COMITE MARITIME INTERNATIONAL

PRESIDENT

15 March 2013

Presidents of National Maritime Law Associations

cc Titulary members

Dear President

General Review of the Rules on General Average

Please find **attached** a Questionnaire prepared by an International Working Group regarding a general review of the Rules on General Average.

This is the first step of the review. The main object is to explore what of many possible subjects should be considered in more detail during the further work.

As you will see the Questionnaire deals with many subjects but it should be kept in mind that any further points you may feel should be considered can be raised.

I would be very grateful if you could review the Questionnaire and submit any comments you want to make as soon as conveniently possible and no later than by 15 June 2013.

The comments so received will be the basis for a report which will be considered by an International Subcommittee at its first meeting which takes place in Dublin on 29 September to 1 October 2013 in connection with a CMI Symposium hosted by the Irish MLA.

Yours sincerely,

Stuart Hetherington

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CMI

INTERNATIONAL WORKING GROUP ON GENERAL AVERAGE

QUESTIONNAIRE

INTRODUCTION

At the Plenary Session of the 2012 Beijing Conference the Chairman of the Working Group presented a summary of the deliberations and recommended to the CMI Executive Council *"that it should appoint a new International Working Group (IWG) on General Average, with a mandate to carry out a general review of the York-Antwerp Rules on General Average, and, noting that the York-Antwerp Rules 2004 had not found acceptance in the ship-owning community, to draft a new set of York-Antwerp Rules which meet the requirements of the ship and cargo owners and their respective insurers, with a view to their adoption at the 2016 CMI Conference."* This recommendation was accepted by delegates.

An IWG has now been formed under the Chairmanship of Bent Nielsen (Denmark) the other members are:

Richard Shaw (UK) – Joint Rapporteur
Taco van der Valk (Netherlands) – Joint Rapporteur

Andrew Bardot (UK, International Group)
Ben Browne (UK) – IUMI
Richard Cornah (UK) – AAA
Frederic Denefle (France)
Jurgen Hahn (Germany)
Michael Harvey (UK) – AMD
Linda Howlett (Australia)– ICS
Jiro Kobu (Japan)
Sveinung Makestad (Norway)
John O'Connor (Canada)
Peter Sandell (Finland)
Jonathan Spencer (USA)
Esteban Vivanco (Argentina)

In addition to achieving a broad consensus in advance of the 2016 Conference, this questionnaire is intended to encourage a general review of all aspects of the York-Antwerp Rules, and therefore is not confined to the issues that have recently proved to be controversial.

As well as responses to the questions posed, IWG would welcome comments on any other aspects of the Rules that may have given rise to difficulties in practice.

Some of the questions make reference to previous reports, papers and proposals, copies of which are to be made available on the CMI website (www.comitemaritime.org) under Work in Progress / York-Antwerp Rules. The various references to "Lowndes" refer to J.H.S. Cooke & R.R. Cornah, *Lowndes and Rudolf. The Law of General Average and The York-Antwerp Rules*, London: Sweet &

CMI

INTERNATIONAL WORKING GROUP ON GENERAL AVERAGE

QUESTIONNAIRE

Maxwell 2008 (13th edition) – the extracts are also to be made available on the CMI website.

The IWG would be grateful for the co-operation of all parties by providing responses to this questionnaire no later than **15 June 2013**. This will enable the IWG to review the responses and prepare a report for circulation prior to the CMI Symposium in Dublin which is due to be held 29th September – 1st October 2013.

There will be an IWG on Saturday, 28 September 2013 and an International Sub-Committee meeting on Sunday, 29 September 2013, immediately preceding the Symposium in Dublin which will seek to identify areas for further work .

In the questionnaire references to the York Antwerp Rules (YARs) are to the 1994 Rules, unless otherwise stated.

QUESTIONNAIRE

SECTION 1 – GENERAL

1. THE BIG PICTURE

1.1 During the discussion leading up to the 2004 Rules some parties advocated the *"abolition"* of General Average.

a) Would you support this approach?

b) If so,

i) How would this be achieved, given that the York Antwerp Rules are incorporated as a matter of contract and their principles are embedded in the national law of maritime nations?

ii) How, and to which parties, would you allocate the expenses and losses now dealt with as General Average?

1.2 The current edition of Lowndes includes the following:

"The principles of general average, as now embodied in the York-Antwerp Rules, also continue to perform a useful function in patrolling two important borders that lie between:

- *Matters that form part of the shipowners' reasonable obligations to carry out the contracted voyage, and those losses and expenses that arise in exceptional circumstances.*

- *Property and liability insurers as their differing responsibilities meet and sometimes merge, in the context of a serious casualty.*

Both of these difficult areas benefit from the reservoir of established law and practice that general average provides, helping to secure a degree of certainty that is always the object of commercial interests. However, practitioners must be aware that such commercial interests will have little patience with any system that becomes inflexible or too demanding of time and money, and the principles and practice of general average will continue to need to be kept under review."

a) Looking at the big picture, are there areas of the maritime adventure where the York-Antwerp rules are an impediment rather than a help to commerce?

b) Alternatively, are there new areas where the "general average" approach could usefully be applied?

SECTION 1 – GENERAL

2. ROTTERDAM RULES

Article 84 deals with the topic in general terms:

"Nothing in this Convention affects the application of terms in the contract of carriage or provisions of national law regarding the adjustment of general average."

Two earlier Articles deal with the specific points of dangerous goods and cargo sacrifices.

"Article 15
Goods that may become a danger

Notwithstanding articles 11 and 13, the carrier or a performing party may decline to receive or to load, and may take such other measurers as are reasonable, including unloading, destroying, or rendering goods harmless, if the goods are, or reasonably appear likely to become during the carrier's period of responsibility, an actual danger to persons, property or the environment."

"Article 16
Sacrifice of the goods during the voyage by sea

Notwithstanding articles 11, 13, and 14, the carrier or a performing party may sacrifice goods at sea when the sacrifice is reasonably made for the common safety or for the purpose of preserving from peril human life or other property involved in the common adventure."

Articles 15 and 16 are referred to in Article 17.3 (o) as one of the excepted list of events. The effect of the "notwithstandings" in both Articles is rather confusing, and the question could be raised as to whether the carrier could escape any liability for a cargo sacrifice (say jettison to lighten the ship) if the ship had first got into difficulties due to unseaworthiness (Art 14).

By 2016 it is likely that the Rotterdam Rules may be more widely adopted.

a) The IWG invites your general comments as to whether the YARs need to be changed in any way to accommodate the new approach that the Rotterdam Rules bring to contracts of carriage.

b) The following practical issues have arisen in the context of a serious casualty:

"While hull insurers would not be greatly affected (except in the relatively rare cases of ship sacrifice) the P&I Clubs would clearly be paying cargo's proportion of general average much more frequently, as cargo declines to pay on the grounds of a breach of the contract of affreightment.

SECTION 1 – GENERAL

An immediate practical implication would be that the greatly increased likelihood of cargo sustaining a defence to contribution would make it unwise to automatically incur the costs of an expensive security collection from a multi-interest cargo. However, deciding not to collect security is not a call the shipowner should make without consulting the P&I Club, whose cover is likely to be conditional on proper security having been collected and a demonstrable breach of contract having occurred.

In most salvage cases (see Article 13.2 Salvage Convention 1989), cargo will still have a direct liability to provide security to salvors and pay their proportion of the award, before seeking recovery from the carrier, albeit with a much greater chance of success under the Rotterdam Rules. Counter-security in respect of cargo's rights to recover salvage paid (to salvors) may become a much bigger issue and this may result in delays. It is possible that Owners and their P&I Clubs may sometimes agree to provide security and pay 100% of the salvage in order to reduce costs and achieve a quick negotiated settlement, but the bigger the exposure the greater the pressure will be to let matters run their normal course.

That pressure can only be increased by the Rotterdam Rules repeated reference in Article 17 to "all or part" of liability for a loss and the concept of a loss being apportioned somehow if the carrier can partly disprove his fault.

"Article 17
Basis of liability

1. *The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility as defined in chapter 4.*

2. *The carrier is relieved of all or part of its liability pursuant to paragraph 1 of this article if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 18.*

3. *The carrier is also relieved of all or part of its liability pursuant to paragraph 1 of this article if, alternatively to proving the absence of fault as provided in paragraph 2 of this article, it proves that one or more of the following events or circumstances caused or contributed to the loss, damage, or delay:*

   (a) *Act of God;*

   (b) *Perils, dangers, and accidents of the sea or other navigable waters;*

   (c) *War, hostilities, armed conflict, piracy, terrorism, riots and civil commotions;*

(d) Quarantine restrictions; interference by or impediments created by governments, public authorities, rulers, or people including detention, arrest, or seizure not attributable to the carrier or any person referred to in article 18;

(e) Strikes, lockouts, stoppages, or restraints of labour;

(f) Fire of the ship;

(g) Latent defects not discoverable by due diligence;

(h) Act or omission of the shipper, the documentary shipper, the controlling party, or any other person for whose acts the shipper of the documentary shipper is liable pursuant to article 33 or 34;

(i) Loading, handling, stowing, or unloading of the goods performed pursuant to an agreement in accordance with article 13, paragraph 2, unless the carrier or a performing party performs such activity on behalf of the shipper, the documentary shipper or the consignee;

(j) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(k) Insufficiency or defective condition of packing or marking not performed by or on behalf of the carrier;

(l) Saving or attempting to save life at sea;

(m) Reasonable measures to save or attempt to save property at sea;

(n) Reasonable measures to avoid or attempt to avoid damage to the environment; or

(o) Acts of the carrier in pursuance of the powers conferred by article 15 and 16"

In a collision where it seems likely that both ships are equally to blame, the owner knows that he is no longer protected by the "nautical fault" exception, but equally he is not at fault in respect of the blame attaching to the other vessel. On that basis could he not recover 50% of any general average contribution due from his cargo? That would seem to be the case.

Many of the most serious casualties in recent years have involved containership fires originating in cargo. These have given rise to complex legal disputes, particularly on factual issues with the shipper alleging poor stowage (perhaps over a heated bunker tank) and the carrier pointing to the (undeclared) dangerous nature of the cargo. This situation arose in the recent High Court judgment in the "Aconcagua" [2010] 1 Lloyds Rep 1. The carrier (actually the charterer seeking indemnity for US$27 million paid to the shipowner) won the day on the basis that it was a rogue cargo and the shipper

could not prove that the heating of the bunker tank was causative. However if the heating of the tank had been causative the Court indicated that this would have constituted negligence in the management of the ship – an excepted peril under the Hague Rules. Under the RR the carrier will lose the protection of that excepted peril but this would surely be a case in which the point about contributing causes (rogue cargo/fault of crew) would be at issue.

Whilst under the Rotterdam Rules it is highly likely the carrier will usually have to accept some degree of fault there will remain considerable incentive to allege partial fault of others. Some difficult decisions will need to be made very quickly about whether to collect general average and/or salvage security in such cases."

Is there anything that the YARs can or should try to do in resolving these practical issues?

3. DEFINITIONS

The YARs do not make any attempt to define the terms used. For example, in the "*Trade Green*" [2000] 2 Lloyds Rep 451 (see Lowndes 11.25 – 11.30 attached) the judge rejected the view that the terms "voyage" and "common adventure" had the same meaning, saying that the voyage only referred to the vessel's progress from the load port to arrival at the port of discharge. Most practitioners would consider that the voyage lasts from the commencement of loading up to the completion of discharge. However, since one of the objectives of the YAR is to achieve uniformity of practice, it is obviously undesirable that there is any variance in the interpretation of important words and phrases.

a) Should the YARs include a section of definitions?

b) If so, what terms need to be defined?

4. SCOPE

The York-Antwerp Rules are frequently admired for dealing with complex issues in a very succinct manner. This approach relies in part on average adjusters and, occasionally, the Courts filling in the gaps by reference to established law and practice; this leaves room for flexibility when dealing with different types of vessel or trade in a commercially effective way, and for practice to adapt to changing circumstances.

The possible downside is the risk of a lack of uniformity, particularly where inexperienced Courts are asked to rule on GA matters.

SECTION 1 – GENERAL

Do you consider the existing approach should be maintained, or should the YARs, at the expense of brevity, provide a more self-contained and complete code that needs less knowledge of external practice or law?

5. FORMAT

The 2004 Rules introduced several "tidying up" amendments, including a more extensive numbering system.

Do MLA's consider this should be maintained?

6. DISPUTE RESOLUTION

Many codes or contracts include provision for arbitration in the case of disputes. CMI is accepted as the custodian of the YARs, should it also offer itself as part of the 2016 Rules as providing an arbitration or mediation facility on dispute resolution relating to the application of the Rules (excluding issues pertaining to the contract of affreightment)?

7. ENFORCEMENT

The York Antwerp Rules have never touched on areas relating to the legal basis for contributions, cost of exercising liens, the terms of security documents etc. Bills of Lading may incorporate terms dealing with some of these matters, but often they are left to the law governing the contract of affreightment or the Courts at the ports of discharge.

a) Could additional provisions in the YARs offer greater uniformity and certainty in these areas?

b) Should CMI consider offering, or including in the YARs, a recommended standard version of key documents such as the Average Guarantee and Average Bond?

8. ABSORPTION CLAUSES

Absorption Clauses (whereby Hull insurers pay GA in full up to a certain limit) are now found in almost all Hull Policies, and have played a significant role in reducing the number of smaller uneconomic collections of security and contributions from cargo.

Are there any changes that might be made to the York Antwerp Rules that might further assist in this process?

SECTION 1 – GENERAL

9. PIRACY

Under many maritime jurisdictions it has been accepted as a matter of law or practice that the payment of ransom is a legitimate expense. Where the normal criteria for Rule A are met (as has generally been the case with the Somali pirate seizures) allowances have been made without the need for express wording relating to piracy.

a) Do you consider that express wording in YARs would be desirable to deal with the general principles or regulate specific allowances?

b) To build up a general picture it would be useful if MLAs could advise whether in their jurisdictions there are statutory or other restrictions on the payment of ransoms, or other related expenses.

10. COSTS

Are there any areas of the General Average process where the costs could be avoided, reduced or controlled, including:-

a) Adjusters fees

b) Costs of collecting security

c) Format of adjustments

d) Involvement of legal and other representatives

11. OTHER MATTERS

It is open to all parties receiving this questionnaire to raise questions or points that are not already covered by the questionnaire.

QUESTIONNAIRE

SECTION 2 – INTRODUCTORY RULES

1. RULE OF INTERPRETATION

This Rule makes the lettered rules subservient to the Rule Paramount and the numbered rules. However, in practice although Rules A, C and G are subordinated to the numbered rules, the matters treated in Rules D, E and F are in effect paramount because they deal with matters which are not conflicted by the numbered rules.

Should this Rule be re-worded to reflect the above?

2. RULE PARAMOUNT

The Rule Paramount provides a defence to a claim in general average if the sacrifice or expenditure was unreasonable, even though the claimant was not itself responsible for the unreasonable conduct. Thus, for example, the owners of cargo unreasonably jettisoned by the Master will have no claim for contribution, at the least against those interests who were also not guilty of the unreasonable conduct.

Should this rule be re-worded so that those interests who are innocent of the unreasonable conduct are not denied their right to contribution?

3. RULE OF APPLICATION

The draft wordings put forward by CMI at Beijing included for the first time a Rule of Application which was explained as follows:-

"Most of BIMCO's existing GA clauses provide for the application of YAR 1994 (or 1974) "and any amendments hereof" or words to that effect. The purpose of the proposed Rule is to make YAR 2012 covered by such GA clauses to the extent possible. It is realised that some courts may hesitate to accept that the new Rule of Application can have any effect on the interpretation of older GA clauses. However, other courts may accept this and find the rule useful.

The rule is expected to save the printing of new standard documents, help in solving any uncertainty whether the "new" YAR is covered by terms like "any amendments hereof" and assist in a fast and widespread application of the new amended YAR.

The IWG has proposed that this rule be inserted as the first provision of the YAR before the Rule of Interpretation."

The proposed rule had the following wording:

These York Antwerp Rules (2012) shall be considered to be an amendment or modification of previous versions of the York Antwerp Rules. Notwithstanding the foregoing, these York Antwerp Rules (2012) shall not apply to contracts of carriage entered into before the formal adoption of the Rules.

SECTION 2 – INTRODUCTORY RULES

Should the 2016 Rules contain a similar provision?

SECTION 3 – LETTERED RULES

1. RULE A

No known issues.

2. RULE B

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

2.2 Are further provisions needed to deal with allowances under Rules X and XI relating to tug and tow at a port of refuge?

3. RULE C

3.1 The general exception of "loss of market" is considered by some commentators to be unfair in that it denies the owner of cargo a claim in general average for financial loss suffered due to loss of his market consequent upon a general average detention during the course of a voyage.

Is this an issue that should be revisited?

3.2 Should the second paragraph of Rule C:-

a) include express reference to the exclusion of liabilities (see Lowndes C.37 attached)

b) make it clear that *"in respect of"* includes preventative measures

4. RULE D

See Section 1 re the Rotterdam Rules.

5. RULE E

5.1 Are the present time limits sufficient or could further measures be included to help speed up the adjustment process?

5.2 In the existing wording of paragraph three, does a request for (say) cargo claims by the adjuster re-start the clock for the 12 month period? If so, should the period in all cases be from the date of the casualty?

6. RULE F

SECTION 3 – LETTERED RULES

6.1 Since 1974, substituted expenses are allowed wholly to GA *"without regard to savings to other interests."* Previously, English Rules of Practice dealing with specific types of substantiated expense (cargo sold at a port of refuge, towage and cargo forwarding from a port of refuge) provided for the expense (up to the savings) to be divided in proportion to the saving in expenses thereby occasioned to the parties to the adventure.

The 1974 change was made in the interest of uniformity and simplicity, however do you consider this issue should be revisited?

6.2 The wording of Rule F refers only to any extra "expense" and the drafting committee in 1974 rejected the proposal that the words "or loss" should be included, following the English Rule of Practice F17 which states:-

"That for the purpose of avoiding any misinterpretation of the resolution relating to the apportionment of substituted expenses, it is declared that the saving of expense therein mentioned is limited to a saving or reduction of the actual outlay, including the crew's wages and provisions, if any, which would have been incurred at the port of refuge, if the vessel has been repaired there, and does not include supposed losses or expenses, such as interest, loss of market, demurrage, or assumed damage by discharging."

a) Do you consider this Rule should be amended to include "loss"

b) If not, do MLA's consider that additional wording is required to define more clearly (perhaps along the line of the above Rule of Practice) the limits of what constitutes an expense?

6.3 It has been suggested that the most common Rule F allowances for towage to destination and forwarding of cargo are of such clear general benefit to commercial interests that they should be allowed as General Average (subject always to the Rule Paramount) without having to consider savings, which may often involve difficult or artificial calculations.

Do you consider this should be looked at further?

7. RULE G

7.1 The Rule sets out "non-separation allowances" and specifies that such allowances (removal to and whilst at a repair port) can only be made "for so long as justifiable under the contract of affreightment and the applicable law". Whilst frustration by reason of damage may be easy to determine, frustration of a voyage by reason of delay is a much more uncertain matter.

Is there a better formula to determine a reasonable cut off point for such allowances?

SECTION 3 – LETTERED RULES

7.2 With regard to "non-separation allowances" there is variation in practice as to whether allowances can continue after repairs are completed while the vessel regains position, with many adjusters taking the view that, once available for trading, allowances should cease.

Do you consider this requires express provision in the Rules or can this be left to the discretion of the Adjuster?

7.3 Do you consider that the requirements for notification should be retained, or does it give rise to difficulties in practice?

7.4 Where a voyage is frustrated by reason of delay (e.g. the damage is serious and requiring lengthy repair but is not so costly as to make the vessel a commercial total loss), should non-separation allowances continue:-

a) Only up to the point at which it becomes apparent that the voyage is frustrated.

b) Up to the point at which the delay became sufficient to frustrate the voyage.

7.5 Deciding how long is *"justifiable under the contract of affreightment and the applicable law"* has proved controversial in some cases. Given that the decision is often "fact sensitive" and subject to differing criteria according to national laws, is there a better way of establishing an equitable cut-off point for such allowances?

QUESTIONNAIRE

SECTION 4 – NUMBERED RULES

1. RULE I

No Known issues.

2. RULE II

No known issues.

3. RULE III

No known issues.

4. RULE IV

The use of the terms "wreck" and "carried away" sounds rather archaic and Lowndes (para 4.18/4.19 - see attached) finds other grounds to criticise the rule.

Assuming the principle needs to be retained, can it be expressed in a clearer and more contemporary way?

5. RULE V

No known issues.

6. RULE VI

6.1. The debate regarding the inclusion or exclusion of salvage where the law or contract already provides for a means of distribution between the parties (for simplicity we suggest this is referred to as LOF salvage, although other contracts/jurisdictions achieve the same effect) was unresolved after Beijing.

The arguments for and against were set out in the Report by the CMI International Subcommittee on General Average which can be found in the CMI Yearbook 2003 at pages 290-292 on the CMI website.

In 2012 a compromise version of Rule VI was put forward by a CMI IWG (which can be found on the CMI website under Work in Progress, York-Antwerp Rules) which provided for exclusion of LOF salvage from GA if it constituted more than a fixed percentage of the total general average.

SECTION 4 – NUMBERED RULES

Some adjusters have commented that it is already their practice to approach the parties if it seems likely that the effect of re-apportioning salvage will be disproportionate to the time and cost involved.

Adjusters have also pointed out that if salvage payments are excluded from GA they still rank as an extra charge incurred in respect of the property subsequent to the GA act and therefore should be deducted from the Contributory Value (see Rule XVII). The saving in procedural cost of excluding salvage would therefore not necessarily be that significant.

Looking to 2016 the current options would appear to be:-

i) Retaining the 1994 position
ii) Adopting the 2004 position
iii) Adopting a compromise position as put forward by CMI in Beijing which would also involve deciding on the percentage figure.
iv) Continuing as in (i) but encouraging adjusters' "ad hoc" approach wherever possible.
v) Continuing as in (i) and (iv) but including an express provision obliging the adjuster to consider the possibility of not including salvage, perhaps linked to the Rule Paramount.

a) Which option(s) do you support?

b) Are there other options that should be considered?

c) If options (ii) or (iii) are supported should an amendment to Rule XVII be made so that salvage payments are not deducted from contributory values when salvage is not allowed as GA?

6.2 At present Rule VI makes no reference to legal and other costs incidental to a salvage operation and subsequent award. Such costs are customarily allowed by adjusters under Rule C, as a direct consequence of the GA act of engaging salvors.

a) Should the allowance for legal and other costs be expressly recognised in Rule VI?

b) Would it encourage co-operation amongst salved property interests and early negotiated settlements if legal costs were expressly excluded?

7. RULE VII

Should the word "ashore" be replaced by "aground"?

SECTION 4 – NUMBERED RULES

8. RULE VIII

(a) Should the word "ashore" be replaced by "aground"?

(b) The word "reshipping" is capable of mis-interpretation; should it be replaced by "reloading"?

9. RULE IX

No known issues.

10. RULE X

10.1 In the second para of X(a) should the words in italics be inserted

"..... is necessarily removed to another port or place of refuge because repairs *necessary to complete the voyage* cannot be carried out at the first port of refuge."

in order to confirm the line taken in the "*Bijela*" [1992] 1 Lloyds Rep 636 (see Lowndes para 10.36 attached)

10.2 With regard to X(b) should express wording be introduced to say that the cost of discharge is not GA if the voyage is frustrated or voluntarily terminated, or if repairs are not carried out from some reason?

11. RULE XI

11.1 Wages and maintenance of crew are allowed in GA while detained at a port of refuge for the common safety or to effect repairs necessary for the safe prosecution of the voyage, under the YARs 1994 (XI(b)) but not in YARs 2004. Both sets of Rules allow wages during the deviation to a port of refuge, and some have suggested that no crew wages should be allowed in General Average at all. What should be the position under YARs 2016?

11.2 In the "*Trade Green*" [2000] 2 Lloyds Rep 451, the judge decided that the term "port charges" relates only to the charges a vessel would ordinarily incur in entering a port, and went on to say:

"I do not think that r.XI(b) can be construed so as to cover all sums charged by the port authority regardless of the circumstances; in my view it is much more limited in its scope. It is true that in the present case the services of the tugs and the charges for those services were imposed on the vessel by the port authority, but they were imposed in response to an unusual situation and were not imposed in the common

interests of the ship and cargo. In these circumstances, I do not think that they can properly be regarded as port charges within the meaning of r.XI(b)."

Most adjusters would regard this view as being against both principle and practice. For example, the cost of a standby tug if required by the port authority is commonly allowed as a port charge.

Does this point now need to be covered expressly by the Rules either by amendment to Rule XI or by inclusion of a definitions section (see Section I-3 above)?

11.3 With regard to the phrase *"until the ship shall or should have been made ready to proceed upon her voyage"*, Lowndes (para 11.34-5 attached) refers to examples of delays caused by ice conditions or strikes.

Is express wording needed to deal with such contingencies and/or to clarify the situation when a delay arises from a second accident or the condition of cargo?

11.4 Rules X(b) and XI(b) contain the proviso excluding allowances *"when damage is discovered at a port or place of loading or call without any accident or other extra-ordinary circumstances connected with such damage having taken place during the voyage."*

Does the wording of this proviso (added in 1974) fulfil its intended purpose?

11.5 The introduction of Rule XI(d) was the most significant feature of the 1994 Rules.

a) Is there any need to change the overall basis of the compromise between property/liability insurers reflected in the XI(d)?

b) Have you encountered any difficulties in the application or wording of XI(d)?

c) Do the words "actual escape or release" need to be qualified as in Rule C with the words "from the property involved in the common maritime adventure", or in any other way?

d) Should sub-paragraph (iv) include reference to bunkers as well as cargo?

12. RULE XII

No known issues

SECTION 4 – NUMBERED RULES

13. RULE XIII

No known issues

14. RULE XIV

14.1 The 1994 and 2004 Rules deal with temporary repairs for the common safety and for sacrificial damage in the same way. The 2004 Rules adopted a different approach which gives priority to Particular Average savings as illustrated by these figures:-

Actual temporary repair cost.....	US$100,000
Actual permanent repair cost.....	500,000
	US$600,000

Estimated permanent repair cost at the port of refuge:-

a) US$600,000 – no allowance.

b) US$550,000 – this is less than the combined actual costs so that US$50,000 can be considered for allowance in General Average, subject as before to savings. On the basis of the figures used above, the US$50,000 could be allowed in full, given savings of say US$75,000 in port charges and other detention expenses.

Any reduction in General Average allowances under this wording would be met as part of the Particular Average claim, subject to the deductible and assuming the vessel to be insured.

Do you consider the 2004 version should be retained?

14.2 The House of Lords judgment in the "*Bijela*" [1992] 1 Lloyds Rep 636 was handed down only shortly before the Sydney Conference on 1994.Have you encountered any practical difficulties regarding the application of Rule XIV, there having been no reported litigation since 1994?

15. RULE XV

No known issues.

16. RULE XVI

SECTION 4 – NUMBERED RULES

This Rule provides for cargo sacrifices to be determined "at the time of discharge". Modern transportation involves cargo being carried under one contract of carriage from the port of shipment by sea to a port of discharge and thence by road or rail to in inland destination for delivery to the consignee under a through Bill of Lading. The commercial invoice referred to in the Rule and Rule XVII will include the freight and insurance cost of the whole journey and will not normally be shown broken down between the different sea and land transits. For practical reasons average adjusters have normally, since such multimodal transport became common, adopted CIF values at the time and place of delivery in terms of the invoice; this is frequently the inland destination. They acknowledge that this practice is not strictly in accordance with the wording of the Rules. The practical reasons for its adoption are the great difficulty and consequent cost of determining in these circumstances what the value "at that time of discharge" is.

Should the relevant wording be changed to *"at the time of delivery under the contract of carriage"*, or should both phrases be included, allowing the adjuster to decide the most equitable basis?

(The point also arises with regard to the same wording found in Rule XVII.)

17. RULE XVII

17.1 Clause 15 of LOF 2011 LSSA Clauses expressly allows the Arbitrator to disregard low value cargo when "the cost of including such cargo in the process is likely to be disproportionate to its liability for salvage."

Adjusters have similarly excluded low value cargo when appropriate as a matter of good practice, but would it be useful to have an express sanction for doing so in the Rules?

17.2 Claims for deductions from contributory values of cargo may be made because of loss of a seasonal market or (for example) losses caused by the need to purchase a replacement item for a time sensitive contract. Rules C refers to losses by delay but only in the context of making allowances, not the calculation of contributory values.

Is this an area where clarification is required?

18. RULE XVIII

No known issues

19. RULE XIX

No known issues.

SECTION 4 – NUMBERED RULES

20. RULE XX

In the discussions at the Vancouver Conference (2004) it was argued strongly that payment of commission could no longer be justified under modern banking practices, and the 2004 Rules no longer provide for such allowances.

Do you consider that the 2004 position should be maintained in 2016?

21. RULE XXI

21.1 It appeared to be common ground at the Vancouver Conference that a fixed rate of interest was too inflexible over the life of a version of the YARs and that a variable rate, set annually by CMI, should be preferred.

Do you remain of this view?

21.2 The Vancouver conference agreed guidelines for the CMI International Working Group responsible, essentially that the rate should be *"interest applicable to moneys lent by a first class commercial bank to a shipowner of good credit rating."* Since then the rates have been set out as follows:-

2005 ..... 4.50%
2006 ..... 4.50%
2007 ..... 5.50%
2008 ..... 5.75%
2009 ..... 6.00%
2010 ..... 4.00%
2011 ..... 3.00%
2012 ..... 3.00%
2013 ..... 2.75%

While agreeing with the principle of flexible rates, some shipowners have expressed concern that the rates adopted are unrealistic in the current climate when bank lending is extremely tight and sentiment is against the credit-worthiness of the shipping industry, however reputable individual owners may be.

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

22. RULE XXII

SECTION 4 – NUMBERED RULES

Due to the difficulty in setting up joint accounts, sometimes in a foreign currency, it has become the practice of adjusters to hold deposits in trust accounts in their own name. Should this practice be recognised by the YARs?

23. RULE XXIII

The 2004 Rules introduced the time bar provisions for the first time. While recognising possible difficulties in certain jurisdictions, do you consider these provisions should be retained and, if so, are there any areas needing improvement?

Bent Nielsen
Chairman
International Working Group

March 2013

BRITISH SHIPPING LAWS

LOWNDES AND RUDOLF

The Law of General Average and The York-Antwerp Rules

THIRTEENTH EDITION

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(2) those losses damages and expenses recovery of which is specifically sanctioned by the numbered rules, namely:
   (a) damage to the property involved in the common maritime adventure consequent upon a sacrifice or other general average act, which may still be allowed under r.II, III or V; and
   (b) certain costs of preventing or minimising damage to the environment, which may be recoverable under r.VI of the 1994 Rules, or r.XI(d).

"In no case": As explained in the commentary on the Rule of Interpretation, claims under any of the numbered rules are not affected by any of the provisions of r.C which are inconsistent with them. These apparently all-embracing words therefore exclude from general average only those claims which are sustainable solely under the provisions of r.A, such as the example mentioned in para.C.28, above, or under any of the other lettered rules. Their purpose is simply to emphasise that the losses, etc. referred to in this paragraph are excluded even if they are the direct consequence of the general average act. **C.37**

"losses, damages or expenses": These words are identical to the corresponding wording in the first paragraph of the rule,[57] and are also intended to be of the same comprehensive nature. The exclusion contained in this paragraph therefore extends not only to physical loss or damage to the environment and to clean-up costs, but also to liabilities[58] incurred to third parties in respect of environmental damage. The original draft considered by the CMI Conference at Sydney contained an express reference to liabilities, but this was deleted at the instigation of hull and cargo insurers.[59]

"in respect of damage to the environment": The expression *damage to the environment* is the same as that used in the International Convention on Salvage 1989,[60] where it is defined as meaning: **C.38**

> "substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosion or similar major incidents."

The Convention, and its definition of *damage to the environment*, are expressly referred to in r.VI(a) of the 1994 Rules, and it seems clear that

[57] See para.C.24, above.

[58] At the Sydney conference in 1994 the US delegation was concerned that this wording did not, with complete certainty, exclude liabilities. Accordingly they made a formal statement in the plenary session of the Conference as follows: "The Delegation of the United States of America understands that the proposed York-Antwerp Rules 1994 exclude allowances in general average in respect of liability in consequence of the escape or release of pollutant substances from the property involved in the common maritime adventure." The British delegation entertained no such doubts.

[59] Some hull and cargo insurers, while not disputing that in certain circumstances liabilities would be allowable in general average under the York-Antwerp Rules, were anxious to avoid any express references to liabilities in the Rules, even in a provision excluding them from allowances.

[60] The Convention has the force of law in England: see the Merchant Shipping Act 1995, s.224 and Sch.11.

York-Antwerp Rules 1994

No change, although the suggestion was again made that the rule was obsolete. **4.15**

York-Antwerp Rules 2004

No change other than the substitution of *allowed* for *made good* as part of the process of tidying up the drafting of the Rules. **4.16**

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 *made good/allowed* as general average.

CONSTRUCTION

In the case of cargo, and parts of the ship which have not previously been carried away, the rule simply embodies the principle that there can be no sacrifice of that which is valueless, or doomed anyway.[18] However, in the case of parts of the ship which have been previously carried away the rule, for reasons of practical convenience, extends this principle. **4.17**

There may be great practical difficulties in determining:

(1) whether, for instance, a mast or spars (or other part of the ship) previously carried away in a storm but still lying alongside the ship attached by the rigging were "hopelessly lost" or might have survived the storm had they not been cut away; and
(2) if they had so survived, what their likely value would have been in damaged condition.

These are solved by assuming that any part of the ship which has previously been carried away by accident shall be considered to be valueless when cut away for the common safety, and not the subject of any general average allowance.

"**Loss or damage**": The wording of the rule as a whole is less than perfect, and a difficulty arises from the introduction of the word "damage". It is possible to visualise, for instance, that a broken mast on an auxiliary sailing vessel might be cut away for the common safety, and, before clearing **4.18**

[18] See paras 4.01–4.10, above.

the vessel, cause damage to the propeller. The loss of the mast is plainly excluded by the wording of the rule. The propeller was not itself previously harmed, by accident or otherwise. Is the damage to it to be excluded, because it was sustained through cutting away the mast? It is submitted that the loss or damage referred to are the financial consequences to the shipowner solely through cutting away the wreck or parts of the ship, and that the damage to the propeller is not excluded. This accords with principle.[19]

"**wreck**": See paras 4.03 to 4.09, above.

4.19 "**parts of the ship which have been previously carried away . . .**": This is the part of the rule which involves the departure from principle referred to above. If a part of the ship has been carried away, is then secured to the ship in the hope that it can be saved, and is subsequently cut away for the common safety, the rule excludes contribution, whether or not the part in question was valueless, or effectively doomed anyway. The words *carried away* denote that the part in question must have become detached accidentally; if it was detached deliberately this part of the rule will not be applicable. In an example drawn from practice the pipe-laying ramp of an offshore construction barge was damaged in a collision, as a result of which it was subsequently detached from the barge by the crew, and secured alongside to prevent it sinking. A storm approached, causing the ramp to range heavily against the side of the barge, causing significant damage to both, and the master decided to cut away the ramp, after which it was lost. In these circumstances it was necessary to decide whether the ramp was in a state of wreck, or already effectively lost by accident. If the ramp had been carried away (i.e. detached from the barge) by the original collision itself, these considerations would have been immaterial, since the rule would have excluded contribution anyway.

"**by accident**": See the commentary above. If the original damage, rather than being accidental, was the result of a general average sacrifice, any further loss caused by the cutting away would in most circumstances be recoverable as a direct result of that sacrifice.

[19] e.g. see *Ove Lange, Trustee v George D. Emery & Co and Insurance Co of North America*, unreported, January 1926, the facts of which are recorded at para.2.12, above.

then shift to a berth within the port. It can be argued with good reason that the cost of this move should be dealt with in the same manner as the cost of the repairs, but in practice the cost of the move will often be treated as the "expense of entering such port" and allowed as general average.

10.35 **"and when she shall have sailed thence with her original cargo, or a part of it . . ."** Introduced in 1864, these words are perfectly adequate for those countries which admit a general average situation only when a vessel has cargo on board. However, for the benefit of those countries following the English legal system, which contemplates a general average situation even when the vessel is in ballast but under charter,[31] the words might with convenience be translated *as "when she shall have sailed thence in continuance of her original voyage"*. This probably reflects the precise intention of the framers of the rule and would also be appropriate to those hull insurance conditions which accept a general average even when the vessel is in ballast and *not* under charter.

"corresponding expenses": Where a ship put back to her port of loading and, whilst she was there detained, ice formed in the river through which she had to proceed to sea. Bigham J. held, *obiter*,[32] that the shipowner could not recover contribution in respect of the expense of cutting a passage through the ice, as the expenses contemplated by the rule were "the ordinary expenses of leaving the place of loading 'corresponding' to the expenses of entering such place". This seems a somewhat narrow construction to put upon the words. It is suggested that what is meant is that if the expense of getting to point A in a harbour is, allowed as the expense of entering the port, then, in the reverse direction, the expense of sailing outward from point A will be so allowed even if it greatly exceeds the corresponding expense of entry.

Second Paragraph

10.36 The broad intention[33] of this paragraph is clear, namely: if a ship is necessarily removed from a port or place of refuge at which repairs are impossible to another port or place in order that repairs may be effected, the second port or place shall also be treated as a port of refuge to which all the provisions of rr.X and XI will apply. Further, the cost of moving to the other port, including any necessary temporary repairs and towage, plus crew wages, etc. and bunkers, shall also be allowed as general average.

"necessarily removed . . . because repairs cannot be carried out": It is suggested that the repairs contemplated are those necessary to complete the voyage, which may or may not be permanent repairs. If it is possible, in a commercial sense, to effect such repairs, the paragraph will not apply. In

[31] See paras 17.59–17.61, below.
[32] *Westall v Carter* (1898) 3 Com. Cas. 112 at 114 (1890 Rules).
[33] See also paras 10.26–10.27, above.

The Bijela[34] Hobhouse J. held that the paragraph did not apply if either temporary or permanent repairs were possible at the first port of refuge, and on the wording of the paragraph this conclusion seems inevitable.

"**necessarily removed to another port**": The other port to which the vessel is removed for repairs should be a *necessary* choice and, if only by reason of the new Rule Paramount, that choice should be reasonable to *all* the parties to the adventure. Cases are occasionally encountered in practice where the repairs necessary to complete the voyage might have been effected at a "neighbouring" port but, perhaps because the cargo has been forwarded under a Non-Separation Agreement.[35] the vessel then proceeds even on a trans-Atlantic or trans-Pacific voyage simply to secure the most advantageous repair charges. The costs of proceeding to such a repair port, or during any resulting over-extended delay, will only rarely be admitted as general average.

"**the provisions of this Rule shall be applied to the second port. . .**": This r.X deals, effectively, only with the cost of:

(1) entering and leaving a port of refuge:
(2) discharging cargo; or
(3) storing and reloading cargo,

and, whilst it might have made the matter clearer if r.XI had also been expressly mentioned, there can be no doubt that the port charges and crew wages, etc. incurred during the detention at the second port of refuge are independently recoverable under the provisions of r.XI(b), which applies to any port or place, whether it be a first or second port of refuge.

10.37 "**The provisions of Rule XI shall be applied to the prolongation of the voyage occasioned by such removal**": Rule XI provides, inter alia, for the allowance in general average of crew wages, etc. and fuel and stores consumed during the periods:

(1) deviating into and out of a port of refuge; or
(2) detained in a port of refuge.

Both periods might naturally be construed as a "prolongation of the voyage", but in the particular context and development of the York-Antwerp Rules, the term "prolongation of the voyage" applies particularly to period (1) above.[36]

[34] *Marida v Oswal Steel* [1992] 1 Lloyd's Rep. 636 at 644. The decision was upheld in the Court of Appeal [1993] 1 Lloyd's Rep. 411, Hoffmann L.J. dissenting but reversed in the House of Lord ([1994] 1 Lloyd's Rep. 1), but in neither of those tribunals did the point under the second paragraph of r.X(a) arise directly for decision. In the House of Lords the views of Hobhouse J. on the point are referred to without criticism, and it is submitted that his decision on the second paragraph of r.X(a) remains valid. The case is discussed in more detail in connection with r.XIV, para.14.31 *et seq.*, below.

[35] See r.G, above.

[36] See also para.11.10, below.

York-Antwerp Rules 1994

No changes of any real consequence were made on this occasion, but the minor changes made in 1974 had made mention of crew wages, etc. and fuel and stores consumed, but overlooked the concomitant port charges that would be incurred. This oversight has now been remedied and, for ease of reference, the additional wordings are printed in italics in the full text of the sub-rule copied in the next paragraph. Additionally, the five paragraphs of the rule were re-arranged in what was thought to be a more logical order. **11.24**

RULE XI(b) **11.25**

When a ship shall have entered or been detained in any port or place in consequence of accident, sacrifice or other extraordinary circumstances which render that 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 admitted in general average.

Fuel and stores consumed during the extra period of detention shall be admitted as general average, except such fuel and stores as are consumed in effecting repairs not allowable in general average.

Port charges incurred during the extra period of detention shall likewise be admitted as general average except such charges as are incurred solely by reason of repairs not allowable in general average.

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 admissible as general average, even if the repairs are necessary for the safe prosecution of the voyage.

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 admitted as general average only up to 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.

York-Antwerp Rules 2004

At the Vancouver Conference various proposals were put forward to remove existing allowances for wages and maintenance under rr.XI(a) and XI(b), and/or fuel and stores and/or port charges while at a port of refuge. A number of delegates felt particularly strongly that wages were a loss by delay and should not be singled out for a special allowance when r.C excluded all other such losses. On the other hand, it was noted that the allowance of wages had been an accepted part of general average in many jurisdictions prior to the first York-Antwerp Rules. A compromise was **11.26**

suggested by the Canadian delegation to exclude wages only while at the port of refuge, retaining the status quo for the deviation to the port and subsequent regaining of position.

Rule XI(a) is therefore unchanged, but all reference to wages is now removed from the new r.XI(c) which was formerly r.XI(b), a change having been made in the ordering of the paragraphs. The rule reads as follows:

> *"(c)(i) When a ship shall have entered or been detained in any port or place in consequence of accident, sacrifice or other extraordinary circumstances which render that 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, fuel and stores consumed 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, except such fuel and stores as are consumed in effecting repairs not allowable in general average.*
>
> *(ii) 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.*
>
> *(iii) 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 fuel and stores consumed and port charges incurred during the extra detention for repairs to damages so discovered shall not be admissible as general average, even if the repairs are necessary for the safe prosecution of the voyage.*
>
> *(iv) When the ship is condemned or does not proceed on her original voyage, fuel and stores consumed and port charges shall be admitted 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."*

CONSTRUCTION

11.27 Whereas the previous sub-rule XI(a) provides for the period while at sea proceeding to or from a port of refuge, the present sub-rule XI(b) (or XI(c) in the 2004 Rules) deals with the period spent within any port or place (of refuge) and permits the allowance in general average of:

(1) wages and maintenance of crew (not under 2004 Rules);
(2) fuel and stores consumed; and
(3) port charges incurred,

during the extra period of detention in the port when the ship shall have:

(a) "**entered**" in consequence of accident, sacrifice or other extraordinary circumstances which render that necessary for the common safety;
(b) been "**detained**" in consequence of accident, sacrifice or other extraordinary circumstances which render that necessary for the

common safety. For example a serious collision in the port causes severe leakage, or a fire in the cargo threatens the common safety even within the port;

(c) been "**detained**" 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. For example, some accident to the ship occurs in the port which in no way threatens the common safety while within the port, but which requires repair before the voyage can be safely prosecuted.

Thus, the scope of this sub-rule is undoubtedly very wide, but there are a few situations where wages and maintenance of crew, etc. during any extra detention would not be allowed as general average, for example:

(1) to recondition damaged cargo, whether the damage be from accidental cause or by general average sacrifice;
(2) to rectify some defect in the ship which constitutes neither accident[17] nor sacrifice,[18] but merely an extraordinary circumstance[19] (for example overheated bearings, or a slowly extending fracture in a crankshaft), if the work is done at a port of loading or of call at which the vessel has called in the normal course of her voyage. See also the commentary on r.X(b);
(3) where a vessel has been ordered out of port for the safety of the port (for example in fear of an explosion on board ship);
(4) during the extra time it may take to discharge damaged cargo at its intended destination, even though the damage may be caused by, for example, flooding the hold for the common safety.

11.28 A number of aspects of r.XI(b) (r.XI(c) of York-Antwerp Rules 2004) were considered in the *Trade Green*[20] which can most conveniently be dealt with together.

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

[17] See para.10.32, above.
[18] See para.10.32, above.
[19] See para.10.33, above.
[20] *Trade Green* [2000] 2 Lloyd's Rep. 451.

"*Detained*": The primary contention put forward by cargo was that the voyage within the meaning of the Rules had ended when the vessel berthed at Aquaba and that the vessel had therefore not been "detained" in a way contemplated by r.XI(b), which looked to a situation in which the vessel was prevented from continuing her progress to her final destination. The contrary argument that the words "voyage" and "common maritime adventure" have essentially the same meaning was rejected by the judge, who considered that rr.X and XI were both concerned with the interruption of the vessel's progress to destination and that the choice of the word "voyage" in these Rules (as opposed to "adventure" found in other Rules) had to be given its effect as a progression from the loading port to arrival at the port of discharge. He therefore found that, in the absence of any detention of the vessel, there could be no allowance under r.XI(b).

The grounds for this decision were viewed by many practitioners with some surprise. It had never been previously suggested that a distinction (relevant to these circumstances) should be made between "voyage" and "adventure" in the manner suggested in this case. A valid distinction exists between the contract voyage under the bill of lading and the common adventure, since the latter continues when there has been a prior abandonment of the contract voyage. However, the use of "voyage" in rr.X and XI is a reminder that the repairs under consideration are those required to bring ship and cargo to the end of the contract voyage and not merely to the nearest place at which the common adventure can be safely ended by discharging cargo.

The meaning given to the term "voyage" by practitioners in the context of the York-Antwerp Rules is supported by a questionnaire sent to the participating national committees prior to the Stockholm Conference that produced the 1924 Rules. The first question was, "what is the duration of a sea voyage for the purpose of performing a General Average act?"
The answer supplied by the English Committee (which was full of contemporary luminaries and headed by Lord Justice Kennedy) was:

> "A voyage begins when a ship either enters upon a chartered voyage or when she takes on board any cargo for carriage, and terminates when delivery of the whole cargo is completed or abandoned or partly completed and for the rest abandoned (Williams v London Assurance; Whitecross Wire Co v Savill)."

The other national committees took a similar view in responding to the questionnaire and it is likely that adjusters will continue to treat the voyage as something that concludes only on completion of discharge of cargo.

It is suggested that since it is common ground that the tug charges imposed on the *Trade Green* made no contribution to the common safety and that the time this occupied was not necessary for effecting repairs necessary for the safe prosecution of the voyage—these being the two triggers of an allowance under r.XI(b)—the claim for these expenses could have been rejected on these simple grounds.

The general average claim having failed because of the decision that there was no detention during the voyage, the judge expressed the following obiter views on the remaining issues.

"*Port or place*": The judge rejected the proposition that a "place" must be in the nature of a "port" (see also para.10.31, above).

"*Port charges*": As noted above, the tug charges were allowed by the adjusters on the basis that they were port charges incurred within an extra period of detention. The judge noted the absence of direct authorities and therefore considered the language of r.XI(b) and the context provided by rr.X and XI as a whole. **11.29**

> "In this context I think that the natural meaning of the expression 'port charges' in r.XI(b) is apt to include any charges which the vessel would ordinarily incur as a necessary consequence of entering or staying at the port in question. That would obviously include standard charges and levies of all kinds and may also extend to charges for standard service such as garbage removal which may or may not be optional but would be regarded as ordinary expenses of being in port. It is unnecessary to decide that point in the present case, but I note that this is the view put forward by the editors of Lowndes & Rudolf at para.11.32. Ordinary tug charges for assisting the vessel into and out of the port might well fall within r.XI(b), therefore, but it is much more difficult to bring the towage charges in the present case within it. They were not ordinary charges which any vessel using the port could expect to incur and apart from the fact they were levied by the port authority bore little similarity to port charges in the accepted sense. I do not think that r.XI(b) can be construed so as to cover all sums charged by the port authority regardless of the circumstances; in my view it is much more limited in its scope. It is true that in the present case the services of the tugs and the charges for those services were imposed on the vessel by the port authority, but they were imposed in response to an unusual situation and were not imposed in the common interests of the ship and cargo. In these circumstances I do not think that they can properly be regarded as port charges within the meaning of r.XI(b)."

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

The usual situation to which the rule applies is where a vessel puts into a port of refuge for the common safety, either because she has sustained hull or machinery damage, or because of an emergency affecting her cargo. In such circumstances it is very likely, and often a certainty, that the ship will incur charges by reason of her use of the port which exceed those which a ship in full operating condition would incur, and those charges are therefore treated as general average because they are a direct consequence of the decision to use the port. The most common example would be the requirement of a tug to stand by a vessel at the anchorage while her main engine is repaired. Sometimes bad weather or poor holding ground will mean that the master calls for a standby tug which is therefore evidently required for the safety of ship and cargo. On other occasions the port authority instigates the requirement out of concern to avoid disruption to the port operations or damage to its facilities, so that it becomes a

condition of entering and staying at the port. Frequently a combination of these motives may be found.

The practice of viewing "port charges" as something that could go beyond standard harbour dues etc also extended under the 1974 Rules to costs of anti-pollution measures required by a Port Authority prior to allowing entry to a port or granting permission to remain there. Such allowances were expressly sanctioned by r.XI(d) of the 1994 Rules (and unchanged in the 2004 Rules) when it was emphasised that no extension of allowances under the 1974 Rules (or adjusters' practice under them) was being made.

However, it was never considered sound adjusting practice to simply allow all charges within a port of refuge without questioning their purpose. Expenses not relating to the objective of ensuring the common safety or keeping the vessel in port to effect repairs necessary for the safe prosecution of the voyage—for example the crew going ashore for medical treatment, or a shift to a bunker berth, would be excluded. Additionally, as noted in para.11.27, above, the clearly defined circumstances that permit the allowances of wages also apply to port charges. It will also be noted that the examples in para.11.27 of situations in which wages would not be allowed (which also appeared in the 12th edition) included example 3, that of a vessel that had been ordered out of a port for the safety of the port.

11.30 "*Extra period of detention*": Had they lost on the other issues, counsel for the defendants argued that the towage charges had not been incurred during the extra period of detention which he defined as the time after which the vessel would otherwise have been able to leave the port; since the vessel would have remained at Aquaba for some time to discharge cargo the towage charges were not incurred during any extra period of detention in terms of r.XI(b). The judge agreed that (at a port of call) the extra period of detention is the period after which she would have been ready to leave port having completed scheduled operations there.

If detention can only be allowed at ports of call after all the scheduled activities at that port have been completed, this gives rise to some curious anomalies. If a vessel enters a port of refuge following a cargo fire which has been fought using Co_2 and remains there for several days while the cargo cools, the detention would in practice be allowed from the time of her arrival. However, on the Trade Green approach, if the vessel had entered a port of call no allowance could be made during the same period because the vessel had yet to carry out her cargo handling operations at that port of call—likewise in the event of a fire at a loading port when only part cargo had been loaded.

It is suggested that the existing and universal practice is to be preferred, namely to allow the period during which the ordinary scheduled activities at the port are interrupted or postponed because of the taking of measures for the common safety, or the carrying out of repairs necessary for the safe prosecution of the voyage.

When fire breaks out in the cargo of a ship at one of her ports of discharge an "extra period of detention" thereby results to the ship, and much discussion has taken place concerning the period during which the fire continues to burn. As the Chairman of the United States Association of Average Adjusters said in his annual address in 1962:

> "It is considered by some that the detention period should commence at the time the fire is extinguished while others are of the view that the full period of time during which efforts are being made to extinguish the fire should be included in General Average."

It is submitted that the latter view is correct and that the vessel has been "detained . . . in consequence of accident. . . which render(s) that necessary for the common safety" within the meaning of the sub-rule while fire-fighting operations are being carried out. The practice in the United States is also to commence allowances under the sub-rule from the time of the first act to extinguish the fire.

11.34 **"until the ship shall or should have been made ready to proceed upon her voyage"**: Since the 11th edition of this work it has been asserted that it is the condition of the ship alone which governs how long the "extra periods of detention" can be said to run. This view was difficult to reconcile with some of the propositions also made in the same editions with regard to certain types of delay not directly connected with the condition of the ship itself, namely:

11.35
1) Fog or gales, will not be admissible in general average on the grounds that weather conditions are generally variable and irregular, and a similar delay might just as easily occur at sea on the voyage itself.
2) Ice conditions may be allowable provided that it can be shown that such ice conditions were to be expected and were, or ought to have been, within the contemplation of the master when he decided to put into the port of refuge.
3) A strike of pilots or tugs might also be allowable, depending upon circumstances. Strikes being less accurately predictable than ice conditions, but not so uncommon in modern times and in certain countries with troubled labour relations as to be beyond the bounds of foreseeability.
4) Waiting for convoy (in war-time), was not admissible in general average, but the practice might be questioned if convoys sailed on known dates or at regular intervals.

The governing factor in making the above distinctions appears to be a test of foreseeability.

The words "until the ship shall have been made ready to proceed upon her voyage" first appeared in the York-Antwerp Rules of 1864 and the additional words "or should have been" appeared in 1890. The longevity of

this wording and the lack of any pressure for amendments can perhaps be explained by a broader meaning being assigned to the idea of the ship being ready than was admitted in the 11th and 12th editions. When r.X(b) was amended in 1974 to expressly exclude the cost of re-stowing shifted cargo (unless for the common safety) it appears to have been generally accepted that allowances for detention expenses during the period of such operations had been correctly made in the past and would continue to be made in the future, even when the cost of the operation itself was excluded. It would appear that the concept of the ship being ready to resume the voyage extended to the readiness of a ship with regard to:

- the context of its cargo carrying voyage, i.e. with cargo on board and in all respects ready to continue the maritime adventure;
- not being impeded by any circumstance that could have been foreseen as likely to flow from the original general average act that brought the vessel to the port of refuge.

Similarly, where a grounded vessel had its cargo discharged into lighters and then refloated, after which the vessel and lighters both moved to a nearby port to re-load the cargo it would appear that the usual practice was to allow the detention expenses during the re-loading even in the absence of a continuing peril or repairs being necessary for the safe prosecution of the voyage. This practice was confirmed by the additional sentence added to r.X(c) in 1994 (see para.10.63) and such allowances were evidently viewed as a natural and foreseeable consequence of the initial general average act.

However, the position is somewhat unsatisfactory because the wording of r.XI(b), which as a numbered rule falls to be construed strictly and on its own merits, makes no reference to foreseeability. The rule admits two specific triggers for an allowance for detention expenses, that is: being detained for the common safety or to effect repairs necessary for the safe prosecution of the voyage. However, the approach is not entirely at odds with the general principles set out in the lettered rules. When Lowndes pressed for the allowance under English law for the cost of storing and reloading cargo as general average, he did so on the basis that such costs were a foreseeable consequence of a general average act, rather than out of any recognition of the principle of common benefit.

A further example of this dilemma relates to the delays on port that may sometimes occur when the vessel is ready to proceed but is arrested by salvors pending provision of security by ship or, more usually, cargo.

The American adjuster and author Buglas, follows the same line as this work with regard to delays caused by weather and ice conditions and then continues:

> "Occasionally a vessel is subjected to extra delay at port of refuge while arrangements are made to obtain the release of the vessel from arrest by salvors. In such cases it is customary to allow detention in general average.

> This may not be strictly in accord with Rule XI but American average adjusters have usually taken a broad view of such delays. The rationale behind such allowances is that, with the best will in the world, it takes time to provide salvors with security at a foreign port. Therefore, if the time taken is reasonable it is customary to allow wages, etc. of crew during such reasonable delay. (It would be unusual to allow a delay of more than two or three days solely for this purpose.) The reasoning is that when the master signs a salvage contract (the general average act) it is apparent that some delay may be unavoidable in providing security and that, therefore, such reasonable and unavoidable delay flows directly from the general average act. It should be stressed that any unreasonable or avoidable delay would not qualify for a general average allowance. Thus, if the delay is due solely to lack of funds or credit, the delay becomes unreasonable and such extension of the detention at a port of refuge would not qualify as general average."

It is understood that a similar approach is also followed by some European adjusters, who report that it is generally accepted.

As Buglas admits, it is difficult to find support for this practice in the wording of r.XI(b) and the addition of the word "expenses" in the third paragraph of r.C since 1994 might be put forward as an additional obstacle to it.

While noting the areas in which universal practice, or the practice in certain locations, goes beyond a strict construction of r.XI(c) it should be emphasised that all adjusters should give proper weight to the words "should have been made ready". Thus, if repairs are prolonged because of owners' work undertaken in addition to repairs necessary for the safe prosecution of the voyage, or other avoidable delays occur, allowances should be curtailed accordingly. Detention arising from arrests by governmental bodies seeking security in respect of pollution liabilities or in relation to civil or criminal actions would also clearly fall outside the scope of this rule.

Second Paragraph

11.36 **"fuel and stores"**: See commentary on r.XI(a).

"except such fuel and stores as are consumed in effecting repairs not allowable in general average": A ship in port consumes power to provide lighting and heating for crew, refrigeration and ventilation of cargo holds, etc.; the cost of all fuel and stores consumed for these routine ship's purposes during the extra detention is chargeable direct to general average. However, if additional fuel and stores are consumed in shifting a vessel to a dry dock or other repair berth, or to provide extra lighting for repairs not allowable in general average, the cost of the additional fuel and stores is not allowable as general average.

Third Paragraph—Paragraph c(iii) in the York-Antwerp Rules

11.37 **"Port charges"**: It is difficult to give an exhaustive list of what are comprised in "port charges" but the words certainly include port and dock dues payable on a day to day basis and may also include the cost of