

YORK ANTWERP RULES 2016

A SUMMARY OF THE CHANGES

Introduction

The York-Antwerp Rules (YARs) govern general average cases by reason of being incorporated into contracts of carriage. First instigated by an international conference in York in 1864, their objective is to promote international uniformity in dealing with general average and to make the process involved commercially effective. The Rules are updated periodically under the auspices of Comité Maritime International (CMI), which is made up of national Maritime Law Associations.

When the YARs were last updated in 2004 at Vancouver there was, for the first time, a lack of consensus between the main commercial stakeholders regarding many of the changes, with shipowning interests also taking the view that the proposed changes were premature, given that the 1994 rules were only a decade old. The 2004 YARs were therefore incorporated in relatively few contracts of carriage. CMI recognised that the position was unsatisfactory, and at the 2012 CMI Conference in Beijing an International Working Group (IWG) was set up to *"carry out a general review of the York-Antwerp Rules and to draft a new set of Rules to meet the requirements of ship and cargo owners and their respective insurers."*

The IWG began by sending out a detailed questionnaire seeking feedback from Maritime Law Associations and various representative bodies, including the International Chamber of Shipping (ICS) and BIMCO, the International Union of Marine Insurance (IUMI) and the leading average adjusters' associations. The membership of the IWG also reflected a wide range of participation in the review process:

Bent Nielsen (Denmark) (Chairman)

Richard Cornah (UK) (Association of Average Adjusters) (Co-Rapporteur)

Taco Van Der Valk (Netherlands) (Co-Rapporteur)

Andrew Bardot (UK) (International Group of P&I Clubs)

Ben Browne (UK) (International Union of Marine Insurance)

Frédéric Denèfle (France)

Jürgen Hahn (Germany)

Michael Harvey (UK) (Association Mondiale de Dispacheurs)

Kiran Khosla (UK) (International Chamber of Shipping)

Jirou Kubo (Japan)

Sveinung Måkestad (Norway)

John O'Connor (Canada)

Peter Sandell (Finland)

Jonathan Spencer (USA)

Esteban Vivanco (Argentina)

The focus of the responses to the questionnaire 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 minimised wherever possible. The main commercial stakeholders representatives, the International Chamber of Shipping (ICS) and the International Union of Marine Insurance (IUMI) faced the additional challenges of finding a basis for a durable compromise on the issues that had proved to be contentious in 2004.

After a great deal of work since Beijing, the new York-Antwerp Rules 2016 were approved by CMI in New York on 6 May, and are supported by both ICS/BIMCO and IUMI.

The YARs 2016 include a number of minor changes that are not necessary to discuss in detail; they include an amended numbering system and greater consistency in the terms used. More significant changes and additions are shown in bold blue type and are followed by a brief explanation in italics inside square brackets. Some of the issues that have been dealt with have a long history and are often complex; therefore the explanations are offered only as a general guide to assist those involved in marine insurance and the other maritime industries.

CMI have also approved a set of non-binding Guidelines that were drawn up by the IWG to assist commercial interests who might be coming across general average matters for the first time. These Guidelines will be available on the CMI website and will be updated periodically.

The responses to the IWG questionnaire and all subsequent working papers can be found on the CMI website at comitemaritime.org, together with the final text of the 2016 Rules and the CMI Guidelines.

R.R. Cornah
Chairman, Richards Hogg Lindley
10th May 2016

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Rule of Interpretation

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

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

Rule A

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

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 paragraphs 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 tug and tow cases was first added in 1994 and was retained in 2004. Such cases give rise to difficult questions of principle (reflected in the very

different approaches taken in the leading cases in the U.K., USA and Scandinavia) and are often dictated by specific terms in towage contracts that have no equivalents in conventional shipping. The changes in 2016 are intended to provide greater clarity about "disconnection" cases and introduce a brief provision regarding port of refuge expenses.]

Rule C

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

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

1. The onus of proof is upon the party claiming in general average to show that the loss or expense claimed is properly allowable as general average.
2. All parties to the common maritime adventure shall, as soon as possible, supply particulars of value in respect of their contributory 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 the termination of the common maritime adventure or payment of the expense, the average adjuster shall be at liberty to estimate the extent of the allowance on the basis of the information available to the adjuster. Particulars of value shall be provided within 12 months of the termination of the 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 two months of receipt of the communication and only on the grounds that they are 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 the event that a recovery is achieved, shall supply to the average adjuster full particulars of the recovery within two months of receipt of the recovery.

[The changes to paragraph 3 of Rule E are intended to help speed up the adjusting process by providing a clearer time-line for the provision of documents and evidence. The adjusters on the IWG had identified delays in providing information as a key area in which improvements could be made, with resultant cost savings.

Paragraph 4 is a new provision which all IWG participants considered to be important so that the adjuster can take recoveries into account and ensure that any appropriate credit to the general average is made in a prompt and equitable way.]

Rule F

Any additional expense 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

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. The proportion attaching to cargo of the allowances made in general average by reason of applying the third paragraph of this Rule shall be limited to the cost which

would have been borne by the owners of cargo if the cargo had been forwarded at their expense. **This limit shall not apply to any allowances made under Rule F.**

[The additional words added in paragraph 4 are intended to resolve an area of uncertainty and differences in adjusting practice.]

Rule I – Jettison of Cargo

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

Rule II – Loss or Damage by Sacrifices for the Common Safety

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

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

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

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 minimising 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.

[As noted in Lowndes and Rudolf (14 edition para. 6.07) in all maritime countries other than the United Kingdom, salvage has generally been treated as general average and has, together with other general average losses, been apportioned over values at destination. The divergence of British practice occurred during the latter part of the 19th century when adjusters began to distinguish, on grounds of principle, between salvage and general average, with salvage being apportioned over values pertaining at the place where the services ended.]

In 1926 the Association of Average Adjusters passed a Rule of Practice that permitted the allowance of commission and interest on salvage awards, but the divergence in practice regarding inclusion of salvage awards in general average was not finally resolved until a further Rule of Practice in 1942.

During the 1974 revision of the YAR, the old Rule VI (concerning carrying a press of sail) was removed and the first version of a Rule VI regarding salvage was inserted, in order to ensure that international practice was uniform on this point.

In the debates leading up to the 2004 YARs, IUMI proposed that the re-distribution of salvage was not necessary and gave rise to additional expense. The arguments for and against were set out as follows in the Working Party report that was presented to the Vancouver conference.

"6.2.1 Arguments for exclusion of salvage from general average:

- *Inclusion of salvage involves unnecessary duplication of the apportionment of the salvage remuneration between contributing interests.*
- *In most cases the proportions are not changed significantly but the cost of readjustment may be relatively high.*
- *It requires collection of two sets of security to cover basically the same moneys.*
- *It prolongs the whole operation, sometimes for years.*
- *It involves additional hassle for cargo underwriters.*

6.2.2 Arguments for inclusion of salvage in general average:

- *It produces a fairer result at the end of the case.*
- *In some cases to leave salvage where it falls after salvage settlement or arbitration can cause serious injustice; e.g. sacrifices made good in general average are added back in computing the values under Rule G. Take for example, a vessel with a sound value of \$1,500,000 and a cargo of \$1,000,000. The vessel is intentionally run aground for the common safety and suffers damage of \$500,000. She is then salvaged. After deducting the cost of damage repairs for the purpose of arriving at the salvaged values at the termination of the salvage service, ship and cargo would each pay 50% of the salvage award, assuming that it was settled separately and not included in general average. However, the shipowner will ultimately receive an allowance in general average for the sacrificial damage. If salvage is included in general average, as it is at present, and the amount made good is added to the arrived value of the vessel at the completion of the voyage, then the contributory*

value of the vessel would be \$1,500,000, and ship would pay 60% of the salvage, which is more equitable in the circumstances.

- *A second casualty can also materially affect the values at the end of the adventure and thus the apportionment. If, for example, a vessel carrying cargo under deck and other cargo on deck receives salvage services, the deck cargo contributes to the salvage award in proportion to its value at the termination of the salvage. If, after suitable repairs, the vessel proceeds towards destination, but encounters very heavy weather in which the deck cargo is carried away and lost, the value of the lost deck cargo at completion of the voyage is nil and that deck cargo will not contribute to the salvage remuneration if it is readjusted in general average.*
- *In some cases the salvage remuneration can be assessed on the basis of rough figures, leaving the fine tuning of the apportionment to be done later in general average. This can expedite salvage settlements and save costs.*
- *Some jurisdictions, e.g. Netherlands, contain laws which require the shipowner to pay salvage in full and collect from cargo in general average – this is recognised by the IUMI proposals.*
- *In many serious casualties general average security will still be collected because the shipowner's likely financial exposure may not be fully known and the possible extent of cargo sacrifices cannot be determined without delaying the release of cargo.*
- *It redresses the balance if one party to the adventure is able to use commercial or other pressures to reach a particularly favourable negotiated settlement with salvors leaving other parties to pay the full cost at arbitration.*
- *Even if salvage is not allowed in general average, it will still be treated as a special charge (which will be deducted in calculating contributory values) therefore the adjustment cannot be completed until the final amount of the salvage charges paid by each interest is available."*

At the Vancouver conference in 2004, shipowning interests continued to voice their objections, but the matter was put to the vote and the IUMI proposal was adopted. ICS/BIMCO considered this to be one of the major factors in the unwillingness of shipowning interests to adopt the 2004 Rules, and if the IWG's mandate for the 2016 rules was to be achieved, reaching a compromise on this issue was essential.

The eventual compromise is reflected mainly in paragraph (b) but it starts with the premise that the default position is that salvage is allowable as general average. With regard to the types of salvage that are payable independently by ship and cargo such as under Lloyds Open Form (as opposed to what is usually called 'contract' salvage that is paid by the shipowner) due note was taken of IUMI's position about the cost of re-apportionment of this type of salvage as general average when it has already been paid separately by the parties. Paragraph (b) therefore says you do not allow LOF type salvages as general average and re-apportion them, unless leaving them out produces an inequitable result; paragraph (b) then gives five scenarios when this may be the case.

It is not enough to show that a particular scenario exists; to trigger a re-apportionment it must be likely to give rise to a significantly inequitable outcome, if the re-apportionment does not take place. A previous attempt at a compromise had been put forward at Beijing to base the requirement on whether or not to allow and re-apportion an LOF type salvage on a specified percentage. However, it was soon found to be impossible to identify a figure or a formula that would work in the wide variety of situations that are encountered in practice. The test adopted in 2016 is therefore one of being "significant" which provides greater flexibility, albeit with an unavoidable degree of subjectivity.]

Rule VII – Damage to Machinery and Boilers

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

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), and 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

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 materials 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.

- (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 this 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 when the expenses of entering such port or place are allowable in 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 that **entry or detention** 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.

[The words "entry or detention" were added to emphasise that allowances for wages, fuel and port charges at a port of refuge are only possible either when ship and cargo remain in peril after having arrived at the port of refuge or when repairs necessary for the safe prosecution of the voyage are being carried out.

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

(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 circumstance connected with such damage having taken place during the voyage, then the wages and maintenance of master, officers and crew and fuel and 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 and crew and fuel and 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).

[During IWG discussions, the idea of providing definitions for all the key terms in the YARs (in the same manner as many well-known international conventions) was considered but rejected on the basis that definitions might simply provide more areas for legal dispute. However, in view of the specific comments made in the "Trade Green" [2000], which were contrary to the intentions of successive versions of the YARs, it was considered appropriate to deal with what is meant by the term "port charges".]

(d) The cost of measures undertaken to prevent or minimise 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 minimise 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 were added to correct an apparent anomaly. While Rule X(b)(i) mentions "handling on board" and "fuel or stores" the previous wording of XI(d)(iv) did not. It was agreed during IWG discussions that there was no logical reason to have a different approach so these words were added.]

Rule XII – Damage to Cargo in Discharging, etc.

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 is 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 here, but this was considered to be unrealistic when coatings are now expected to last for at least 4-5 years.]

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 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.

[With regard to temporary repairs, there was no question that such repairs when carried out for the common safety or of sacrifice damage should continue to be allowed directly as general average.]

The position regarding temporary repairs of accidental damage was discussed at length, and two possible approaches were debated.

The first approach was to retain the wording as it currently stands in the 1994 Rules. Here a calculation is first made of general average expenses saved by doing temporary repairs (for example the cost of discharging, storing and reloading cargo which would be necessary if a vessel had to dry-dock to carry out permanent repairs). Next, the temporary repair costs are allowed as general average up to the total saved and without regard to the savings that might also accrue to other interests (for example, hull insurers get the benefit of permanent repairs being carried out more cheaply at the end of a voyage to China). Only if all the general average savings are exhausted is a possible allowance in particular average considered.

The alternative was the method included in the 2004 Rules. Under this method you again calculate the savings achieved by doing temporary repairs but you first look at the particular average savings (e.g. the saving in permanent repair costs because you can do these after discharge in China) and the temporary repair costs are then charged to the hull and machinery claim up to the amount of those savings. Only if the temporary repair costs exceed all the particular average savings is the balance considered for allowance as general average, up to the general average savings in the same way as the 1994 rules.

In essence, the difference was whether the temporary repair costs should be a 'first charge' against general average or particular average, and it was ultimately agreed to proceed on the basis of the YARs 1994 approach.]

Rule XV – Loss of Freight

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.**

[The introduction in 1974 of the CIF invoice as the yardstick for cargo values was agreed to achieve greater simplicity and lower adjustment costs. However, with multimodal transport it is common for cargo to be landed at (say) Rotterdam which then goes overland to (say) Moscow. The CIF invoice will therefore include the costs of the Rotterdam/Moscow leg, which is after the final destination for the common adventure which is the point at which contributory values are established. In multi-bill cases the difference is unlikely to be significant and the long-standing practice of adjusters is to simply adopt the CIF value to save adjusting costs. This additional wording merely gives express sanction to this practice. It also appears in Rule XVII (a) (i).]

- (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.

(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.**

[With containership cases the adjuster may often be faced with a large number of low value interests. If the general average is relatively low in relation to total contributory values, say 10%, a US\$2,000 shipment will only contribute US\$200. It is likely that the cost of obtaining that contribution in terms of adjuster's costs might be double that, so that the larger cargo interests actually have to pay more to have that cargo included than if it is left out. For this reason it has been recognised to be commercially sensible for adjusters to leave out very small values in appropriate cases, and this addition gives express sanction to that practice. A similar provision was introduced for LOF in 2011 – see Clause 15 of the Lloyd's Standard Salvage and Arbitration Clauses.]

(iii) The value of the ship shall be assessed without taking into account the beneficial or detrimental effect of any demise or time charterparty 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' costs.**

[If salvage is not included in the general average and re-apportioned, because of the terms of Rule VI(b), it still needs to be deducted from the contributory value of ship/cargo because it is (using the words earlier in paragraph b) "an extra charge incurred in respect thereof subsequently to the general average act." Deducting the salvage payment establishes the "real value" to the owner of that property at destination and is no different to deducting physical damage for the same reason. Additionally, if

salvage is not deducted you could have a situation following a serious casualty in which an interest might have to pay 60% of its value to salvors and then also have to pay a 70% contribution for general average. It was therefore agreed by the IWG that such deductions needed to be made. However, in order to reduce adjusting costs in multi-bill cases, the additional wording states that the deduction is limited to just the actual payments made to salvors, so that the adjuster does not have to make separate enquiries with all the cargo interests regarding ancillary expenses, such as costs of providing security and representation.]

- (c) In the circumstances envisaged in the third paragraph of Rule G, the cargo and other property shall contribute 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 is to make it clear that unaccompanied personal effects, such as a container full of house-hold goods being moved to another country are liable to contribute to a general average. This approach is also followed under LOF 2011.]

Rule XVIII – Damage to Ship

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.

[This paragraph has been amended only in the interests of 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 Rule no longer includes any provision for a Commission of 2% to be allowed on general average disbursements – see further below.]

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 the 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 the rate of interest was fixed at 5% in 1950 and the 7% in 1974 and 1994, prevailing interest rates have at times climbed to over 15% and then in recent years have fallen to unprecedented lows. Given that revisions of the YARs are normally about twenty years apart, having a fixed rate was clearly too inflexible a solution. It was also broadly agreed that a fixed 2% commission was out-dated given modern banking practices. The 2004 YARs saw the deletion of any allowance for commission and the

adoption of a flexible rate of interest to be set annually by CMI in accordance with specific guidelines. While all parties agreed that commission was an anachronism, ICS emphasised that shipowners may have to incur additional banking costs if they have to rely on over-draft funding to pay expenses following a serious casualty. ICS further took the view that the guidelines for the 2004 rules were unrealistic in relation to the interest rates actually being paid by their members, particularly when trading conditions meant that even well-established owners might be regarded as a poor credit risk and face having to pay higher interest charges. It was decided at the IWG meetings to proceed on the basis of removing any allowance for commission, and then to leave the industry stake-holders to agree a mechanism for a flexible interest rate that met their respective views on the matter. The resulting compromise was to adopt the appropriate LIBOR rate and add an uplift of 4%.]

Rule XXII – Treatment of Cash Deposits

- (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.**

[Longstanding provisions in successive YARs regarding setting up joint accounts to hold deposits have in the past caused problems with USA anti-trust legislation. Modern anti-money laundering and anti-terrorist legislation has made the setting up of such joint accounts extremely difficult and often impossible. After considering a number of

options, the IWG recommended wording in which the joint account requirement was removed, and instead sets out more clearly how the adjuster should handle such funds.]

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.**

[This time bar rule was first seen in the YARs 2004. As reflected in the opening words, it was accepted that national legislation might often prevail over any contractual provision regarding time bars. However, it was felt that it would provide a greater degree of certainty in countries where a variation was possible, or in the few countries that have no provision at all.]