

CMI GUIDELINES RELATING TO GENERAL AVERAGE

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CMI GUIDELINES RELATING TO GENERAL AVERAGE

A) INTRODUCTION

1. Objective

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

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

2. Effect of guidelines

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

3. Review and amendment

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

In order to monitor the working and effectiveness of the CMI Guidelines, a Standing Committee shall be constituted to consist of:

- A chairman nominated by the Assembly of CMI
- A representative nominated by the International Chamber of Shipping
- A representative nominated by the International Union of Marine Insurance
- Five additional members nominated by the Assembly of CMI

The Standing Committee may recommend changes to the Guidelines as circumstances dictate, which shall be submitted to the Assembly of CMI for approval.

B) BASIC PRINCIPLES

1. Background

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

General average varied in its development in the different leading maritime countries, so that by the latter part of the 19th century substantial differences existed in law and practice throughout the world. In view of the international character of shipping the disadvantages of this were obvious, and there began the series of attempts to obtain international uniformity. An International Conference held in York in 1864 produced the York Rules, which were revised at Antwerp in 1877 to become the first set of York-Antwerp Rules.

In a modern context, as well as continuing to provide an equitable remedy when property is sacrificed for the common good, the principles of general average, as now embodied in the York-Antwerp Rules, also continue to perform a useful function in helping to define important borders that lie between:

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

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

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

Rule A of the York-Antwerp Rules defines a general average act as follows:

"There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure."

2. York-Antwerp Rules

The York-Antwerp Rules consist of lettered rules (A-G) and 23 numbered rules . The lettered rules set out various broad principles as to what constitutes general average; the numbered rules deal with specific instances of sacrifice and expenditure and set out detailed guidelines concerning allowances etc.

Broadly speaking, the York-Antwerp Rules have recognised two main types of allowance:

“Common safety” allowances: sacrifice of property (such as flooding a cargo hold to fight a fire) or expenditure (such as salvage or lightening a vessel) that is made or incurred while the ship and cargo were actually in the grip of peril.

“Common benefit” allowances: once a vessel is at a port of refuge, expenses necessary to enable the ship to resume the voyage safely (but not the cost of repairing accidental damage to the ship) for example, the cost of discharging, storing and reloading cargo as necessary to carry out repairs, port charges, and wages etc. during detention for repairs and outward port charges.

The York-Antwerp Rules are prefaced by a Rule of Interpretation which gives priority to the numbered rules when there is a conflict with the lettered rules. For example, Rule C excludes losses due to delay but Rule XI says that certain detention expenses at a port of refuge (e.g. port charges, wages and maintenance) can be allowed; Rule XI takes priority over the lettered Rule C and such expenses can therefore be allowed.

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

"Rule Paramount

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

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

3. General Average events

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

<u>Casualty</u>	<u>Type of sacrifice or expenditure</u>
<i>Grounding:</i>	Damage to vessel and machinery through efforts to refloat. Loss of or damage to cargo through jettison or lightening of the vessel. Cost of storing and reloading any cargo so discharged. Port of refuge expenses.
<i>Fire:</i>	Damage to ship or cargo due to efforts to extinguish the fire. Port of refuge expenses.
<i>Shifting of cargo in heavy weather:</i>	Jettison of cargo. Port of refuge expenses.
<i>Heavy weather, collision, machinery breakdown, or other accident involving damage to ship and resort to or detention at a port:</i>	Port of refuge expenses. Towage
<i>General:</i>	Payments relating to salvage may also be allowed as general average in any of the above circumstances.

4. Adjustment of general average

The basic principles are:

1. Property at risk

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

2. Contributory values

The sharing of general average sacrifices and expenses is achieved by a pro rata division over what the York-Antwerp Rules refer to as “Contributory Values”.

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

Since values are assessed as at the end of the voyage, it also follows that the amount of contribution may be varied by further loss or damage to the property

between the time of the general average act and the arrival at destination. For example, if the property is totally lost due to a subsequent accident it will have no contributory value and will not contribute to the general average.

3. Termination of the voyage

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

4. Equality of contribution

Equality of contribution must be maintained between the owner of the property sacrificed and the owner of the property saved. In practice this is achieved by the device of adding to the contributory values of property lost or damaged by general average sacrifice the amount allowed (or “made good”) in general average in respect of that sacrifice. If this were not done the owner of jettisoned cargo would receive benefit in the form of money from the general average for loss of his goods without participating in or contributing to the general average losses, as can be seen from the following example:

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

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

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

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

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

5. Example adjustment

		General Average
Shipowners' losses and expenses		
Cost of repairs of damage to vessel's machinery sustained in refloating operations.		US\$ 250,000
Cost of discharging, storing in lighters, and reloading cargo discharged to lighten vessel.		100,000
Salvage paid to tugs for refloating vessel.		1,150,000
Cargo owner's losses		
Value of cargo jettisoned in efforts to refloat.	US\$ 500,000	
Damage to cargo caused by forced discharge, storage and reloading.	100,000	
	600,000	600,000
		US\$2,100,000
Apportioned		
Ship		
Arrived value at destination in damaged condition.	US\$6,750,000	
<i>Add</i> allowance in general average for refloating damage.	250,000	
	US\$7,000,000	pays in ppn.
		US\$ 700,000
Cargo		
Invoice value after deduction of loss and damage.	US\$13,400,000	
<i>Add</i> allowance in general average in respect of jettison and damage due to forced discharge.	600,000	
	14,000,000	“
	US\$21,000,000	pays in ppn.
		1,400,000
		US\$2,100,000

(General Average equals 10% of the contributory values.)

Balance under the adjustment

The Shipowner:

Receives credit for general average losses and expenses.	US\$	1,500,000
Pays general average contribution.		700,000
		<hr/>
	<i>Balance to receive</i>	US\$ 800,000
		<hr/> <hr/>

The cargo owner:

Pays general average contribution.	US\$	1,400,000
Receives credit for general average losses.		600,000
		<hr/>
	<i>Balance to pay</i>	US\$ 800,000
		<hr/> <hr/>

6. Contract of carriage

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

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

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

C) GENERAL AVERAGE PROCEDURES

1. General Average security

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

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

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

The objectives of the security forms currently in use include:

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

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

2. Salvage security

In some circumstances and jurisdictions, and under salvage contracts such as Lloyd's Open Form, the salvor will have a separate right of action against each individual piece of property that is salvaged, once that property is brought into a place of safety. The salvor may therefore exercise a lien on all the cargo at that place and the cargo interests will have to provide two sets of security:

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

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

3. Claim Documentation

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

After collecting security the average adjuster will need information from cargo interests in order to:

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

Cargo interests will generally need to submit the following information to the adjuster:

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

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

D) ROLE OF THE AVERAGE ADJUSTER REGARDING GENERAL AVERAGE

1. The effect of the adjustment

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

2. Best practice of average adjusters

Average adjusters work under different regulatory and professional regimes, however the following elements of best practice appear to be universal and are endorsed by the leading professional associations.

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

2.2 In all cases the average adjuster should:

(a) Give particulars in a prominent position in the adjustment of the clause or clauses contained in the charter party and/or bills of lading that relate to the adjustment of general average or, if no such clause or clauses exist, the law and practice obtaining at the place where the adventure ends. Where conflicting provisions exist, the adjuster should explain in appropriate detail the reason for the basis of adjustment chosen.

(b) Set out the facts that give rise to the general average.

(c) Where the York-Antwerp Rules apply, identify the lettered and/or numbered Rules that are relied upon in making the allowances in the adjustment.

(d) Explain in appropriate detail the choice of currency in which the adjustment is based.

(e) Make appropriate enquiries as to whether any recovery relating to the casualty is being undertaken, and set out the results of those enquiries in the adjustment.

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

E) ROLE OF THE GENERAL INTEREST SURVEYOR

The “General Interest” or “G.A. Surveyor” may be appointed by the Shipowners on behalf of all parties involved in the common maritime adventure, usually only in the larger casualties or where cargo sacrifices are likely to be involved. The Shipowner is responsible for settlement of the G.A. Surveyor’s charges, which are allowed as General Average, but the G.A. surveyor is expected to act in an independent and impartial manner when recording the facts and making recommendations.

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

- 1) To advise all parties on the steps necessary to ensure the common safety of ship and cargo.
 - 2) To monitor the steps actually taken by the parties to ensure that proper regard is taken of the General Interest.
 - 3) To review General Average expenditure incurred and advise the Adjusters as to whether the costs are fair and reasonable.
 - 4) To identify and quantify any General Average sacrifice of ship or cargo.
 - 5) To ensure that General Average damage is minimized wherever possible i.e. by reconditioning or sale of damaged cargo. Except in cases of extreme urgency or where communications are difficult, any significant action with regard to cargo (e.g. arranging for its sale at a Port of Refuge) must be taken in consultation with the concerned in cargo.
2. The authority and funds to make disbursements will generally come from the Shipowner, usually via the Master or the Local Agents. The G.A. Surveyor therefore has no authority to order any particular course of action and his role is an advisory one. However, the G.A. Surveyor’s impartial position and his influence on the eventual treatment of the expenditure will give his advice considerable weight with the other parties involved.
3. The G.A. Surveyor should also be aware that several other Surveyors may be in attendance on behalf of particular interests and that, for reasons of economy, duplication of reporting should be avoided. In the event of any doubt arising as to the depth of investigation required from the G.A. Surveyor, the Adjuster should be contacted for guidance. The G.A. Surveyor is effectively appointed to act on behalf of the whole General Average community, any of whom are generally entitled to view all his exchanges of correspondence and reports.

F) YORK-ANTWERP RULES 2016

1. Rule VI - Salvage

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

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

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

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

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

2. Rule XXII – Treatment of Cash Deposits

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

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

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