

**Report by the CMI Working Group on General Average**  
7 March 2003

**Table of contents**

- 0. SUMMARY
- 1. INTRODUCTION
  - 1.0 IUMI report
    - 1.1 Remée Working Group - papers – decisions
    - 1.2 Remée questionnaire
    - 1.3 The Singapore conference - papers – decisions
- 2. THE WORKING GROUP’S BRIEF
  - 2.1 Wiswall steering committee - papers – decisions
  - 2.2 Topics to be considered by the Working Group
  - 2.3 Topics excluded
  - 2.4 The Working Group – composition – meetings – tasks
  - 2.5 The subjects discussed in this report
  - 2.6 No draft wordings submitted for all proposals
  - 2.7 International Sub-Committee created
- 3. RADICAL CHANGE – COMMON SAFETY/COMMON BENEFIT
  - 3.1 IUMI’s proposals
  - 3.2 IUMI’s proposal “Grip of peril”
  - 3.3 Common Benefit – concept – summary – YAR Rule X, XI, XII
  - 3.4 Substituted expenses – concept – Rule F, Rule XIV (2)
- 4. ARGUMENTS FOR AND AGAINST EXCLUDING COMMON BENEFIT EXPENSES
  - 4.1 Introduction
  - 4.2 Arguments for excluding Common Benefit
  - 4.3 Arguments for retaining Common Benefit
- 5. INCREMENTAL CHANGES – CONSIDERATION OF SPECIFIC TYPES OF EXPENSE
  - 5.1 Cargo handling (including damage caused during handling)
  - 5.2 Wages, fuel and port charges in port of refuge
  - 5.3 Temporary repairs
  - 5.4 Substituted expenses
- 6. RETRIBUTION OF SALVAGE CHARGES
  - 6.1 General comments
  - 6.2 Arguments for and against excluding salvage
  - 6.3 Draft clause
- 7. TIME BAR (PRESCRIPTION)
  - 7.1 General comments
  - 7.2 Summary of replies to Remée questionnaire
  - 7.3 Draft clause

- 7.4 Legislation (Issues of Transport Law)
- 8. INTEREST
  - 8.1 General comments
  - 8.2 Currency
  - 8.3 A possible formula – LIBOR
  - 8.4 Proposal and draft clause
- 9. COMMISSION
  - 9.1 General comments
  - 9.2 Arguments for and against allowing commission
- 10. ABSORPTION CLAUSE
  - 10.1 General comments
  - 10.2 Extent of use
  - 10.3 BIMCO standard clause
- 11. SEPARATE TREATMENT OF SACRIFICES OF PROPERTY
- 12. TIDYING UP THE TEXT OF THE YAR

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## **0. SUMMARY**

This report sets out the results of the studies conducted in 2002 by the Working Group under the Chairmanship of Mr Bent Nielsen (Denmark) on the proposals for revision of the York-Antwerp Rules made by the International Union of Marine Insurers (IUMI), and in particular that the scope of General Average should be limited by excluding "common benefit". The purpose of this report is to review the arguments on each side of the debate, so that in due course an informed decision can be made at the Vancouver Conference of the CMI in June 2004.

The Working Group has followed the traditional CMI method of work in setting down from a neutral stance the matters which it considers to be important in making the relevant decisions, and has not itself taken a position on any of the arguments.

## **1. INTRODUCTION**

### **1.0 IUMI report**

At the 1994 Conference of the CMI held in Sydney, Australia an International Subcommittee under the Chairmanship of Mr David Taylor conducted a review of the York-Antwerp Rules (YAR) in the light of developments since the previous review in 1974. Prior to the conference extensive consultations with all interested parties had as usual taken place. At the end of the Sydney Conference a new version of the YAR, to be known as the YAR 1994, was adopted by the plenary session.

In the course of the discussions in the International Subcommittee and at the Sydney Conference the representatives of certain insurers, including IUMI, put forward proposals for radical reform of General Average based on a change of principle to exclude from General Average allowances based on "common benefit", so that only allowances based on "common safety" were retained. It was however evident that these proposals had not received sufficiently thorough development prior to the conference to enable them to be considered in detail.

However, at the IUMI Conference in Berlin in April 1998 a Working Group submitted a paper entitled "Report of IUMI Drafting Working Group. General Average - How should it be Changed?" This report is set out in full on page 298 of the CMI Yearbook 2000. The report was adopted by IUMI, and as a result in March 1999 a formal request was submitted by IUMI to CMI that a case for further revision of the YAR should be placed on the agenda of CMI.

### **1.1 Remée Working Group - papers – decisions**

A Working Group was therefore set up under the Chairmanship of Mr Thomas Remée (Germany) and consisting of Mr Pierre Latron (France) and Mr Hans Levy (Denmark), which prepared a questionnaire submitted to all CMI member maritime law associations.

Meanwhile at the CMI Colloquium which took place in Toledo, Spain in September 2000, the possible review of the YAR was one of the subjects selected for discussion. Papers were presented, inter alia, by Mr Eamonn Magee, an underwriter, and Mr Geoffrey Hudson, an average adjuster, whose main thrust was respectively for and against the amendment of the YAR along the lines proposed by IUMI. These papers are also printed in the CMI Yearbook 2000 on pages 294 and 314, respectively. A lively debate ensued, at the conclusion of which it was the common consensus that this was a subject which should be included on the work programme of the 2001 CMI Conference in Singapore. Mr Richard Shaw (UK) was appointed Rapporteur of that session and of the session at the Singapore Conference.

## **1.2 Remée questionnaire**

The text of this questionnaire is set out on page 292 of the 2000 CMI Year Book. It was not possible to draft a synopsis of all the replies received from 21 Maritime Law Associations. One of the great strengths of the CMI is the diversity of membership of the national maritime law associations of which it is composed, and many such associations appointed a subcommittee with a broad mix of members to draft their association's reply. It is not surprising therefore that in many cases the responses have indicated a divergence of views between the members of their committee between those representing marine insurers (who have generally favoured the revisions proposed by IUMI) and those representing shipowning interests and average adjusters (who have not).

In summary, of the 21 national Maritime Law Associations which replied to the questionnaire, 10 were in favour of retaining the "common benefit" principle of General Average while 7 associations were in favour of excluding "common benefit", and 4 associations were so divided as to be unable to formulate a common position.

In accordance with CMI practice no questionnaire was sent to IUMI or other industry groups.

## **1.3 The Singapore conference - papers – decisions**

At the CMI Conference held in Singapore in February 2001 a lively debate took place on whether or not further work should be done by CMI on the IUMI proposals. A substantial body of opinion argued that the review conducted in preparation for the 1994 Sydney Conference had been thorough and wide ranging, and that a further review of the YAR at this stage was premature. However the majority view was that the concerns expressed by IUMI and its supporters were of sufficient importance to justify further work by the CMI, and this view was adopted by the Conference. The resolution of the Conference which is printed in the CMI Yearbook 2001, page 213, requests the Working Group to consider what, if any, revision of the YAR should be made in the light of the deliberations and conclusions at the Conference.

## **2. THE WORKING GROUP'S BRIEF**

### **2.1 Wiswall steering committee - papers – decisions**

However the CMI Executive Council was concerned that the implementation of this decision should not lead to a completely open-ended review of all aspects of General Average and appointed a steering committee under the Chairmanship of Dr Frank Wiswall (USA), Vice President of CMI, to analyse the list of topics included in the IUMI Report of April 1998 and to identify those which merited further study by this Working Group. Dr Wiswall's steering committee conducted extensive consultations and held two well-attended meetings in London in May and December 2001, and a detailed report was submitted to, and approved by, the CMI Executive Council at its meeting in London on 7<sup>th</sup> December 2001. A copy of this report is available on the CMI website at [www.comitemaritime.org](http://www.comitemaritime.org)

### **2.2 Topics to be considered by the Working Group**

The topics which should be considered by this Working Group are therefore the following:

- **Port-of-refuge expenses** - to consider whether certain expenses currently allowed (such as wages) should be excluded, and whether such an incremental approach is preferable to a blanket exclusion of all so-called common benefit expenses,
- **Absorption clauses** - exclusion of sacrifices in General Average,
- **Salvage claims** - to consider whether salvage remuneration should be readjusted in General Average,
- **Interest** - to consider the question of interest, and in particular whether the rate of interest stated in the YAR should be governed by a formula rather than a set figure,
- **Commission<sup>1</sup>**
- **Temporary repairs,**
- **To let liability lie where it falls in sacrifices of property,**
- **Time bar,** and
- **"Substituted expenses"** – as one part of the consideration of the "Common Safety" vs. "Common Benefit" approach.

### 2.3 Topics excluded

The topics which are excluded from our consideration are the following:

- **"Ballast General Average",**
- **Deductible clauses,**
- **"Error in management" exclusions,**
- **Reversal of the 1994 Rule 11 (d) compromise,**
- **Exclusion of adjusters' fees, and**
- **Other miscellaneous matters raised by the IUMI Report.**

### 2.4 The Working Group - composition - meetings – tasks

The CMI Executive Council also reviewed the composition of the General Average Working Group in the light of developments since the Singapore Conference as a result of which the membership now consists of:

Mr Bent Nielsen (Denmark)	Chairman
Mr Richard Shaw (UK)	Rapporteur
Mr Ben Browne (UK)	
Mr Richard Cornah (UK)	
Mr Gilles Heligon (France)	appointed in place of Mr Pierre Latron in April 2002
Mr Hans Levy (Denmark)	
Mr Jens Middelboe (Denmark)	
Mr Howard McCormack (USA)	

Meetings of the Working Group have been held in London on 18<sup>th</sup> and 19<sup>th</sup> March 2002 and in Copenhagen on 3<sup>rd</sup> and 4<sup>th</sup> July 2002.

### 2.5 The subjects discussed in this report

In this report we propose to:

- summarise the proposals for change of YAR relating to the topics listed in 2.2
- analyse these topics
- set out the arguments for and against the proposed changes.

The report is arranged as follows:

Section 3 sets out the most radical change (Common Safety/Common Benefit) and section 4 looks at points for and against that change.

Section 5 looks at the possibility of incremental change, i.e. the case for making changes in individual rules relating to cargo handling, substituted expenses, wages and other detention expenses.

Section 6 considers the possible exclusion of salvage.

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<sup>1</sup> Commission was included in the list of topics which the Wiswall Steering Committee indicated should not be considered by this Working Group, but it has subsequently been agreed that this topic should be considered by the Working Group.

Section 7 deals with the possibility of introducing a time bar provision.

Section 8 considers a possible introduction of a variable interest formula.

Section 9 deals with commission.

Section 10 describes the present position regarding the use of absorption clauses.

Section 11 considers a proposal to let sacrifices “lie where they fall”, rather than be distributed in General Average.

Finally, section 12 sets out minor improvements that could be considered as and when a further revision takes place.

## **2.6 No draft wordings submitted for all proposals**

The Working Group has considered the possibility of including in this report possible wordings to give effect to the IUMI proposals in respect of "Common Benefit". However, until a policy decision has been made as to whether or not the YAR should be amended and if so to what extent, it is impractical to assess the extent of the amendments to the existing YAR which would be required. Any modification of the present regime could involve exclusion or limitation of admissibility in General Average of cargo handling, crew wages and maintenance, fuel and stores, and port charges.

The Working Group has, however, felt it useful to propose draft wordings to reflect some of the less complicated proposals, e.g. in respect of time bar, interest and salvage.

## **2.7 International Sub-Committee created**

The Executive Council of the CMI at its meeting in Antwerp on 6-7 December 2002 resolved to create an International Sub-Committee (ISC) to deal with the proposals for amendments of the YAR which are the subject of this report.

This report will be the basic working document of the ISC which shall meet in Bordeaux the full day of 11 June 2003 and will operate in parallel with colloquium sessions. A final decision will be made at the Vancouver Conference of CMI in June 2004.

# **3. RADICAL CHANGE – COMMON SAFETY/COMMON BENEFIT**

## **3.1 IUMI’s proposals**

The express purpose of IUMI’s proposals is to rein back “the progressive extensions in the scope of General Average which have taken place over at least the last 100 years with a view to lessening the burden which General Average places on property underwriters worldwide.” Now that insurance is so very much more universally held by ship owners IUMI believe losses should lie where they fall to a greater extent than at present. The current concept of General Average is now felt to be outdated for a number of reasons. Despite this, IUMI recognise that there is an argument for continuing General Average in certain limited situations and that it would be difficult to abolish General Average altogether, for example because the maritime legislative community worldwide is not yet “ready” for such a novel step.

## **3.2 IUMI’s proposal “Grip of peril”**

The principal philosophy of the IUMI proposals is that the emphasis of General Average shall be common safety rather than common benefit.

Expenses and sacrifices would only be admissible if they are made or incurred while ship and cargo are “in the grip of a peril”. A workable definition of the word “peril” would therefore be required. IUMI suggest that a peril should only continue until ship and cargo are in a condition of reasonable safety. It should not therefore usually continue after the arrival of the vessel at a port of refuge.

The Working Group is of the view that it may be of assistance to provide illustrative examples showing some practical effect of IUMI’s proposal. The adjuster members of the Working Group have therefore kindly prepared three such examples which are annexed to this report.

## **3.3 Common Benefit - concept - summary - YAR Rule X, XI, XII**

**3.3.1** Even though the main principle as expressed in Rule A is that only expenditures made or incurred for the common safety shall be allowed in General Average, certain expenditures which are not incurred for common safety are admitted in General Average according to Rules X (b) and (c), XI (b) and XII. These latter rules under the "Rule of interpretation" as "numbered rules" have, of course, preference above Rule A as a "lettered rule".

**3.3.2** Such expenditures are admitted if they relate to repairs which "were necessary for the safe prosecution of the voyage". This is often expressed as expenditures incurred for "the common benefit" as opposed to expenditures incurred for "the common safety".

**3.3.3** Under Rule X (b) and (c), the cost of cargo handling (handling, discharging, storing, re-loading and stowing cargo, fuel and stores) to enable accidental damage to the ship to be repaired shall be admitted as General Average if the repairs were necessary "for the safe prosecution of the voyage". Rule XII provides that damage to cargo (and fuel or stores) sustained as a consequence of this handling is admitted as General Average.

**3.3.4** Under the same circumstances, i.e. if repairs of accidental damage are necessary for the safe prosecution of the voyage, Rule XI (b) provides for the admittance as General Average of wages and maintenance of master, officers and crew (sub-paragraph 1), fuel and stores (sub-paragraph 2) and port charges (sub-paragraph 3), all incurred during the period of repairs.

**3.3.5** It should be noted that, if the repairs are of damage caused by a General Average sacrifice or incurred as a General Average sacrifice, such expenditures e.g. for cargo handling, wages, fuel and port charges are admitted in General Average under the common safety principle, not as common benefit.

#### **3.4 Substituted expenses - concept - Rule F, Rule XIV (2)**

**3.4.1** Rule F provides that additional expense incurred in place of another expense which would have been allowable as General Average (substituted expenses) shall be admitted as General Average. Rule XIV (2) contains the specific rule that the costs of temporary repairs made for the common benefit shall, in effect, only be accepted in General Average as a substituted expense.

**3.4.2** In practice, the main effect of the substituted expense principle is the allowance as General Average of expenses which are incurred in place of expenses which are allowable under the common benefit rules. Indeed, the view has been expressed, but is not supported by the Working Group, that there would be no need for a rule about substituted expenses if the common benefit principle were abolished.

**3.4.3** The most frequent "substituted expenses" are the costs of temporary repairs, towage to destination and transshipment of cargo to destination.

**3.4.4** The costs of temporary repairs and towage to enable the vessel to be removed to another port of refuge because repairs cannot be carried out in the first port of refuge are allowed in General Average under Rule X (a) 2. Although subject to some doubt, this may be classified as a hybrid allowance based on the principles of common safety/common benefit.

### **4. ARGUMENTS FOR AND AGAINST EXCLUDING COMMON BENEFIT EXPENSES**

#### **4.1 Introduction**

We shall list below the arguments which have been heard by the Working Group on both sides. As previously made clear, this Working Group takes no position as to the validity of any particular argument on either side.

#### **4.2 Arguments for excluding Common Benefit**

**4.2.1** A marked majority of hull and cargo insurers have unified and strong feelings that the common benefit principle should be abolished. IUMI's hull and cargo insurer members pay the

vast majority of the sums shifted in General Average so their voice is an important one. If the YAR are not amended some insurers have said that there is a risk that the present cover for General Average contributions will be restricted. As the representative of IUMI, Nicholas Gooding, said at CMI in Singapore in February 2001:

"If we had to resort to an "insurance solution" to solve our General Average problem, I think it would be a disappointment to us all. Some may say such a solution would not be deliverable but you should not ignore what is happening in the insurance markets. With the admirable exception of Japan, most marine hull and cargo insurers are losing money and have been for some time. In Lloyd's there are approximately 25 syndicates writing hull [business] and slightly less cargo. At the peak of the market there were probably 3 times as many. It is likely numbers will continue to contract with people falling by the wayside through poor results or mergers. In the London company market there are now only a handful of players. The marine market of the future will be fewer in number, but substantial in size. It will become easier to sell new solutions to old problems in such a market.

I myself would rather address the problem through auspices of the CMI and a revision of the YAR."

**4.2.2** General Average is seen to be an unnecessary, expensive and unjust way of dealing with marine casualties. According to a study of 1700 General Average adjustments conducted for insurers by M. Marshall in 1996 and last updated in 1999<sup>2</sup> the annual cost of General Average claims to insurers is about USD 300 million. 10% or USD 30 million is made up of adjustment costs and a further 10% is interest and commission. 80% of cases are acknowledged as or considered likely to have been caused by the fault of those on the ship and/or the ship owner. However, 60%-65% of the total cost of claims is borne by cargo interests. In short, the current system does not "work" in the eyes of many in the market (not just underwriters but also owners who increasingly resort to Absorption clauses to avoid declaring General Average).

**4.2.3** The adjustment of claims is a time-consuming process. Again according to M. Marshall's study, in seven years we can expect 95% of adjustments to be completed. While two thirds of the adjustments are produced in the 2 years after General Average is declared, these account for only one third of the money moved in General Average.

A reduction in the overall number of General Averages would go some way towards resolving this.

**4.2.4** Ship owners will say that in the current market with margins ever tightening now is hardly the time to tamper with their potential liabilities; they cannot afford a big uninsured loss. This misunderstands the thrust of the changes proposed; Nearly all the "new" liabilities will be covered by insurance products currently available (such as loss of earnings insurance) and any which may not be so covered will no doubt be provided with cover by a market eager for new business. Moreover, Cargo and Charterer interests are themselves experiencing extremely tough market conditions, at least as bad as those faced by ship owners.

**4.2.5** In response to those who suggest that "due consideration should be had to the long history of common benefit" (see 4.3.5 below) it should be pointed out that the opposition amongst property underwriters to the YAR, based as they are on "common benefit", goes back at least 140 years.

**4.2.6** In response to those who suggest that it is too soon after 1994 to revise the YAR it is pointed out that the first study produced by Matthew Marshall (see 4.2.2 and 4.2.3 above) was only presented to the IUMI Conference in Toronto one month before the CMI met in Sydney in 1994. Time did not allow for them even to be introduced there, let alone for IUMI to consider and formulate an alternative to the current rules. So the 1994 Rules were adopted in a climate in which property underwriters had very little to contribute. Many feel it would be unfortunate if the initiatives of IUMI and others were not to result in a reform of the Rules just because it is felt to be too soon to re-examine them following a review in 1994, which was based on incomplete input.

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<sup>2</sup> A copy of Mr Marshall's Report is available on the CMI website [www.comitemaritime.org](http://www.comitemaritime.org) Note that the CMI and this Working Group are not in a position to confirm or deny the figures set out in this report, nor the conclusions drawn therefrom.

**4.2.7** In cases where the ship is legally unseaworthy, cargo interests will decline to contribute in General Average. Declarations of General Average may be a waste of time and money in such cases, especially where amounts are below the hull and P & I insurers' deductible or only slightly above it. The abolition of the common benefit principle would reduce the sums re-distributed in General Average and thereby reduce the cost of wasted Adjustments and the general inconvenience of General Average declarations (e.g. obtaining/giving cargo security etc.).

**4.2.8.** The YAR have in the past been misused by certain ship owners to obtain unfair pecuniary advantage. In particular

- allowing wages in General Average while bearing up to and in a port of refuge is seen as an encouragement to unscrupulous ship owners to declare General Average for simple repairs
- allowing some port of refuge expenses is seen as a reward to owners of substandard ships for failing to maintain their vessels
- many examples of cases have been given in which owners have used General Average (and especially temporary repair and port of refuge expenses) as an excuse to demand money on account to continue the voyage rather than waiting to deliver the cargo, obtain security and rely on an adjustment. This affords owners of unseaworthy vessels an opportunity to obtain funds from cargo interests to which legally they may not be entitled.

It is said that these abuses have over many years sullied the reputation of the institution of General Average so that for many years many underwriters have regarded it as little more than an engine of "fraud and speculation". A radical reform of the Rules will restore the reputation of General Average.

**4.2.9** Unless the contract of carriage is legally terminated, the owners are legally bound to deliver the cargo to the port of destination. A ship owner is only legally entitled to abandon a voyage if the test under the applicable law is passed. If he fails to meet the criteria he must carry the cargo to destination. None of the IUMI proposals alters the test of abandonment under any particular law.

**4.2.10** Putting into a port of refuge is just another contingency for which the owners should allow in their voyage calculations or against which they can insure.

**4.2.11** In some circumstances a ship owner is obliged to pay charges for handling cargo at a port of refuge (which currently are allowable in General Average). If these are disallowed the ship's value for the purposes of ascertaining whether the voyage may be abandoned may be reduced; consequently, in a few cases the voyage may be abandoned where at present it could not be. However, it is said that the effect mentioned in 4.3.11 will be minimal.

**4.2.12** Many of the expenses, such as wages and fuel, will have to be paid by the owner anyway. Accordingly, there is no good reason why he should recover them unless perhaps ship and cargo are in the grip of a peril.

**4.2.13** To include wages, fuel and port charges is inequitable and against the main principle in Rule C (3) because it is a loss or an expense incurred by reason of delay.

### **4.3 Arguments for retaining Common Benefit**

**4.3.1** The general philosophy of cooperation which underlies General Average encourages the parties to incur the expenditure necessary to ensure that the ship and cargo reach their ultimate destination. If this distribution of expenses were not regulated by the common benefit rules, the parties would, after the emergency has incurred, often have to resort to individual agreements about the distribution of outlays and expenses (particularly cargo handling) necessary to bring about an expedient and cost-effective solution for all parties concerned. This would involve serious risks of delays and other losses which would not occur under the present system. Such individual agreements may well be to the disadvantage of the cargo interests compared with the present system and it is possible that in many cases the delays and losses arising would hit the cargo interests harder than the ship owner.

**4.3.2** The result of the YAR as presently drafted is that cases move seamlessly from common safety to common benefit, thus reflecting the reality of many casualty situations, which do not fall neatly into defined stages. By retaining common benefit one is thereby avoiding a significant area of dispute.

**4.3.3** It is said that the present system is an equitable compromise of the division of the costs and risks between ship and cargo in an emergency. It clears up the difficulties smoothly and fairly, and in most cases the system permits the voyage to be completed.

**4.3.4** In the present depressed market ship owners consider that they are unable to accept the additional costs involved in the IUMI proposals, and that these changes will be strenuously resisted by ship owning interests.

**4.3.5** Due consideration should be taken to the long history and role of the principle of common benefit. The introduction of any new rules will run the risk that they will lead to litigation regarding their interpretation and resulting costs (but see paragraph 4.2.5 above).

**4.3.6** If the common benefit principle were abolished or restricted, this would put the uniformity and the universal acceptance of the YAR in danger and may lead to a variety of new Bills of Lading and Charter Party clauses entitling the ship owner to charge all sorts of expenses to the cargo interests. Under the common benefit rule, many of these costs would be apportioned between the contributing interests.

**4.3.7** Each time the YAR are amended this results in the need for them to be incorporated into Bills of Lading and charter parties. If this happens at frequent intervals (of less than 25 years) this leads to confusion with several forms of Bill of Lading and Charter Party in circulation. The Working Group has been informed that adjusters estimate that 60% of the cases presently under adjustment in 2002 involve contracts of carriage which incorporate the YAR 1974.

**4.3.8** It is appreciated that the wish to do away with the "common benefit type" allowance has been triggered by problems experienced with such allowance in cases involving sub-standard ships. However, "hard cases make bad law" and such undesirable consequences should not be removed by abolishing the common benefit rule altogether, but rather by introducing supplementary rules by which misuse of the principle is reasonably prevented. The Rule Paramount introduced in the YAR 1994 is, in fact, such a rule. The express requirement of "reasonableness" in that rule may eliminate many cases of misuse.

**4.3.9** The common benefit expenses are of great commercial importance when combined with Rule F regarding substituted expenses. The allowance for transshipment or towage to destination in substitution for cargo handling costs, or other common benefit expenses, enables cargo to be brought to destination much more quickly than might otherwise be the case. Existing cargo policies only cover forwarding expenses when the voyage is terminated at an intermediate port and not if the voyage is simply delayed by lengthy repairs.

**4.3.10** If there is unseaworthiness or another basis of liability for loss or damage to cargo, there are ways of dealing with it under Rule D. The advantage of the structure provided by General Average is that legal arguments can take place after the voyage has been completed. The initial allocation of costs is done under the YAR and then issues of liability can be decided later, as a result of which expenditure is settled by contribution between the parties or the relevant liability insurer.

**4.3.11** If common benefit expenses such as cargo handling are no longer dealt with as General Average many of them will fall on the ship owner and in some instances, on the Hull Insurers. Such costs falling on the Owner can be added to repair costs to justify frustration of the voyage on grounds of cost. Cargo handling necessary to effect repairs at an intermediate port is allowable as Particular Average (the "MEDINA PRINCESS") and can therefore be used to help establish a Constructive Total Loss claim. Removal of common benefit expenses will therefore see an increase in cases of cargo being left at ports of refuge, and/or in legal disputes seeking to contest this outcome.

**4.3.12** Many of the costs removed from General Average under the IUMI proposals will fall on other insurers. Others, such as transshipment expenses, crews wages, and port charges may require additional insurances beyond existing hull and cargo policies.

**4.3.13** The figures relied upon by IUMI reflect past realities which may have justified radical action if they still prevailed. However ISM, Port State Control, consolidation of ship owning companies, and increased use of absorption clauses have greatly reduced the number of General Average cases where contributions from cargo are sought. The abolition of the defences of nautical fault and fire, currently under discussion internationally, will further hasten this process.

**4.3.14** In some cases it is difficult to distinguish between expenses or sacrifices for common safety and those for common benefit. For example in some cases a ship that has been on fire at sea may have cargo that continues to smoulder or pose a threat even after being brought into a port of refuge. Some part of the discharging may still be for the common safety whilst other elements of cargo are removed to effect repairs (common benefit). The present rules usually render it unnecessary to make these difficult distinctions between cargo that is taken off to recondition sacrifice or accidental damage, or a combination of both. The present inclusive nature of the Rule therefore works well.

## **5. INCREMENTAL CHANGES - CONSIDERATION OF SPECIFIC TYPES OF EXPENSE**

### **5.1 Cargo handling (including damage caused during handling)**

Cargo handling, including handling, discharging, storing, reloading and stowing cargo, fuel and stores, is allowed under Rule X (b) and (c). Under Rule XI(d)(iv) anti-pollution measures taken in connection with cargo handling are also allowed in General Average.

Damage to or loss of cargo, fuel or stores sustained in consequence of such handling etc. is allowed under Rule XII.

Cargo handling was allowed as General Average prior to 1860 and also under the 1864 YAR.

There are strong views that the system works well in practice and that, coupled with allowances under Rule F which encourage transshipment of cargo to destination, brings many practical and commercial benefits.

Very often, if the cargo has to be discharged in a port of refuge to enable repairs to be effected to the vessel, it is much more convenient and expeditious to tranship it to the port of destination rather than to store it and reload it in the port of refuge.

It was also noted that the arguments in favour of retaining this rule are stronger than those for the retention of the allowance for crew wages, fuel and stores and port charges in that the expenses (for cargo handling etc.) are an additional outlay that is not related to the mere fact that the voyage is delayed.

It should be noted that there are cases where cargo may need to be discharged for the common safety in the port of refuge and also cases where repairs of damage caused by sacrifice may require dry-docking and may thus require discharging of the whole or part of the cargo. Such cargo handling is not allowed under the common benefit rule but is treated as being for the common safety.

Likewise, it should be noted that loss or damage to cargo may arise as a result of a General Average act and will be allowed on the basis of the common safety rule, e.g. jettison of cargo (Rule II) and damage to cargo caused by extinguishing of fire (Rule III). Also, sometimes cargo damage which arises as a consequence of cargo handling in a port of refuge may be allowed under the common safety rule, e.g. where repairs to ship damage caused by sacrifice require dry-docking and discharging of cargo, and this in turn causes cargo damage.

See also the comments in paragraph 4.3.14.

### **5.2 Wages, fuel and port charges in port of refuge**

Wages and maintenance of crew, fuel and stores consumed and port charges incurred during extra period of detention are allowed under Rule XI (b).

These costs accrue during the whole period of a permanent repair and represent a compensation of the owners' loss by delay. The owner may, however, often have substantial additional losses, e.g. loss of earnings, not allowed in General Average. Equally, other interests may suffer serious financial losses due to late arrival of their cargo.

This allowance is often controversial, in particular where the repairs are prolonged and/or where it is disputable whether the damage is accidental.

It is seen by many underwriters as an incentive to ship owners to declare General Average unnecessarily when their ship needs repairing, thus imposing costs on them which they feel they should not bear.

It should be noted that the crew's normal wages will never be allowed in General Average by reason of Rule C unless they are allowed under Rule XI. The most notable instance of this is Rule XI(a) which provides that crew wages incurred during the prolongation of the voyage occasioned by the ship entering a port of refuge as a consequence of an accident or sacrifice should be allowed. The crew's overtime is treated differently from crew's wages and may be incurred as a direct consequence of the crew assisting in a General Average act and will be compensated in General Average without regard to common benefit rules.

Adjusters have pointed out to the Working Group that with the spread of absorption clauses it is now less common that a General Average will involve contribution by cargo if it is based solely on wages and port costs.

It should be remembered that there are cases where crew wages, etc. are recoverable in General Average under the common safety principle, i.e. if the repair is to damage caused by a General Average sacrifice.

For the purpose of illustration, the following are examples of monthly wage costs for a variety of vessels:

1.	Oil tanker 156,809 GRT (Iranian):	USD	53,036.00
2.	Bulk carrier 24,943 GRT (Greek):	USD	51,676.46
3.	Chemical tanker 4,954 GRT (US):	USD	45,661.00
4.	General cargo 6,440 GRT (Thai):	USD	39,450.00
5.	Bulk carrier 41,699 GRT (Indian):	USD	29,274.00

### 5.3 Temporary repairs

**5.3.1** The allowance of temporary repairs carried out to secure the immediate safety of ship and cargo appears always to have been universally accepted as General Average. The allowance of temporary repairs to damage caused by sacrifice was supported in some jurisdictions, but the widest divergence in practice existed over the question of whether temporary repairs to Particular Average damage could ever be allowed in General Average and, if so, in what circumstances.

A Rule was introduced at the 1924 revision in order to ensure greater consistency of practice. It confirmed in similar terms to later revisions that temporary repairs for the common safety, or of sacrifice damage, were allowable in General Average and that temporary repairs of accidental damage could also be allowed, up to the savings in General Average expenditure realised thereby.

The only remaining doubt left by the first version of the Rule was whether the cost of temporary repairs should be a first charge on the savings to General Average alone or should be apportioned over all savings, including for example savings in Particular Average that arose by deferring permanent repairs to a cheaper locality. This uncertainty was resolved in the 1950 Rules that inserted the words "without regard to the saving, if any, to other interests".

While the allowance of temporary repairs in connection with common safety and sacrifice continued to enjoy general acceptance, a number of changes were suggested to the second paragraph of Rule XIV when considering the 1994 revision of the Rules. The Rule was also subject to intense scrutiny in the English courts in the case of the "Bijela" ([1994], 2 Lloyd's Rep. 1). In the event, the Rule was not changed, although it is now of course subject to the new Rule paramount of the 1994 Rules.

**5.3.2** If the IUMI proposal to remove "common benefit" allowances were implemented, allowances for temporary repairs to accidental damage would also fall away since they depend upon being allowed in substitution for "common benefit" expenses such as cargo handling, port charges, wages and fuel etc.

**5.3.3** IUMI did not submit separate proposals dealing with Rule XIV in isolation, but other commentators have criticised the existing Rule on the following grounds:

- Repairs to accidental damage should always be a matter for the property insurers concerned.

- Savings to ship interests in permanent repair costs may be very significant and the present Rule requires no contribution until General Average savings are exhausted.
- Given modern repair methods, temporary repairs may achieve a semi-permanent or permanent status, particularly on older vessels.

These and other points were considered at the time of the 1994 revision process and the Working Group has not felt it appropriate to go over the same ground again in great detail. One of the practical difficulties that was noted was the divergence in practice between insurance markets as to how temporary repairs were treated in Particular Average, which would impact on the way in which ship owners would seek to recover such costs in General Average. In addition, the difference in approach between jurisdictions remains, so that removal of the second paragraph of Rule XIV would mean a return to the uncertainties that prevailed prior to its introduction.

**5.3.4** Under Rule X (a) 2, the costs of temporary repairs in a port of refuge to enable the vessel to be removed to another port of refuge because repairs cannot be carried out in the first port of refuge are admitted as General Average. It is doubtful if this may be considered an allowance based on the common safety principle, see paragraph 3.4.4 above.

Temporary repairs as substituted expense for any of the expenses mentioned under 5.1 and 5.2 are allowed under Rule XIV (2).

Again, it should be remembered that there are also temporary repairs in the port of refuge which are necessary for the common safety as well as temporary repairs of damage caused by sacrifice which would be allowed under the common safety principles.

## **5.4 Substituted expenses**

**5.4.1** The IUMI proposal would, as described above, automatically remove the possibility of substituted expense allowances under Rule F in most practical situations.

**5.4.2** Provided the voyage is not frustrated at the port of refuge, transshipment of cargo is often allowable in substitution for the costs of storing and reloading of cargo where this would be required to carry out repairs necessary for the safe prosecution of the voyage.

This arrangement is generally considered beneficial to all parties.

Transshipment can, like towage, be a part of a salvage operation in which case it is allowed on the basis of the common safety principle.

**5.4.3** A vessel may be towed to destination rather than entering or remaining at a port of refuge. The cost of such towage (after crediting such expenses as fuel etc. that may have been saved by the ship owner) is often allowed in General Average in substitution for expenses that would have been incurred if the vessel had remained at the port of refuge to effect repairs.

Again, such allowances facilitate the early completion of a voyage. Contribution between the parties for voyage to destination also help to discourage the unnecessary prolongation of salvage services to achieve the same purpose.

The IUMI proposals would confine towage allowances to those incurred while the ship and cargo were in the grip of a peril. This could have the effect of dissuading ship owners from terminating salvage services at the first port of refuge to ensure that the cost of the tow to the second port of refuge is contributed to by cargo interests. This tactic may not be successful as was shown in the English case of the "PA MAR" [1999] 1 Ll. Rep. 338 in which a salvage award of a tow under LOF from the Red Sea to Singapore (the owners' chosen port of repair) was substituted by an award against cargo by one in respect of a tow only as far as Aden. Because the ship owner can sometimes recover in General Average contribution to the cost of towage under the present system by virtue of YAR Rule X (a) 2, there is an argument for retaining Rule X (a) 2 so as to prevent the towage being performed at the more expensive salvage rates which might occur in some cases if the IUMI proposal is adopted.

## **6. REDISTRIBUTION OF SALVAGE CHARGES**

### **6.1 General comments**

As noted in Lowndes and Rudolf (*12 edition para. 6.11*) 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 19<sup>th</sup> 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 British 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 was removed and the first version of the current Rule VI was inserted in order to ensure that international practice was uniform on this point.

The rule that salvage remuneration shall be allowed in General Average is criticised on the following grounds:

- In most jurisdictions, salvage charges are only payable to the salvor by each of the salvaged interests; i.e. ship owners are not responsible for the cargo's share, cargo owners not for other cargo's or the ship's share.<sup>3</sup> Therefore, the salvage remuneration is already distributed between the parties and a (new) distribution via the General Average is not necessary.
- Redistribution by General Average adjustment disturbs separate settlements between the salvor and/or the owner of a salvaged interest, because the latter does not obtain a final solution, as his share of all the remuneration paid by all parties may eventually be fixed at a different amount.

After considerable debate during the preparatory work of the 1994 YAR and also during the conference in Sydney, proposals to exclude salvage settlements were not carried.

However, the criticism has continued and IUMI have strongly urged that this should be considered again (see IUMI paper dated 2 April 1998, section 15).

It should be noted that the majority of the MLAs responding to the Remée questionnaire favoured IUMI's proposal on this point.

## 6.2 Arguments for and against excluding salvage

### 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.<sup>4</sup>
- A second casualty can also materially affect the values at the end of the adventure and thus the apportionment.<sup>5</sup>

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<sup>3</sup> See Article 13.2 of the International Convention on Salvage, 1989

<sup>4</sup> Take, for example, a vessel with a sound value of \$1,500,000 and 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 ship owner 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.

<sup>5</sup> 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 termina-

- 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 ship owner 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 ship owner’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.

### 6.3 Draft clause

**6.3.1** The following text is submitted by the Working Group as a possible replacement of Rule VI if a policy decision is taken to exclude salvage from General Average:

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

*b) Salvage payments 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 Art.13 paragraph 1(b) of the International Convention on Salvage 1989 have been taken into account.*

*c) Special compensation payable to a salvor by the ship owner under Art. 14 of the said Convention 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 payment as referred to in paragraph (a) of this Rule.”*

## 7. TIME BAR (PRESCRIPTION)

### 7.1 General comments

The YAR contain no provision concerning time barring of General Average contributions. In national laws, there is a wide variety of time bars, and some national laws are unclear, in particular with respect to the possible effect of the signature of the Average Bond or Average Guarantee.

In practice, it is often difficult, time-consuming and costly to assess if contributions are time-barred. Contributions may be owed by parties of many different nationalities, and legal advice may be needed in many jurisdictions where a suit must be brought to avoid a time bar.

International unification would therefore seem to be an advantage.

However, it is said the YAR are not a good vehicle to bring about unification of time bar rules because in many jurisdictions time bar provisions are treated as law of a "public order" character which cannot be amended by agreement.

Despite these problems, the Working Group considers that there are some real benefits to the inclusion of such a provision in the YAR. In some jurisdictions it would provide a legally valid argument and in others it could serve as a guideline to legislators, judges and practitioners and would provide an incentive to progress the matter and implement a unified time bar provision. The decision of the English Court in the “ARMAR” case [1980] 2 Lloyd’s Rep 450 demonstrates the value of such a change.

tion 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.

The operation of such a time limit should not affect the 12-month time limits in Rule E.

## **7.2 Summary of replies to Reméc questionnaire**

Some national associations have expressed sympathy for the introduction in the YAR of a time bar for contributions pointing out that it could have effect in some jurisdictions; however, most replies indicate that this is a matter which should be left to national law because it cannot validly be dealt with through contractual agreement.

## **7.3 Draft clause**

The following draft wording to be adopted in the YAR, developed from the wording in the IUMI Report, has been modelled on the equivalent provision in the International Convention on Civil Liability for Oil Pollution and Rule E of the YAR:

*“a) Any rights to claim General Average contribution shall be extinguished unless an action is brought by the party claiming the contribution within a period of one year after the date upon which the General Average adjustment was issued. However, in no case shall an action be brought after six years from the date of the termination of the common maritime adventure. These periods may be extended if the parties so agree after the termination of the common maritime adventure.*

*b) Subject to the provisions of this Rule, the time limits provided in this Rule shall also apply to claims under General Average bonds and guarantees. This Rule shall not apply as between the parties to the General Average and their respective insurers.*

*c) This Rule shall supersede any national law which provides for a different time limit from that specified herein.”*

## **7.4 Legislation (Issues of Transport Law)**

The Working Group proposes that the CMI should recommend to UNCITRAL that a rule time barring General Average contributions as proposed above should be included in the draft International Convention on Issues of Transport Law now under consideration.

# **8. INTEREST**

## **8.1 General comments**

The Working Group has considered the rate of interest stated in the YAR (Rule XXI) and how this might be governed by a formula rather than a set figure and is proposing a formula in which the rate is linked to the LIBOR (London Inter-Bank Offered Rate).

## **8.2 Currency**

Interest rates vary, of course, over time and from currency to currency.

Therefore, justice strongly favours a variable formula which links the interest not only to the time but also to the currency of the adjustment.

It would greatly facilitate the introduction of an interest formula in the YAR if one could also provide that all adjustments should be made up in one currency.

However, the Working Group considers it unrealistic that such a proposal would be adopted because, during the work resulting in the 1994 YAR, proposals providing that all adjustments are made in USD (or SDR) were thoroughly considered but failed to be adopted.

Under the present system, the adjuster chooses the currency of the adjustment on the basis of an estimate of what would generally be the most acceptable and convenient currency for the parties to the General Average.

It seems (perhaps surprisingly) that this system has not given rise to much controversy. This would indicate that there would not be much need to introduce rules about the currency of the adjustment except for the purpose of solving the interest problem.

The Working Group considers it important to notice that the adjuster members of the Working Group have estimated that 80% of all General Average adjustments are stated in USD and that it would be exceptional to see adjustments which are stated in other currencies than cur-

rencies closely linked to USD, JPY, GBP and EUR or the European currencies which are now substituted by or closely linked to the EUR.

### 8.3 A possible formula - LIBOR

The Working Group has considered different variable interest rates, e.g. US prime rate. Of these rates we are confident that the LIBOR (London Inter-Bank Offered Rate) would be the most suitable formula to consider for the adoption in the YAR<sup>6</sup>. The LIBOR is administered by the British Bankers Association. The interest rates of the LIBOR system are fixed daily upon inputs from a contributory panel of banks concerning the rate at which a prime bank could borrow funds from another prime bank in a specific currency for different periods ranging from 1 week to 12 months.

The Working Group has been advised that the LIBOR is considered very representative for all the (major) currencies, that the market transactions made on the basis of a LIBOR rate are very substantial and that the LIBOR system is universally accepted.

Naturally, where transactions in a specific currency are more rare, the LIBOR may not always be as representative of what will be considered a proper level of interest for that specific currency. This may be the case not only with respect to currencies of small economies but also currencies for which international transfers or transactions have been restricted or regulated. Thus, the LIBOR system (by its nature) only works efficiently for freely convertible currencies in an open market.

The LIBOR is, as mentioned, the rate which one prime bank can obtain from other prime banks, which would normally be lower than the market rate as between other parties where an interest rate based on the LIBOR would be fixed at the LIBOR plus a percentage, a so-called spread or margin. A spread of 2-3% would be usual for borrowers with a good credit rating.

The Working Group has been advised that the most usual formula would be based on the 3-month LIBOR, i.e. the LIBOR rate fixed for three months at a time.

The period for which interest is normally allowed in the adjustments would often be several years, but it is uncomplicated - even manually - to calculate interest if the rate varies every third month. There are also uncomplicated computer programmes which can be used for such calculations, and it may be possible to establish a service on CMI's web-site for such calculations.

### 8.4 Proposal and draft clause

If a variable interest rate is to be used in the YAR, one option would be a formula consisting of the following elements:

- 3-month JPY-, GBP-, EUR-LIBOR for adjustments made up in JPY, GBP and EUR (including a few remaining European currencies), respectively.
- 3-month USD-LIBOR to be used for adjustments made up in USD and/or other currencies.
- The LIBOR (rates) used should be those for each quarter, i.e. fixed on 1 January 1 April, 1 July and 1 October.
- Since these rates are based on interest payment every third month, the interest calculations to be used should not be a flat rate calculation but should be based on quarterly accruing interest. This is so, because the 3-month LIBOR rate is lower than a similar interest rate fixed for a longer period.

A possible clause to substitute the YAR Rule XXI could be as follows:

*"a) Interest shall be allowed on expenditure, sacrifices and allowances in General Average until three months after the day 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 of interest shall be the London Inter-Bank Offered Rate (LIBOR) as published by the British Bankers Association for a 3-month deposit as fixed on each 1 January, 1 April, 1 July and 1 October plus 3% p.a. for the currency in which the adjustment is made up, provided this is JPY, GBP, EUR or USD. If the currency is NOK, SEK, DKK or SF, the 3-month EUR LIBOR fixed on the said dates plus 3% p.a. shall be applied. In all other cases, the 3-month USD LIBOR fixed on the said dates plus 3% p.a. shall be applied.*

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<sup>6</sup> Details about the definition and fixing of the LIBOR can be found at BBA's web-site: [www.bba.org.uk](http://www.bba.org.uk), where also the rates are published daily.

*c) The interest rates are to be used for calculation of interest for the 3-month period following the dates they are fixed, except that the rate for the three months after the day of issue of the General Average adjustment shall be the rate applied in the last period before this date. The interest shall accrue quarterly."*

## **9. COMMISSION**

### **9.1 General comments**

The YAR Rule XX provides that a commission of 2% on disbursements, except crew wages and maintenance, fuel and stores not replaced during the voyage, shall be allowed in General Average.

In Sydney, proposals to extend the allowance to commission on all General Average were not adopted. The IUMI now propose that all General Average commission shall be abolished. They also propose that administrative costs such as telephones telexes and other communication charges should be excluded from General Average completely.

### **9.2 Arguments for and against allowing commission**

#### **9.2.1 Arguments *against* allowing commission:**

- Originally, commission served as a useful incentive to parties to fund General Average disbursements, but the introduction of interest by the 1924 YAR has created unwarranted duplication.
- Owners' communication, banking and office expenses are now allowed separately which equally has created unwarranted duplication.

#### **9.2.2 Arguments *for* allowing commission:**

- It provides an incentive to the parties to fund the General Average disbursements;
- In collision cases the UK Admiralty Court allows an "agency item" (usually of 1%) in addition to all vouched claim items to cover the time and trouble of dealing with the collision. According to Mr Marshall's figures only 22% of General Averages arise out of collisions. "Agency" is not allowed in respect of non-collision claims.
- To allow commission in General Average is a historic custom in a substantial number of countries.

## **10. ABSORPTION CLAUSES**

### **10.1 General comments**

Absorption clauses are clauses in hull policies whereby the underwriters accept that the ship owner has the option not to declare General Average in which case the hull cover "absorbs" all General Average losses, usually up to an agreed figure.

Some absorption clauses have given rise to certain practical problems. Also, absorption clause limits are not always set at appropriate levels for the vessels and trade involved.

### **10.2 Extent of use**

Absorption clauses are very widely used. Major container operators have absorption clauses with large limits but they are common also in many other trades and most insurance markets.

The adjuster members of the Working Group have indicated that such clauses appear in over 60% of hull policies, albeit with regional variations.

### **10.3 BIMCO standard clause**

In May 2002, BIMCO has approved a standard absorption clause.<sup>7</sup> The Working Group has examined a draft of this clause and supplied comments which have been taken into account in the final version.

After the work done by BIMCO the Working Group considers that there is no need for further work to be done on this topic.

## **11. Separate treatment of Sacrifices of Property**

One suggestion made in the Steering Group chaired by Dr Wiswall was that sacrifices (of physical property) should lie where they fall, while expenditures (of money) falling within the definition of General Average should continue to be apportioned.

The Working Group does not consider that such an amendment to the principles of General Average is either practical or desirable. The equal treatment in General Average of sacrifices and expenditure has been codified not only by Rule A of the YAR 94 but also by Section 65 (1) of the British Marine Insurance Act 1906, which reads “A General Average loss is a loss caused by or directly consequential on a General Average act. It includes a General Average expenditure as well as a General Average sacrifice.”

This proposal was considered by the author of Lowndes and Rudolf (12 edition), the textbook on General Average, in paragraph 90.14 of appendix 5. We can do no better than quote the comments of the author in full:

*“Such a scheme might simplify some adjustments but would hardly reduce the number prepared. It is extremely rare for any General Average to consist of sacrifice alone and, indeed, 90 per cent or more of all General Average adjustments consist only of General Average expenditure, plus bunkers and stores consumed. Further, the total value of cargo sacrifices almost certainly exceeds the value of ship sacrifices, so that there would be an increased burden on cargo interests with resultant increases in cargo rates of premium.”*

For the reasons succinctly set out above this Working Group does not consider that this proposal would meet with acceptance internationally.

## **12. Tidying up the text of the YAR**

**12.1** In the course of our work we have noted a number of imperfections in the drafting of the YAR which are no doubt the result of their evolution since 1877. These imperfections are not such as to justify a conference to amend the Rules, but we mention them here for the sake of completeness.

**12.2** The terms “admitted in”, “allowed in”, “admitted as” and “allowed as” General Average appear to be used interchangeably with no detectable difference in meaning. The words “made good” in General Average which appear, for example, in Rules I, II, III, and IV have a meaning which is different from “allowed” or “admitted” in General Average.

**12.3** The term “bearing up for” (a port of refuge) in the heading of Rule XI is archaic and should be replaced by “putting into”.

**12.4** Many of the Rules consist of more than one paragraph, but those paragraphs are not separately numbered. We consider that any revision of the Rules should include the addition of paragraph numbers to each separate paragraph.

**12.5** The Working Group is of the opinion that the reference to temporary repairs in Rule X (a) 2 must mean temporary repairs necessary to enable the vessel to proceed from first port of refuge to second port of refuge (i.e. not to destination). We therefore suggest adding “of refuge” after “port or place” where it appears for the third time in Rule X (a) 2.

**12.6** The Working Group has noted that the YAR do not contain any definition of the date of termination of the common maritime adventure in Rules E and G. This is significant both for the values on the basis of which the adjustment is to be made, and also the commencement of the run-

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<sup>7</sup> A copy of this clause with BIMCO’s explanatory notes are available on the CMI website at [www.comitemaritime.org](http://www.comitemaritime.org)

ning of time for any applicable time limit. The Working Group recommends that consideration be given to the inclusion in the YAR of a properly worded definition.

7 March 2003

Bent Nielsen, Chairman

## ANNEX – GENERAL AVERAGE EXAMPLES

### EXAMPLE 1

#### Narrative

A vessel on a loaded passage involved in a collision. After separating from the other vessel, she puts into a Port of Refuge for the Common Safety and to effect repairs necessary for the safe prosecution of the voyage.

The following losses/costs ensue:

	<b>YAR 1994</b>	<b>Common Safety only</b>
Extinguishing damage to cargo ignited by collision.	Allowed (Rule III)	Allowed
Fuel & stores, crew wages, port charges entering port of refuge.	Allowed (Rules X & XI)	Allowed
Fuel & stores, crew wages, port charges during repairs.	Allowed (Rule XI b)	Not allowed
Discharging, storing and reloading part cargo to enable vessel to dry dock for repairs.	Allowed (Rule X b)	Not allowed
Cost of temporary repairs carried out to avoid discharge of full cargo.	Allowed up to GA savings (Rule XIV)	Not allowed
Port charges outwards and fuel & stores and wages and maintenance regaining position.	Allowed (Rules X & XI)	Allowed ?*

\*Depending on whether English Law or other practice is followed.

### EXAMPLE 2

#### Narrative

A container vessel grounds while on a loaded passage. Salvors are engaged under Lloyds Open Form and the vessel is re-floated and taken to a nearby Port of Refuge. No.1 Hold is flooded and vessel down by the head. Divers inspection confirms dry docking required to effect repairs, estimated duration 25 days, full cargo discharge required.

	<b>YAR 1994</b>	<b>“Common Safety” only</b>
Damage to propeller sustained during efforts to re-float.	Allowed (Rule VII)	Allowed
Port charges entering port of refuge.	Allowed (Rule X a)	Allowed
Anti-pollution vessels standing by during re-floating operations and while entering port of refuge.	Allowed (Rule XI d)	Allowed

LOF terminated on arrival alongside but tug remains on standby at harbour authority request until No.1 hold pumped out.	Allowed (Rule A or Rule XI b)	? *
Deck stowed containers over No.1 hold discharged to facilitate pumping and restore safe trim.	Allowed (Rule X b)	? *
Divers apply additional temporary repairs to assist pumping.	Allowed (Rule XIV)	? *

\*Dependent on the facts, as determined.

### EXAMPLE 2 (continued)

	<b>YAR 1994</b>	<b>“Common Safety” only</b>
Cargo discharged to quayside.	Allowed (Rule X b)	Not allowed
Cargo transhipped to destination on two vessels.	Allowed (Rule F subject to savings)	Not allowed
Wages and maintenance, port charges etc up to completion of discharge.	Allowed (Rule XI b)	Not allowed
Wages and maintenance and port charges etc to completion of repairs.	Allowed (Rule G/XI b)	Not allowed

### EXAMPLE 3

#### Narrative

While a containership is discharging alongside at an intermediate port, a fire breaks out in the bottom stow of Hold No.5. Shore fire brigade attends, hold No.5 and engine room are partially flooded. Local salvors assist (on contract basis) in bringing fire under control and subsequently supervising discharge of No.3 hold, including containers of hazardous cargo. Permanent repairs are estimated to require 40 days and require part discharge of cargo.

	<b>YAR 1994</b>	<b>Common Safety</b>
Attendance of fire brigade.	Allowed (Rule A)	Allowed
Attendance of salvors to discharge No.3 Hold.	Allowed (Rule A or X b)	? *
Extinguishing damage to adjacent containers.	Allowed (Rule III)	Allowed
Extinguishing damage to ship’s electrical systems.	Allowed (Rule III)	Allowed

Towage to destination.	Allowed (Rule F, subject to savings)	Not allowed
Wages and maintenance, port charges while in port of refuge.	Allowed (Rule XI)	Not allowed

\*Dependent on the facts, as determined