



## STANDARD GENERAL AVERAGE ABSORPTION CLAUSE

### Introduction

General average is an internationally accepted principle of equity relating to the apportionment of loss due to losses sustained for the common safety during a marine adventure. The system dates back to ancient times and is most commonly regulated by the incorporation of the York-Antwerp Rules into contracts of carriage. In recent years the whole concept of general average has come under scrutiny primarily by cargo insurance underwriters, some of who would like to see the system abolished or substantially amended. The CMI (Comité Maritime International), who are the custodians of the York-Antwerp Rules, are currently in the process of reviewing the provisions of the Rules and may make recommendations for change.

Regardless of whether general average is viewed as an outdated concept, BIMCO believes that the abolition of the system would create uncertainty in the shipping industry. Consequently, BIMCO would prefer to see general average preserved, but would provide shipowners with a solid contractual mechanism to allow them if they so choose, to claim for the other parties' contributions under their hull insurance policy. This mechanism is usually referred to as an "absorption clause".

A general average absorption clause is a provision inserted into a hull insurance policy. The clause requires the underwriters to "absorb" up to an agreed amount a claim in general average that the insured shipowner has against another party, most commonly cargo interests. Such clauses are frequently found in hull policies in a wide variety of forms, some better worded than others. At present, absorption clauses are widely used by shipowners, especially those involved in the container sector, to avoid the adjustment of small and therefore uneconomic general average claims, in many cases involving many contributing parties. One of the disadvantages to shipowners of declaring general average where cargo interests are involved is that there is a high risk of delay at the discharge port because general average security must be in place prior to the delivery of the cargo.

It is generally acknowledged that small general average claims are uneconomic because of the amount of work involved in collecting security and settling the contributions due under the adjustment. Collecting security on all contributing interests and settling afterwards is an extremely time-consuming business for average adjusters and could account for up to 50 percent of general average costs. This work and the consequential cost thereof is the same irrespective of the amounts allowable in general average. It has been estimated that an absorption limit of 3 percent of the insured value of the vessel would eliminate one-third of general average claims. A limit of 6 percent of the insured value of the vessel would reduce the number of general average claims by half.

### The BIMCO Standard Absorption Clause

Insurance underwriters and average adjusters have acknowledged that the development of an acceptable standard absorption clause would help promote a broad move away from declaring general average for small and uneconomic claims in all sectors of the industry. To fulfil this

objective BIMCO, working closely with insurance underwriters, average adjusters, shipowners and the P&I clubs, has drafted a Standard General Average Absorption Clause to be incorporated into shipowners' hull and machinery policies. It is hoped that this Clause will be found suitable for use in policies covering all types of vessel from container ships, bulk carriers, tankers to cruise ships. The Clause is designed to benefit shipowners and insurers by avoiding the time and expense associated with pursuing small general average claims.

### **Triggering the Clause**

The BIMCO Absorption Clause is triggered if a shipowner decides not to claim general average, salvage or special charges from cargo, freight, bunkers, containers or any property not owned by the shipowner for an amount up to and including the limit agreed under the Clause. If the total of the general average losses exceeds this limit the policy pays up to the limit but the shipowner cannot recover any excess. It is important to note that, unlike some absorption clauses currently in use, the decision to trigger the BIMCO Absorption Clause rests with the shipowner. However, it should be noted that the shipowner is not required to make any formal "election" of his making a claim under the Clause by giving notice – the Clause is given effect under the insurance policy by the simple fact that the shipowner has not claimed general average contributions from other parties. This mechanism avoids any question of whether, why and when the "election" could or should have been made.

### **Threshold and Upper Limit**

The upper limit up to which the insurers will pay in full the general average, salvage and special charges is left to the parties to decide on a case by case basis, determined by the size or value of the vessel. The mechanism is based on whichever is the higher figure of the agreed percentage of the insured value of the vessel or a specified lump sum. To avoid small or low value vessels defeating the objective of the Clause a threshold figure of \$150,000 has been incorporated. It is considered that in most cases general averages amounting to less than this figure would cost a disproportionately large amount to adjust. Although this figure should accommodate the majority of vessels, it is given primarily for guidance and the parties should, if necessary, adjust the threshold figure in accordance with their specific needs.

### **Scope of the Clause**

The scope of the Clause expressly covers not only cargo but also freight, bunkers' and containers' proportion of general average and salvage. In particular cases, containers and bunkers can account for a very high proportion of the contributory values. Consequently, it was felt important not to have to value any of the potentially contributing interests.

The reference to salvage has been included to make it clear that it is payable under the Clause. Strictly speaking, however, the reference is not necessary as salvage is brought within general average by Rule VI (Salvage Remuneration) of the York-Antwerp Rules 1994, which are incorporated into the Absorption Clause by sub-clause 1.3.

### **Special Charges**

The term "special charges" in the first sentence of the opening paragraph is taken from Rule 22 of the York-Antwerp Rules. It should be noted that "special charges" referred to in the Clause are included to avoid having to collect security for a shipowner to recover them in cases, for instance, where the charges are substantial or no general average losses are incurred.

### **Sacrifice**

The Clause deliberately omits any specific reference to sacrifices. This has been done for the sake of conciseness because to refer to sacrifices would have required specifying all other allowances referred to in the York-Antwerp Rules, thus making the Clause impracticably long.

### **Fees and Expenses**

Sub-clause 1.1 requires the insurer to pay the reasonable fees and expenses of the average adjuster for calculating claims under the Clause in addition to any payment made where the general average losses amount to or exceed the specified limit.

### **Double Claims**

Sub-clause 1.2 places an obligation on the shipowner once he has triggered the Absorption Clause not to make any duplicate claim for general average, salvage or special charges from those interests whose contribution he has already been reimbursed for by his insurers.

### **Commission and Interest**

Claims under the Absorption Clause expressly exclude the payment of commission and interest (sub-clause 1.3). This is in keeping with common commercial insurance practice in respect of absorption clauses.

### **The York-Antwerp Rules 1994**

For the avoidance of doubt as to which elements are included or excluded from the Absorption Clause, sub-clause 1.3 expressly states that claims under the Clause are to be adjusted in accordance with the York-Antwerp Rules 1994. The only applicable exception to the York-Antwerp Rules is the exclusion of the first paragraph of Rule XX (Provision of Funds) and Rule XXI (Interest on Losses Made Good in General Average) (see “Commission and Interest” above). It is important to note that the exclusion relates only to commission and interest and that other allowances referred to in Rule XX should be permitted. The 1994 Rules apply irrespective of any provision in the contracts of carriage applying to the voyage in question, as it is not necessary, when the Clause is used, to refer to these contracts.

### **Deductible**

As mentioned in the introduction, one of the key objectives of the Standard Absorption Clause is to eliminate small general averages. To help achieve this objective sub-clause 1.4 expressly states that claims under the Absorption Clause are payable without application of the shipowners' deductible. If the deductible were to apply and a shipowner has a high deductible, higher than the limit in the Absorption Clause, he is likely instead to declare general average and get a substantial proportion of his general average claim from cargo and other interests (he will not get anything from the underwriters due to the deductible). For this reason it was generally agreed that the Absorption Clause should be free of the deductible to eliminate, so far as possible, small general average claims.

### **Waiver of Defences**

Sub-clause 1.5 requires the insurers to waive any defences to payment under the Clause that would have been available to cargo and other potentially contributory parties. Recognising that this is a broad waiver, the sub-clause also expressly states that the insurers may still avail themselves of the defences they have under the insurance policy in the event of a breach of the policy by the assured shipowner.

### **Waiver of Subrogation**

Sub-clause 1.6 deals only with subrogation made under the Absorption Clause on payment of a claim by the insurers. Where the fault can be attributed to one of the contributing parties, for example the cargo interests, then by virtue of the second sentence of sub-clause 1.6 the insurers maintain their right of recourse against that party.

### **Contributory Value**

The final provision of the Absorption Clause (sub-clause 1.7) deals with under-insurance and states that for the Clause to be given full effect, the vessel is assumed insured for its full contributory value for the purposes of general average. This avoids the cost of requiring the adjuster to obtain ship values to determine if the vessel is fully insured.

If you require further information please contact Grant Hunter, Documentary and Legal Division Manager (e-mail: [documentary@bimco.dk](mailto:documentary@bimco.dk)). The full text of the BIMCO Standard General Average Absorption Clause follows this article.

## **STANDARD GENERAL AVERAGE ABSORPTION CLAUSE**

1. If the Assured does not claim general average, salvage or special charges from cargo, freight, bunkers, containers or any property not owned by the Assured on board the vessel (hereinafter called "Property Interests"), the Insurers shall pay in full the general average, salvage and special charges up to ..... % of the insured value of the vessel or US\$ ....., whichever is the higher. The % of the insured value of the vessel or the US\$ sum agreed under this clause shall not be less than US\$150,000.
- 1.1 The Insurers shall also pay the reasonable fees and expenses of the average adjuster for calculating claims under this clause in addition to any payment made under 1. above.
- 1.2 If the Assured claims under this clause he shall not make any claim for general average, salvage or special charges against the Property Interests.
- 1.3 Claims under this clause shall be adjusted in accordance with the York-Antwerp Rules 1994, excluding the first paragraph of Rule XX and Rule XXI, relating to commission and interest.
- 1.4 Claims under this clause shall be payable without application of the deductible.
- 1.5 Without prejudice to any defences they may have under the terms of the policy the Insurers waive any defences to payment under this clause which would have been available to the Property Interests.
- 1.6 In respect of payment made under this clause the Insurers waive any rights of subrogation they may have against the Property Interests. This waiver shall not apply where the incident giving rise to such payment is attributable to fault on the part of Property Interests.
- 1.7 For claims under this clause the vessel shall be deemed to be insured for its full contributory value.