore, states that you do not allow LOF type salvages as general average and reapportion them, unless leaving them out produces an unequitable result. Paragraph (b) then gives five different scenarios when this may be the case viz:-

- i. *There is a subsequent accident during the voyage resulting in loss or damage to the property whereby there is a significant difference between salved and contributory values.*
- ii. *There are significant general average sacrifices.*
- iii. *Salved values are manifestly incorrect and significantly incorrect apportionment of salvage expenses.*
- iv. *Any of the parties to salvage has paid a significant proportion of salvage contribution which is due from another party.*

- v. *A significant proportion of the parties have satisfied the salvage claim on substantially different terms. This situation is also referred as ‘differential salvage’ wherein the general average adjustment equalizes the advantages obtained by one party through the strength of its negotiating. It comes to the assistance of parties who are not in a position of parity as regards their power of negotiation with the salvors.*

To trigger a reapportionment, it is not enough to show that a particular scenario exists. It must also be demonstrated that the scenario is likely to give rise to a significantly inequitable outcome if the reapportionment does not take place. Thus, the test adopted in 2016 is one of being ‘significant’ which provides greater flexibility, albeit with an unavoidable degree of subjectivity. This is because the previous attempt at the Beijing Conference to base the requirement on whether or not to allow and reapportion an LOF type salvage on a specified percentage met with no success, as it was soon found to be impossible to identify a figure or a formula that would work in wide variety of situations that are encountered in practice.

The intention of the new Rule is clearly to avoid the cost of reapportionment, if the difference in result would not merit it. Whilst the wording is new, it has been suggested that the difference in practice will not be great. As the CMI guidelines explain, many leading Adjusters will, when appropriate, already propose to the parties that if apportionment of salvage as general average would not produce a meaningful change in the figures, or would be disproportionately costly, salvage should be omitted from the adjustment. As such the new Rule serves primarily to approve and regularize this practice.

Rule VII – Damage to Machinery and Boilers: No change

Damage caused to any machinery and boilers of a ship which is ashore and in a position of peril, in endeavouring to refloat, shall be allowed in general average when shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage; but where a ship is afloat no loss or damage caused by working the propelling machinery and boilers shall in any circumstances be allowed as general average.

Rule VIII – Expenses Lightening a Ship when Ashore, and Consequent Damage: No change

When a ship is ashore and cargo and ship’s fuel and stores or any of them are discharged as a general average act, the extra cost of lightening, lighter hire and reshipping (if incurred), any loss or damage to the property involved in the common maritime adventure in consequence thereof, shall be allowed as general average.

Rule IX – Cargo, Ship’s Materials and Stores Used for Fuel: No change

Cargo, ship’s materials and stores, or any of them, necessarily used for fuel for the common safety at a time of peril shall be allowed as general average, but when such an allowance is made for the cost of ship’s material and stores the general average shall be credited with the estimated cost of the fuel which would otherwise have been consumed in prosecuting the intended voyage.

Rule X – Expenses at Port of Refuge, etc.: No change

- a) i) When a ship shall have entered a port or place of refuge or shall have returned to her port or place of loading in consequence of accident, sacrifice or other extraordinary circumstances which render that necessary for the common safety, the expenses of entering such port or place shall be allowed as general average; and when she shall have sailed thence with her original cargo, or a part of it, the corresponding expenses of leaving such port or place consequent upon such entry or return shall likewise be allowed as general average.
- ii) When a ship is at any port or place of refuge and is necessarily removed to another port or place because repairs cannot be carried out in the first port or place, the provisions of the Rule shall be applied to the second port or place as if it were a port or place of refuge and the cost of such removal including temporary repairs and towage shall be allowed as general average. The provisions of Rule XI shall be applied to the prolongation of the voyage occasioned by such removal.
- b) i) The cost of handling on board or discharging cargo, fuel or stores, whether at a port or place of loading, call or refuge, shall be allowed as general average when the handling or discharge was necessary for the common safety or to enable damage to the ship caused by sacrifice or accident to be repaired, if the repairs were necessary for the safe prosecution of the voyage, except in cases where the damage to the ship is discovered at a port or place of loading or call without any accident or other extraordinary circumstances connected with such damage having taken place during the voyage.
- ii) The cost of handling on board or discharging cargo, fuel or stores shall not be allowable as general average when incurred solely for the purpose of restowage due to shifting during the voyage, unless such restowage is necessary for the common safety.
- c) Whenever the cost of handling or discharging cargo, fuel or stores is allowable as general average, the costs of storage, including insurance if reasonably incurred, reloading and stowing of such cargo, fuel or stores shall likewise be allowed as general average. The provisions of Rule XI shall apply to the extra period of detention occasioned by such reloading or restowing.

- d) When the ship is condemned or does not proceed on her original voyage, storage expenses shall be allowed as general average only up to the date of the ship's condemnation or of the abandonment of the voyage or up to the date of completion of discharge of cargo, if the condemnation or abandonment takes place before that date.

Rule XI – Wages and Maintenance of Crew and Other Expenses putting in to and at a Port of Refuge, etc.

- a) Wages and maintenance of master, officers and crew reasonably incurred and fuel and stores consumed during the prolongation of the voyage occasioned by a ship entering a port or place of refuge or returning to her port or place of loading shall be allowed as general average in accordance with Rule X(a).
- b) i) When a ship shall have entered or been detained in any port or place in consequence of accident, sacrifice or other extra-ordinary circumstances which render *entry or detention* as necessary for the common safety, or to enable damage to the ship caused by sacrifice or accident to be repaired, if the repairs were necessary for the safe prosecution of the voyage, the wages and maintenance of the master, officers and crew reasonably incurred during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage, shall be allowed in general average.

Under the 2004 Rules there was no allowance in general average for wages and maintenance during the extra detention at a port of refuge. The 2016 Rules revert to the position under the 1994 and earlier Rules, allowing wages whilst at port of refuge when detained for common safety or to effect repairs necessary for safe prosecution of the voyage.

The words 'entry' or 'detention' were added to emphasize that allowance under this Rule XI(b)(i) is possible only in case where the ship and cargo remain in peril after her having arrived at the port of refuge or when repairs necessary for safe prosecution of voyage are carried out at the port of refuge.

- ii) Fuel and stores consumed during the extra period of detention shall be allowed as general average, except such fuel and stores as are consumed in effecting repairs not allowable in general average.
- iii) Port charges incurred during the extra period of detention shall likewise be allowed as general average except such charges as are incurred solely by reason of repairs not allowable in general average.
- iv) Provided that when damage to the ship is discovered at a port or place of loading or call without any accident or other extraordinary circumstances connected with

such damage having taken place during the voyage, then the wages and maintenance of master, officers, crew, fuel & stores consumed and port charges incurred during the extra detention for repairs to damages so discovered shall not be allowable as general average, even if the repairs are necessary for the safe prosecution of the voyage.

- v) When the ship is condemned or does not proceed on her original voyage, the wages and maintenance of the master, officers, crew, fuel & stores consumed and port charges shall be allowed as general average only up to the date of the ship's condemnation or of the abandonment of the voyage or up to the date of completion of discharge of cargo if the condemnation or abandonment takes place before that date.
- c) i) For the purpose of these Rules, wages shall include all payments made to or for the benefit of the master, officers and crew, whether such payments be imposed by law upon the shipowners or be made under the terms of articles of employment.
- ii) *For the purpose of these Rules, port charges shall include all customary or additional expenses incurred for the common safety or to enable a vessel to enter or remain at a port of refuge or call in the circumstances outlined in Rule XI(b)(i).*

The intention behind adding new Rule was to clearly define 'port charges' to avoid misinterpretation. This was following specific comments made in the case 'Trade Green' (2000), which were contrary to the intentions of successive versions of the York Antwerp Rules.

In the case, vessel carried a cargo of rice in bags from Bangkok to Aqaba under Bills of Lading providing for York Antwerp Rules-1974. Whilst discharging cargo alongside, a fire broke out in the engine room and on instructions of the port authority, vessel was taken from berth to anchorage with assistance of tugs. The fire was brought under control by ship's crew at anchorage. The tug charges were the largest component of general average and were allowed by the Adjusters under Rule XI(b). Cargo interests challenged the adjustment under four preliminary grounds viz. detention, port or place, port charges and extra period of detention. As per 'Trade Green' approach, if the vessel had entered a port of call no allowance could be made during the same period because the vessel had yet to carry out her cargo handling operations at the port of call, likewise in the event of a fire at a loading port, when only part cargo has been loaded.

York Antwerp Rules-2016 reverts to the universal practice existed as the same is preferred i.e. to allow

the period during which the ordinary scheduled activities at the port are interrupted or postponed because of taking measures for common safety, or carrying out of repairs necessary for safe prosecution of voyage.

- d) The cost of measures undertaken to prevent or minimize damage to the environment shall be allowed in general average when incurred in any or all of the following circumstances:-
- i) As part of an operation performed for the common safety which, had it been undertaken by a party outside the common maritime adventure, would have entitled such party to a salvage reward;
 - ii) As a condition of entry into or departure from any port or place in the circumstances prescribed in Rule X(a);
 - iii) As a condition of remaining at any port or place in the circumstances prescribed in Rule XI(b), provided that when there is an actual escape or release of pollutant substances, the cost of any additional measures required on that account to prevent or minimize pollution or environmental damage shall not be allowed as general average.
 - iv) Necessarily in connection with the *handling on board*, discharging, storing or reloading of cargo, *fuel or stores* whenever the cost of those operations is allowable as general average.

The additional words 'handling onboard' and 'fuel or stores' in the above Rule XI(d)(iv) was to correct an apparent anomaly. Whilst Rule X(b)(i) mentions these words the previous wording of Rule XI(d)(iv) of York Antwerp Rules-1974 & 1994 did not include the same. This was a logical inclusion to avoid a different approach or interpretation.

Rule XII – Damage to Cargo in Discharging, etc.: No change

Damage to or loss of cargo, fuel or stores sustained in consequence of their handling, discharging, storing, reloading and stowing shall be allowed as general average, when and only when the cost of those measures respectively are allowed as general average.

Rule XIII – Deductions from Cost of Repairs

- a) Repairs to be allowed in general average shall not be subject to deductions in respect of 'new for old' where old material or parts are replaced by new unless the ship is over fifteen years old in which case there shall be a deduction of one third. The deductions shall be regulated by the age of the ship from the 31st December of the year of completion of construction to the date of the general average act, except for insulation, life and similar boats, communications and

navigational apparatus and equipment, machinery and boilers for which the deductions shall be regulated by the age of the particular parts to which they apply.

- b) The deductions shall be made only from the cost of the new material or parts when finished and ready to be installed in the ship. No deduction shall be made in respect of provisions, stores, anchors and chain cables. Drydock and slipway dues and costs of shifting the ship shall be allowed in full.
- c) The costs of cleaning, painting or coating of bottom shall not be allowed in general average unless the bottom has been painted or coated within the *24 months* preceding the date of the general average act in which case one half of such costs shall be allowed.

Since 1974, previous versions of the Rules have specified a period of 12 months for bottom painting, however, this was considered to be unrealistic as the ship's bottom coating are now expected to last much longer and, therefore, the revision of 24 months.

Rule XIV – Temporary Repairs

- a) Where temporary repairs are effected to a ship at a port of loading, call or refuge, for the common safety, or of damage caused by general average sacrifice, the cost of such repairs shall be allowed as general average.
- b) Where temporary repairs of accidental damage are effected in order to enable the common maritime adventure to be completed, the cost of such repairs shall be allowed as general average without regard to the saving, if any, to the other interests, but only up to the saving in expense which would have been incurred and allowed in general average, if such repairs had not been effected there.
- c) No deductions 'new for old' shall be made from the cost of temporary repairs allowable as general average.

In the 2004 Rules, only if temporary repair costs exceeded all the particular average savings (e.g. savings in cost of permanent repairs because you can do it at a cheaper port), the balance is considered for allowance as general average, up to the general average savings.

Whereas, in the 1994 Rules, temporary repair costs are allowed as general average up to the total cost saved, without regard to the savings that might accrue to other interest (e.g. to hull underwriters for particular average savings). Only if all the general average savings are exhausted it is possible to make allowance in particular average.

In essence, the difference between the two Rules was whether the temporary repair costs should be a 'first charge' against general average or particular average. It

was ultimately agreed to proceed on the basis of York Antwerp Rules-1994 approach, where the temporary repair costs are first charge on general average and only once general average savings are exhausted it is possible to make an allowance in particular average.

Rule XV – Loss of Freight: No change

Loss of freight arising from damage to or loss of cargo shall be allowed as general average, either when caused by a general average act, or when the damage to or loss of cargo is so allowed.

Deduction shall be made from the amount of gross freight lost, of the charges which the owner thereof would have incurred to earn such freight, but has, in consequence of the sacrifice, not incurred.

Rule XVI – Amount to be Allowed for Cargo Lost or Damaged by Sacrifice

- a) i) The amount to be allowed as general average for damage to or loss of cargo sacrificed shall be the loss which has been sustained thereby based on the value at the time of discharge, ascertained from the commercial invoice rendered to the receiver or if there is no such invoice from the shipped value. *Such commercial invoice may be deemed by the Average Adjuster to reflect the value at the time of discharge irrespective of the place of final delivery under the contract of carriage.*

It is a practice for the Adjusters to simply adopt the CIF value of cargo stated in the invoice for calculation of contributory value, after the introduction of the same in the 1974 Rules. However, with multi modal transport it is common for the cargo to be landed at a sea port say Mumbai from where it goes overland say Delhi. The CIF invoice will therefore also include cost of Mumbai-Delhi leg, which is after the final destination where the common adventure ends. As per York Antwerp Rules, the contributory value is calculated at a place where the common adventure ends (Mumbai) and not final destination (Delhi). However, it is an established practice to ignore the difference in value of cargo between the sea port where the common adventure ends and the final destination and the CIF value as per invoice is considered. This additional wording in the above Rule XVI(a)(i) merely gives express sanction to the practice followed by the Adjusters.

Thus, it is now stated that the Average Adjuster may deem the commercial invoice to reflect the value of cargo at the time of discharge irrespective of the place of final delivery under the contract of carriage. This provision may assist in all cases of multi modal bills where there is subsequent transportation by land.

- ii) The value at the time of discharge shall include the cost of insurance and freight except insofar as such freight is at the risk of interests other than the cargo.
- b) When cargo so damaged is sold and the amount of the damage has not been otherwise agreed, the loss to be allowed in general average shall be the difference between the net proceeds of sale and the net sound value as computed in the first paragraph of this Rule.

Rule XVII – Contributory Values

- a) i) The contribution to a general average shall be made upon the actual net values of the property at the termination of the common maritime adventure except that the value of cargo shall be the value at the time of discharge, ascertained from the commercial invoice rendered to the receiver or if there is no such invoice from the shipped value. *Such commercial invoice may be deemed by the Average Adjuster to reflect the value at the time of discharge irrespective of the place of final delivery under the contract of carriage.*

These words were not part of 1994 York Antwerp Rules and were added for congruity to reflect the changes made to Rule XVI(a)(i) as above.

- ii) The value of the cargo shall include the cost of insurance and freight unless and, insofar, as such freight is at the risk of interests other than the cargo, deducting therefrom any loss or damage suffered by the cargo prior to or at the time of discharge. *Any cargo may be excluded from contributing to general average should the Average Adjuster consider that the cost of including it in the adjustment would be likely to be disproportionate to its eventual contribution.*

The Adjusters are very often faced with a large number of low value cargo interests especially, in general average cases of container vessel where the general average is relatively low in relation to total contributory value e.g. suppose 10% GA on a US\$.1000 shipment will contribute US\$.100 towards GA contribution. It is likely that the cost of obtaining the contribution in terms of Average Adjuster's costs might be much more than the contribution. As a result, the larger cargo interests actually has to pay more to have the cargo included than if it is left out. Thus, it is commercially sensible for the Adjusters to leave out very small values in appropriate cases. It is now provided that any cargo may be excluded from contributing to general average should the Average Adjuster consider that the cost of including the same in the adjustment is likely to be disproportionate to its eventual contribution.

The addition in Rule XVII(a)(ii) gives express sanction to this practice. This is an idea borrowed

from the assessment of Salvage Award under Clause 15 of Lloyd's Standard Salvage & Arbitration Clause (LSSA) of LOF-2011.

- iii) The value of the ship shall be assessed without taking into account the beneficial or detrimental effect of any demise or time charter party to which the ship may be committed.
- b) To these values, shall be added the amount allowed as general average for property sacrificed, if not already included, deduction being made from the freight and passage money at risk of such charges and crew's wages as would not have been incurred in earning the freight had the ship and cargo been totally lost at the date of the general average act and have not been allowed as general average; 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. *Where payment for salvage services has not been allowed as general average by reason of paragraph (b) of Rule VI, deductions in respect of payment for salvage services shall be limited to the amount paid to the salvors including interest and salvors' cost.*

In view of the insertions made to Rule VI(b) above, in certain given circumstances, salvage would not be included in general average and reapportioned. However, it would still need to be deducted from the contributory value of ship/cargo because it is 'an extra charge incurred in respect thereof subsequently to the general average act' [as quoted in above paragraph (b)]. Deducting the salvage payment establishes the 'real value' to the owner of that property at destination and is no different from deducting physical damage for the same reason. Additionally, if salvage is not deducted, there could be a situation following a serious casualty in which an interest might have to pay say 70% of its value to salvors and then also have to pay say 60% contribution for general average.

However, in multi bill cases the Adjusters would be confronted with voluminous work, if they have to make separate inquiries with all cargo interest regarding ancillary expenses, such as, bail fees, cost of providing security, etc. and, therefore, the additional wording in Rule XVII(b) states that such deduction is limited to just actual payments made to the salvor.

- c) In the circumstances envisaged in the third paragraph of Rule G, the cargo and other property shall continue on the basis of its value upon delivery at original destination unless sold or otherwise disposed of short of that destination, and the ship shall contribute upon its actual net value at the time of completion of discharge of cargo.

- d) Where cargo is sold short of destination, however, it shall contribute upon the actual net proceeds of sale, with the addition of any amount allowed as general average.
- e) Mails, passengers' luggage and *accompanied* personal effects and accompanied private motor vehicles shall not contribute to general average.

The insertion of words 'accompanied' is to make clear that unaccompanied personal effect and/or motor vehicle such as, a container full of household goods or personal vehicles being moved to another country are liable to contribute to general average. This approach is also followed under LOF-2011.

Rule XVIII – Damage to Ship: No Change

The amount to be allowed as general average for damage or loss to the ship, her machinery and/or gear caused by a general average act shall be as follows:-

- a) When repaired or replaced,

The actual reasonable cost of repairing or replacing such damage or loss, subject to deductions in accordance with Rule XIII;

- b) When not repaired or replaced,

The reasonable depreciation arising from such damage or loss, but not exceeding the estimated cost of repairs. But where the ship is an actual total loss or when the cost of repairs of the damage would exceed the value of the ship when repaired, the amount to be allowed as general average shall be the difference between the estimated sound value of the ship after deducting therefrom the estimated cost of repairing damage which is not general average and the value of the ship in her damaged state which may be measured by the net proceeds of sale, if any.

Rule XIX – Undeclared or Wrongfully Declared Cargo

- a) Damage or loss caused to goods loaded without the knowledge of the shipowner or his agent or to goods willfully misdescribed at the time of shipment shall not be allowed as general average, but such goods shall remain liable to contribute, if saved.
- b) *Where goods have been wrongfully declared at the time of shipment at a value which is lower than their real value, any general average loss or damage shall be allowed on the basis of their declared value, but such goods shall contribute on the basis of their actual value.*

Change in the wordings was made only for greater clarity.

Rule XX – Provision of Funds

- a) The capital loss sustained by the owners of goods sold for the purpose of raising funds to defray general average disbursements shall be allowed in general average.
- b) The cost of insuring general average disbursements shall be allowed in general average.

The fixed 2% Commission on general average disbursements which was allowed in the earlier Rules was deleted in York Antwerp Rules-2016 as it was considered that Commission was an anachronism and archaic given modern banking facilities. Though it was emphasized by International Chamber of Shipping that shipowners may have to incur banking cost if they have to rely on overdraft funding to pay expenses following a serious casualty.

Rule XXI – Interest on Losses Allowed in General Average

- a) Interest shall be allowed on expenditure, sacrifices and allowances in general average until three months after the date of issue of the general average adjustment, due allowance being made for any payment on account by the contributory interests or from the general average deposit fund.
- b) *The rate for calculating interest accruing during each calendar year shall be 12-month ICE LIBOR for the currency in which the adjustment is prepared, as announced on the first banking day of that calendar year, increased by four percentage points. If the adjustment is prepared in a currency for which no ICE LIBOR is announced, the rate shall be the 12-month US Dollar ICE LIBOR, increased by four percentage points.*

Since 1950 Rules, the rate of interest was fixed on a per annum basis i.e. from the date of payment until the date of adjustment. In YAR-1950 it was 5% which was increased to 7% in YAR-1974. Whereas, in YAR-1994, 7% was retained but the period for allowance of interest was extended until 3 months after the date of issue of GA Adjustment. The increase in interest rate was to take into consideration the prevailing market rate for the interest. The increase in period was bearing in mind the fact that the settlements in general average would generally take more than 3 months after issuing the adjustment report.

It was considered that YARs are normally revised once in 20 years and, therefore, having a fixed rate was too inflexible a solution. Thus, in 2004 CMI adopted flexible rate of interest to be set annually by CMI in accordance with specific guidelines. ICS took the view that the guidelines of 2004 were unrealistic in relation to interest rates and, therefore, in 2016 this was left to the industry stake holders to agree to a mechanism for rate of interest. The resulting compromise was to adopt the appropriate LIBOR rate for the currency in which the adjustment is

prepared as announced on the first banking day of that calendar year and increase the same by an uplift of 4%.

The rate of interest is no longer fixed but is floating and now been pegged at 4% above ICE LIBOR or US\$ ICE LIBOR where the adjustment is prepared in a currency for which no ICE LIBOR is announced.

Rule XXII – Treatment of Cash Deposit

- a) Where cash deposits have been collected in respect of general average, salvage or special charges, such sums shall be remitted forthwith to the Average Adjuster who shall deposit the sums into a special account, *earning interest where possible, in the name of the Average Adjuster.*
- b) *The special account shall be constituted in accordance with the law regarding client or third-party funds applicable in the domicile of the Average Adjuster. The account shall be held separately from the Average Adjuster's own funds, in trust or in compliance with similar Rules of law providing for the administration of the funds of third parties.*
- c) The sums so deposited, together with accrued interest, if any, shall be held as security for payment to the parties entitled thereto, of the general average, salvage or special charges in respect of which the deposits have been collected. Payments on account or refunds of deposits may only be made when such payments are certified in writing by the Average Adjuster and notified to the depositor requesting their approval. Upon the receipt of the depositor's approval, or in the absence of such approval within a period of 90 days, the Average Adjuster may deduct the amount of the payment on account or the final contribution from the deposit.
- d) All deposits and payments or refunds shall be without prejudice to the ultimate liability of the parties.

The new Rule XXII sets out more clearly how the Adjuster should handle the cash deposits. In earlier Rules cash deposits collected were to be paid into a special account in the joint names of representatives nominated on behalf of the shipowners and a representative nominated on behalf of the depositors in a bank to be approved by both. This joint account requirement in the earlier Rules was removed and a special account can now be opened under YAR-2016 solely in the name of the Average Adjusters.

Due to money laundering and anti-terrorist legislation setting up of joint account was extremely difficult and often impossible and, therefore, procedure for opening such an account is clearly prescribed in the new Rule.

Rule XXIII – Time Bar for Contributing to General Average

- 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 from 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.*

The time bar Rule was first inserted in the 2004 YAR. The opening words reflect that national legislation shall prevail over any contractual provisions regarding time bars. The new Rule extinguishes rights to GA contribution unless an action is brought within a period of one year after the date upon which the GA Adjustment is issued. There is then a 'long stop date' for commencement of proceedings within 6 years from the date of termination of the common maritime adventure. This Rule, which applies to claims under average bonds and guarantees, marks an important departure from the current position. Not only does it impose a short one year time bar, but the use of the long stop date reduces the limitation period which would otherwise be applicable to claims under average bonds and guarantees. Ordinarily, a six year time period, from the date of adjustment would apply to claims under GA security as was held in the case 'The Potoi Chau', (1984).

CMI GUIDELINES RELATING TO GENERAL AVERAGE

For the first time, the new Rules are also accompanied by a guidance documents entitled 'CMI Guidelines Relating to General Average'. These guidelines which are not intended to be of binding force provide information as to the basic principle of GA Adjustment and the collection of security. They also explain the roles of Average Adjuster and the GA Interest Surveyor and in so doing seek to set out best practice.

These guidelines were drawn up to assist commercial interests who might be coming across general average matters for the first time. The guidelines are not intended to override or alter in any way the provisions of York Antwerp Rules, the Contract of Carriage or any governing jurisdictions.

Below is the brief narration of the text approved for CMI Guidelines by CMI Assembly held on 6th May 2016.

Introduction

1. Objective

These guidelines are intended to assist in dealing with general average cases and to provide:-

- general background information
- guidance as to recognized best practice
- an outline of procedures

2. Effect of the Guidelines

These guidelines do not form part of the York Antwerp Rules; they are not binding and are not intended to over-ride or alter in any way the provisions of the York Antwerp Rules, the contracts of carriage or any governing jurisdictions.

3. Review and Amendment

The first edition of the CMI Guidelines has been adopted by the plenary session of the 42nd International Conference of CMI in New York, May 2016, and ultimately approved by the Assembly of CMI.

In order to monitor the working and effectiveness of the CMI Guidelines, a Standing Committee shall be appointed who may recommend changes to the Guidelines as circumstances dictate, which shall be submitted to the Assembly of CMI for approval.

Basic Principles

1. Background

The principle of GA has its origin in the earliest days of maritime trade and is based on simple equity; if one merchant's cargo is jettisoned to save the ship and the rest of the cargo, the shipowner and other cargo interests would all contribute to make good the value of the jettisoned cargo. The word 'average' is a medieval term meaning a 'loss'. Thus a 'general average' loss involves all the interests on a voyage, whereas, a 'particular average' loss affects only one interest. As the doctrine developed various types of losses were added to that of jettison; perhaps the most important step was the recognition that expenditure of money was in principle no different from the sacrifice of property, if it was incurred in similar circumstances and for the same purpose.

GA not only provide an equitable remedy when property is sacrificed for the common good, but the principles of general average, as now embodied in the YAR, also continue to perform a useful function in helping to define important borders that lie between:-

- Matters that form part of the shipowners' reasonable obligations to carry out the contracted voyage and those losses and expenses that arise in exceptional circumstances.
- Property and liability insurers as their differing responsibilities meet and sometimes merge, in the context of a serious casualty.

Both of these difficult areas benefit from the reservoir of established law and practice that general average provides, helping to secure a degree of certainty that is always the objective of commercial interests.

It is important to appreciate that the York Antwerp Rules do not have the status of an International Convention. They take effect only by being incorporated into contracts of affreightment. The Rules are updated periodically under the auspices of Comité Maritime International, which is made up of National Maritime Law Associations.

2. York Antwerp Rules

Broadly speaking, the York Antwerp Rules have recognized two main types of allowances:

- Allowances for 'Common Safety' - sacrifice of property e.g. flooding of cargo hold to fight a fire and consequent damage to ship and cargo, or jettison of cargo and resultant damage to ship and cargo.

Expenditure made or incurred for common safety e.g. salvage or lightening of a vessel that is made or incurred while the ship and cargo were actually in the grip of peril.

- Allowances for 'Common Benefit' – once common safety has been attained and a vessel is at a port of refuge, expenses incurred to enable the ship to resume the voyage safely e.g. the cost of discharging, storing and reloading cargo as necessary to carry out repairs, port charges and wages of crew etc. during detention for repairs and outward port charges. However, this does not include expenses incurred for cost of repairing accidental damage to the ship which is a particular average loss subject to terms and conditions of the H&M policy.

The York Antwerp Rules are prefaced by a Rule of Interpretation which gives priority to the numbered Rules when there is a conflict with the lettered Rules. For example, Rule C excludes losses due to delay, but Rule XI states that certain detention expenses at a port of refuge, such as, port charges, wages and

maintenance can be allowed; Rule XI takes priority over the lettered Rule C and such expenses can therefore be allowed.

The York Antwerp Rules also include a Rule Paramount after the Rule of Interpretation, which states that:-

Rule Paramount

"In no case shall there be any allowance for sacrifice or expenditure unless reasonably made or incurred"

The burden of proof lies on the party claiming in general average to prove that both the general average act and the amount of any allowance are reasonable. It is suggested that in applying this Rule there can be no absolute standard of 'reasonableness' and that a situation must be judged on the particular facts prevailing at the time and place of the incident.

3. General Average Events

The following are simple examples of potential general average situations:-

Casualty	Type of Sacrifice or Expenditure
Grounding	Damage to vessel and machinery through efforts to refloat. Loss of or damage to cargo through jettison or lightening of the vessel. Cost of storing and reloading any cargo so discharged. Port of refuge expenses.
Fire	Damage to ship or cargo due to efforts to extinguish the fire.
Shifting of cargo in heavy weather	Jettison of cargo.
Heavy weather, collision, machinery breakdown, accident involving damage to ship and resort to a port	Port of refuge expenses, detention cost & towage charges.
General	Payments relating to salvage may also be allowed as general average in any of the above circumstances.

4. Adjustment of General Average

The basic principles are:-

- Property at Risk

Generally, all the property that is involved in the voyage or 'common maritime adventure', and is at risk at the time of the occurrence giving rise to the GA act is required to contribute to the GA losses and expenses. The contribution is based on a pro rata division according to the value of that property at the end of the voyage.

- Contributory Values

The sharing of GA sacrifices and expenses is achieved by a pro rata division over what the YAR refer to as 'Contributory Values'.

The basis for calculation of contributory values and GA losses is the value of the property to its owner at the termination of the adventure. Expenses incurred in respect of the property after the GA act (other than those which are allowed in GA) must be deducted in arriving at the contributory value. This ensures that property contributes according to the actual net benefit it has received, by deducting the expenses it had to bear to realize the benefit of getting the property at destination.

Since values are assessed at the end of the voyage, it also follows that the amount of contribution may be varied by further loss or damage to the property between the time of the GA act and the arrival at destination. For example, if the property is totally lost due to a subsequent accident it will have no contributory value and will not contribute to the GA.

- Termination of the Voyage

Normally, the 'common maritime adventure' is considered to be terminated on completion of discharge of cargo at the port of destination. If there is an abandonment of the voyage at an intermediate port, then the adventure terminates at that port. If, because of a casualty, the whole cargo is forwarded from an intermediate port by another vessel the cost of forwarding may be allowable as GA, subject to criteria set out in Rules F & G of the YAR.

- Equality of Contribution

Equality of contribution must be maintained

between the owner of the property sacrificed and the owner of the property saved. The fundamental principle of GA is that all property which is sacrificed has to be brought in to contribution in order to achieve parity of contribution with the interests that have been saved. In practice, this is achieved by the device of adding to the contributory values of property lost or damaged by GA sacrifice the amount allowed in GA in respect of that sacrifice or 'made good' as it is usually referred to. If this were not done, the owner of the jettisoned cargo would receive benefit in the form of money from the GA for loss of his goods without participating in, or contributing to the GA losses, as can be seen from the following example:-

Assume that cargo B worth 1,000 is jettisoned/sacrificed for the common safety. A general average of 1,000 is apportioned over the values of ship and arrived cargo (which are all 1,000). If this were between only those parties arrived, the figures would be:-

Ship on	1,000	pays	334
Cargo A on	1,000	"	333
Cargo B on	-	"	-
Cargo C on	1,000	"	333
	<u>3,000</u>	pays	<u>1,000</u>

The result of this apportionment is that after paying their contributions to B the shipowner and merchants A and C would have property with an effective value of 667, whereas merchant B would receive cash amounting to 1,000. This is clearly inequitable, so merchant B also makes a notional contribution to the GA on the amount of the loss made good to him in GA, that is:-

Ship on	1,000	pays	250
Cargo A on	1,000	pays	250
Cargo B on	1,000	is liable for	250
Cargo C on	<u>1,000</u>	pays	<u>250</u>
	<u>4,000</u>	pays	<u>1,000</u>

By making Cargo B 'contribute' on the basis of the amount made good he will receive 1,000 less 250 = 750, and everyone is now in the same position.

5. Example Adjustment

The final text of CMI guidelines also includes an example of GA adjustment which is reproduced here:-

All figures in US\$

Shipowner's Losses & Expenses	General Average
Cost of repairs of damage to vessel's machinery sustained in refloating operations.	250,000
Cost of discharging, storing in lighters, and reloading cargo discharged to lighten vessel.	100,000
Salvage paid to tugs for refloating vessel.	<u>1,150,000</u>
Total GA losses & expenses of Ship	1,500,000

Cargo owner's losses

Value of cargo jettisoned in efforts to refloat.	500,000	
Damage to cargo caused by forced discharge, storage and reloading.	<u>100,000</u>	<u>600,000</u>
Total GA:		<u>2,100,000</u>

Apportioned

Ship

Arrived value at destination in damaged condition.	6,750,000	
Add: Allowance in GA for refloating damage.	<u>250,000</u>	
	7,000,000	pays in ppn. 700,000

Cargo

Inv. value after deduction of loss & damage.	13,400,000	
Add: Allowance in GA in respect of jettison and damage due to forced discharge.	<u>600,000</u>	<u>14,000,000</u>
	21,000,000	pays in ppn. 2,100,000
	<u>21,000,000</u>	<u>2,100,000</u>

(General average equals 10% of the contributory values)

Balance under the Adjustment

The Shipowner:

Receives credit for GA losses & expenses	1,500,000
Pays GA contribution	<u>700,000</u>
<i>Balance to receive:</i>	<u><u>800,000</u></u>

The Cargo Owner:

Pays GA contribution	1,400,000
Receives credit for GA losses	<u>600,000</u>
<i>Balance to pay:</i>	<u><u>800,000</u></u>

This is how equity is attained by apportioning GA losses between all interests involved in common maritime adventure.

6. Contract of Carriage

The parties to the adventure usually make special provision in the contract of carriage regarding general average, the most common being a clause to the effect that general average is to be adjusted in accordance with the York Antwerp Rules. Such stipulations may be contained in the charter party, if any, or the bills of lading, or in both documents, thereby giving contractual effect to the Rules.

Rule D of the York Antwerp Rules gives explicit recognition to the fact that general average exists irrespective of fault or breach of contract by any of the parties. It follows that normally the procedures for protecting the rights of the parties in general average must be observed even when it is suspected that such a fault or breach has taken place. Equally, the existence of a general average situation does not prejudice any rights or defences that are open to parties, for example with regard to cargo damage or alleging a breach of contract as the grounds for not paying a general average contribution.

The giving of general average security in the customary terms is a promise to pay any general average contribution that is found to be properly and legally due. Generally, if there has been a causative breach of contract, the contribution cannot be so described, and cargo interests may have grounds for declining to pay their contribution to general average.

General Average Procedures

1. General Average Security Documents

Most jurisdictions recognize that the shipowner can exercise a lien (i.e. refuse to allow delivery) on cargo at destination in respect of general average losses sustained by any of the parties to the adventure. The preparation of an adjustment will usually take some time, so that the shipowner will relinquish his lien in return for satisfactory security. Generally, the shipowner or appointed Average Adjuster will send notices to cargo interests setting out what is required by way of security (the exact procedure may vary slightly according to the jurisdiction(s) involved). The usual security requirements will be as follows:-

- a) Signature to an Average Bond by the owner or receiver of the cargo;
- b) A cash deposit for an amount estimated by the Adjuster to cover likely general average liabilities, usually expressed as a percentage of the invoice value of cargo. It is usual for an Average Guarantee signed by a reputable insurer to be accepted by the shipowner in place of the cash deposit, and the insurer will then take over the handling of the general average aspects of the case through their normal claims procedures;

Variations in the wordings of such forms have arisen largely as a result of market practices and CMI have a working party looking at providing recommended standard wordings, which may form part of a future edition of these Guidelines.

The objectives of the security forms currently in use include:-

- Providing an acceptable level of security to the shipowner and other parties to the adventure who may be GA creditors;
- Preserving the position under Rule D in respect of defences;
- Encouraging the timely provision of information and evidence to ensure the adjustment process is not delayed;

Both the Average Bond and Guarantee are distinct contracts in their own right, and may, like any contract, be altered by agreement between the parties.

2. Salvage Security

In some circumstances and jurisdictions, and under salvage contracts such as Lloyd's Open Form, the salvor will have a separate right of action against each individual piece of property that is salvaged, once that property is brought into a place of safety. The salvor

may therefore exercise a lien on all the cargo at that place and the cargo interests will have to provide two sets of security:-

- a) salvage security to salvors at the place where the salvage services end.
- b) general average security to the shipowner, at destination.

If there are numerous cargo interests, as on a container ship, interim security may be provided to salvors by the shipowner or charterer to enable the vessel to continue from the place where salvage services ended to the destination, where both types of security will then have to be provided.

3. Claim Documentation

The burden of proof lies with any party wishing to claim general average sacrifices and expenses, and York Antwerp Rule E includes time limits for submitting claims.

After collecting security the Average Adjuster will need information from cargo interests in order to:-

- calculate the contributory value of the cargo.
- make any allowances in general average that are due to cargo.

Cargo interests will generally need to submit the following information to the Adjuster:-

- a) A copy of the commercial (CIF) invoice. If cargo has been sold on terms other than CIF the freight invoice and insurance premium details may be required.
- b) Details of any damage that has occurred to cargo during the voyage, including:
 - survey reports stating the cause and extent of damage;
 - the cargo insurers' settlement, if applicable;

The damage to cargo will be deducted from the sound value to reach the contributory value; this will determine how much the cargo's general average contribution will be. If any of the damage is allowable as general average (e.g. water damage during fire-fighting operations) credit will be given in the adjustment.

Role of the Average Adjuster in General Average

1. The Effect of the Adjustment

In the majority of jurisdictions, the findings of an Average Adjuster regarding amounts payable by the parties to a maritime adventure are not legally binding, unlike with an arbitration award. The majority of adjustments are accepted by the parties (subject to any Rule D defenses) on the basis of the professional standing and expertise of the Adjuster.

2. Best Practice of Average Adjusters

Average Adjuster's work under different regulatory and professional regimes, however the following elements of best practice appear to be universal and are endorsed by the leading professional associations:-

2.1 Irrespective of the identity of the instructing party, the Average Adjuster is expected to act in an impartial and independent manner in order to act fairly to all parties involved in a common maritime adventure.

2.2 In all cases the Average Adjuster should:-

- a) Give particulars in a prominent position in the adjustment of the clause or clauses contained in the charter party and/or bills of lading that relate to the adjustment of general average or, if no such clause or clauses exist, the law and practice prevailing at the place where the adventure ends. Where conflicting provisions exist, the Adjuster should explain in appropriate detail the reason for the basis of adjustment chosen.
- b) Set out the facts that give rise to the general average.
- c) Where the York Antwerp Rules apply, identify the lettered and/or numbered Rules that are relied upon in making the allowances in the adjustment.
- d) Explain in appropriate detail the choice of currency in which the adjustment is based.
- e) Make appropriate enquiries as to whether any recovery relating to the casualty is being undertaken, and set out the results of those enquiries in the adjustment.

2.3 On request, and when practicable, the Adjuster should make available copies of reports and invoices relied upon in the preparation of the adjustment.

Role of the General Interest Surveyor

1. The 'General Interest' or 'G.A. Surveyor' may be appointed by the shipowners on behalf of all parties involved in the common maritime adventure, usually only in the larger casualties or, where cargo is discharged at port of refuge either for transshipment or for carrying out repairs to ship necessary for safe prosecution of the voyage. The shipowner is responsible for settlement of the G.A. Surveyor's charges, which are allowed as General Average, but the G.A. surveyor is expected to act in an independent and impartial manner when recording the facts and making recommendations.

The G.A. Surveyor's role is not to investigate the circumstances leading up to a general average situation (e.g. the cause of a fire) but once the situation exists, his role is generally as follows:-

- To advise all parties on the steps necessary to ensure the common safety of ship and cargo;
- To monitor the steps actually taken by the parties to ensure that proper regard is taken of the General Interest;
- To review General Average expenditure incurred and advise the Adjusters as to whether the costs are fair and reasonable;
- To identify and quantify any General Average sacrifice of ship or cargo;
- To ensure that General Average damage is minimized wherever possible i.e. by reconditioning or sale of damaged cargo. Except in cases of extreme urgency or where communications are difficult, any significant action with regard to cargo (e.g. arranging for its sale at a Port of Refuge) must be taken in consultation with the concerned in cargo.

2. The authority and funds to make disbursements will generally come from the shipowner, usually via the Master or the Local Agents. The G.A. Surveyor therefore has no authority to order any particular course of action and his role is an advisory one. However, the G.A. Surveyor's impartial position and his influence on the eventual treatment of the expenditure will give his advice considerable weight with the other parties involved.

3. The G.A. Surveyor should also be aware that several other Surveyors may be in attendance on behalf of particular interests and that, for reasons of economy, duplication of reporting should be avoided. In the

event of any doubt arising as to the depth of investigation required from the G.A. Surveyor, the Adjuster should be contacted for guidance. The G.A. Surveyor is effectively appointed to act on behalf of the whole General Average community, any of whom are generally entitled to view all his exchanges of correspondence and reports.

York Antwerp Rules 2016

1. Rule VI - Salvage

The wording of Rule VI paragraph (b) is new to the York Antwerp Rules 2016. It arises from concerns that, if the ship and cargo have already paid salvage separately (for example under Lloyd's Open Form) based on salvaged values at termination of the salvors' services, allowing salvage as general average and re-apportioning it over contributory values at destination may give rise to additional cost and delays, while making no significant difference to the proportion payable by each party.

A variety of measures to meet these concerns have been considered, ranging from complete exclusion of salvage to using a fixed percentage mechanism. Such measures were found, during extensive CMI discussions to produce inequitable results or were impossible to apply across the range of cases encountered in practice.

It was pointed out that many leading Adjusters will, when appropriate, propose to the parties that if re-apportionment of salvage as general average will not produce a meaningful change in the figures or will be disproportionately costly, the salvage should be omitted from the adjustment; it is then up to the parties to decide whether it should be included or not. However, it was considered that a means should be found to make this practice more universal and to set out express criteria that would help to ensure that the allowance and re-apportionment of salvage as general average (where already paid separately by ship and cargo etc.) would only occur in cases where there was a sound equitable or financial basis for doing so.

The Average Adjusters will still be required to exercise their professional judgement in applying paragraph (b) because several of the criteria (i-v) that are listed require a view to be taken as to what should be deemed to be 'significant' in the context of a particular case. Because of the wide range of cases that the York Antwerp Rules apply to, it was not considered desirable to offer a fixed definition of how 'significant' should be construed, other than to note that the objective of the new clause was to reduce the time and cost of the adjustment process where it is possible to do so.

When assessing whether there is a significant difference between settlements and awards for the purposes of Rule VI(b)(v) the Adjuster should have regard only to the basic award or settlement against all salvaged interests before currency adjustment, interest, cost of collecting security and all parties' legal costs.

2. Rule XXII – Treatment of Cash Deposits

Under Rule XXII(b) the Adjuster is required to hold deposits in a special account constituted in accordance with the law regarding holding client or third party funds that applies in the domicile of the appointed Average Adjuster.

Unless otherwise provided for by the applicable law, CMI recommends that any special account should have the following features:-

- Funds should be held separately from the normal operating accounts of the Adjuster.
- Funds should be protected in the event of liquidation or the cessation of the Average Adjuster's business.
- The holding bank should provide regular statements that show all transactions clearly.
