COMITE MARITIME INTERNATIONAL, AISBL

PRESIDENT

To the Presidents of the National Maritime Law Associations

cc: Titulary Members
Consultative Members

Oslo 25 June, 2012

Dear President,

Please find attached a report on the work by an International Working Group regarding a proposed revision of the York-Antwerp Rules (YAR).

As you will see, the proposal aims at solving an impasse which has prevented a wide use and application of YAR 2004. The proposal will be considered at the CMI Conference in Beijing from 14 to 19 October this year, see www.cmi2012beijing.org.

I would be very grateful if your Association could review the proposal and submit any comments it wants to make as soon as conveniently possible and no later than by 31 August.

The comments so received will be included in the documentation for the Conference and together with the report and the draft proposal provided the basis for the deliberations in Beijing on this topic.

Best regards,

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CMI

Revision of York Antwerp Rules 2004 (to be known as York Antwerp Rules 2012)

REPORT TO THE NATIONAL MARITME LAW ASSOCIATIONS

(By Karl-Johan Gombrii, Richard Shaw and Bent Nielsen)

0. Introduction

This report deals with a proposal to change the YAR 2004 to ensure that the amended Rules become acceptable to the broadest possible range of commercial interests and achieve a fast and widespread application. The draft changes are set out in section 3 of this Report.

National Maritime Law Associations are invited to provide their written comments to the proposal, which should be received by CMI's secretariat not later than 31 August 2012.

Comments received, together with this Report, will be included as working documents at the CMI Conference to be held in Beijing from 14 to 19 October 2012 where it is hoped that the new YAR (YAR 2012) can be finally agreed and approved by the Plenary of the Conference.

The scope of the proposed changes is limited,and the purpose is restricted to solving an impasse which has prevented a general acceptance of YAR 2004. It follows that he proposal is not meant to be a general revision of the YAR. Therefore, the CMI will on this occasion not be in a position to deal with proposals to amend the YAR which fall outside the scope of these proposed changes. Only this limited revision will be on the Agenda at the Conference in Beijing in the same way as when Rule VI was amended in Paris in 1990 as a consequence of the new rules in the Salvage Convention of 1989.

At the Conference, the proposed YAR 2012 will be considered and amendments madeas my be necessary in Conference sessions chaired by Bent Nielsen and assisted by Richard Shaw as Rapporteur (for details of the Conference Programme see www.cmi2012beijing.org). The result of the deliberations by delegates at these sessions will be submitted to the Plenary of the Conference on 19 October for consideration and, hopefully, adoption.

1. Background

The YAR 2004 have been unacceptable to many shipowners and shipowners' organizations, including BIMCO which has issued circulars to its members recommending against the use of the Rules and has refrained from incorporating the Rules in their standard documents. As a result, YAR 2004 are very rarely incorporated into shipping contracts and therefore very rarely used. The CMI initiated informal discussions with BIMCO in order to ascertain if it would be possible to vercome obstcles to their general acceptance.

The matter was discussed in a meeting held on 12 September 2011 between Torben Skaanild and Soren Larsen of BIMCO and Karl-Johan Gombrii and Bent Nielsen for CMI, and again on 28 September between the same persons except that Karel Stes, the chairman of the BIMCO Documentary Committee, attended while Torben Skaanild did not.

Following subsequent e-mail correspondence and telephone conversations between the persons involved, the Documentary Committee of BIMCO at its meeting on 6 November 2011 accepted CMI's proposal that a

joint working group should consider the matter further and try to agree on a solution/wording which could form the basis for general agreement and acceptance by all interested parties.

The joint working group met on 16 December at BIMCO House in Copenhagen with Karel Stes, Donald Chard (of the UK Chamber of Shipping), Richard Cornah (of Richards Hogg Lindley), Soren Larsen and Grant Hunter (the latter two BIMCO Secretariat) attending for BIMCO, and Bent Nielsen and Richard Shaw attending for CMI (Karl-Johan Gombrii being prevented from attending)

At this meeting possible amendments to YAR 2004 were debated *ad referendum*, on the understanding that the participants had no mandate to bind anybody. While there was agreement in principle to support a solution relating to salvage (including a new Rule of Application), the CMI representatives could not support BIMCO's proposal also to reinstate Rule XI regarding the allowance in GA of crew wages in a port of refuge which had been excluded by YAR 2004. The opposition was on the assumption that the proposed change to Rule XI would not attract general support and in particular be opposed by cargo underwriters. It was however agreed to continue the efforts to find a solution.

Subsequently informal consultations with IUMI (which had initiated the work resulting in the YAR 2004) have shown that (in their words): "the proposed reforms as a package (including the restoration of Rule XI) would carry IUMI's approval assuming no new concessions are requested, the Rule of Application goes in and BIMCO's Documentary Committee amends their standard documents as quickly as reasonably practicable to incorporate the YAR 2012 if they are adopted at the CMI's Conference in Beijing in October 2012".

On this basis CMI decided to put the revision of YAR 2004 on the Agenda for CMI's International Conference in October 2012 and to establish an International Working Group (IWG)to consider the proposed reforms further (particularly the drafting) . The idea was to create a group with representation from major stakeholders as shipowners, underwriters and average adjusters. However, for the group to be efficient and since the work was still at an initial stage and would be submitted for consideration by all interested parties and organizations at the Conference in Beijing, the IWG was limited in size.

The IWG met in Copenhagen 21 March 2012 in the offices of Kromann Reumert and consisted of Donald Chard , Paul Silver, of the Averge Adjusters Association, and Soren Larsen (BIMCO), Ben Browne (IUMI), Michael Harvey (AMD - Association Mondial de Dispacheurs), Andrew Bardot (International Group of P&I Clubs, as observer), Karl-Johan Gombrii and Bent Nielsen (CMI).

Tentative agreement was reached regarding the principles and drafting of the proposed amendments in order to create a set of Rules (YAR 2012) which would hopefully pave the way for their general acceptance and be widely applied, it being understood that the members of the IWG participated in their personal capacities and were generally not in a position to commit the various stakeholders they may be linked to.

In subsequent correspondence the drafting has been further refined and the participants of the IWG have generally agreed to the final version of the draft clauses as annexed to this report (which in their final form were drafted by Michael Harvey).

Approval of the draft is subject to a satisfactory percentage figure in Rule VI(b) being agreed in Beijing (which figure has been left blank in the draft). The percentage figure will work as a "trigger" and decide which salvage cases will be allowed in General Average (GA) and which will be excluded. As already noted, the thinking behind the draft is generally to allow salvage costs in GA only in cases where the result would be a substantial redistribution of the costs between cargo and hull interests. The proposal is that salvage will not be allowed in GA where it is the main element of GA expenditure – how main will be dependent

upon the percentage agreed. In this context IUMI has expressly noted that they will only support the amendment to Rule VI if the percentage in effect excludes a substantial proportion of salvage cases from GA under the revised 2004 Rules.

To assist the reader in evaluating the proposed Rule VI (b) and the "trigger" to be inserted, a set of examples that are intended to illustrate the matter is attached hereto.

2. Summary of new rules in YAR 2004 as compared to YAR 1994.

The following is a summary of the amendments made to YAR 1994 by the YAR 2004 :

RULE VI. SALVAGE REMUNERATION
This was amended to exclude the allowance of salvage from G.A., except in cases where one party to the salvage has paid all or any of the proportion of salvage due from another party.

RULE XI. EXPENSES AT PORT OF REFUGE
This was amended to exclude the allowance in G.A. of wages and maintenance of master, officers and crew while the vessel is detained at a port of refuge.

RULE XIV. TEMPORARY REPAIRS
A second sentence was added to Rule X IV b), the effect of which is that recovery in G.A. of the cost of temporary repairs of accidental damage at a port of refuge is limited to the amount by which the estimated cost of the permanent repairs at the port of refuge exceeds the sum of the temporary repairs plus the permanent repairs actually carried out. This capping of the amount allowed as temporary repairs has sometimes been referred to as the "Baily" method.

RULE XX. PROVISION OF FUNDS
This was amended to abolish commission on G.A. disbursements.

RULE XXI. INTEREST ON LOSSES
This was amended to the effect that the Interest charged is no longer a fixed rate, but a rate that will be fixed each year by the Assembly of the CMI. The CMI will publish this on its website www.comitemaritime.org.

RULE XXIII. TIME BAR.
A new rule was added to the YAR 2004 providing for any rights to G.A. contribution to be time-barred after a period of one year after the date of the G.A. adjustment or six years after the date of termination of the common maritime adventure, whichever comes first. The rule recognizes that its provisions may be invalid in some countries.

POLISHING THE TEXT OF THE YAR 1994
Interchangeable terms were standardized such as "admitted in", "allowed in" and "admitted as" now all became "allowed as". Some terms have been modernized and a consistent numbering of paragraphs was introduced.

3. The proposed amendments of YAR 2012.

3.0 Proposed Draft Clauses

The draft amendments as agreed by the IWG are annexed to this report and commented below.

3.1 Salvage.

Rule VI(a)

The IWG considered this rule should mirror Rule VI(a) of the 1994 Rules. Minor amendments have been made accordingly.

Rule VI(b)

This is the main proposal regarding the treatment of salvage payments.

It is appreciated that there is a strong feeling among many shipowners and shipowners' associations that Rule VI of the 2004 YAR is truly unacceptable in its present form and that this has been a major reason for their resisting YAR 2004. On the other hand it should be recalled that the allowance of salvage in all cases is of no use in the many cases where this is only a confirmation of what was already a fact when the salvage shares were paid by the parties in proportion to salved values. In such cases the abolition~~ment~~ of the allowance of salvage would save considerable (and unnecessary) duplication of costs and work, as well as avoid much delay.

The IWG has considered possible solutions where salvage was only allowed in GA if this would result in a substantial redistribution. This however appeared to necessitate a complex set of new provisions with the resulting risks of difficult application and interpretation. It was therefore thought better to propose the simple and straightforward provision in Rule VI (b) which would be easier to use.

As can be appreciated, the IWG's proposal represents a broad compromise between the opposing interests and it is expected that a balanced solution can be found at the CMI conference concerning the percentage figure which should be inserted in the new rule.

Rule VI(c)

This rule restates the part of Rule VI (a) in YAR 2004 where exception is made from the rule that salvage shall not be allowed. It deals with the situation where one party has made salvage payment(s) for other parties in cases where salvage is not allowed in GA under the proposed Rule VI(a).

Rule VI (d) and (e)

These rules restate the rules in YAR 1974 (as amended in 1990) as well as YAR 1994 and 2004 regarding "enhancement" and "special compensation" under the 1989 Salvage Convention or similar provisions.

Rule VI (f)

This rule is an attempt to solve an existing uncertainty regarding the interpretation of YAR 2004, making it clear the exception of allowance of salvage money does not relate to payments for services for which there is no legal or contractual provision for apportionment between the salved interests. It mirrors a proposed new provision in the AAA Rules of Practice. The Rule in particular clarifies that contract towage and claims under Rule VIII are not covered by Rule VI.

3.2 Crew Wages Rule X (c)

It is proposed to revert to the situation under YAR 1994 and therefore reinstate allowance in GA of crew wages etc. in a port of refuge.

During the work resulting in YAR 2004, IUMI proposed that the common benefit principle be abolished entirely. This radical proposal was much debated and met strong opposition. The final result was a decision to limit this to the abolition of allowance of crew wages etc. incurred in a port of refuge. This is estimated to have the financial effect of redistributing only 1-2 % of the sums allowable in GA. The proposed reinstatement (and IUMI's approval) may be seen against this background.

3.3 Rule of Application

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.

21 June, 2012

Karl- Johan Gombrii Richard Shaw Bent Nielsen

Rule VI Salvage Remuneration

(a) Except as provided in sub-rules VI (b) and (c) expenditure incurred by the parties to the adventure in the nature of salvage, whether under contract or otherwise, shall be allowed in General Average provided that the salvage operations were carried out for the purpose of preserving from peril the property involved in the common maritime adventure.

(b) Salvage payments including interest and legal costs shall not be allowed in General Average if they exceed x per cent of the total sums allowable in general average if salvage were included. The foregoing shall not apply where salvage payments have been paid by one party on behalf of all salved interests.

(c) If one party to the salvage shall have paid a proportion of salvage payments (including interest and legal costs) due from some, but not all, of the salved interests (calculated on the basis of salved values and not General Average contributory values), the unpaid contribution to salvage due from the other parties plus interest pursuant to Rule XXI shall be credited in the adjustment to the party that has paid it, and debited to the party on whose behalf the payments were made.

(d) Salvage payments referred to in this Rule VI shall include any salvage remuneration in which the skill and efforts of the salvors in preventing or minimising damage to the environment such as is referred to in Art. 13 paragraph 1(b) of the International Convention on Salvage 1989 have been taken into account.

(e) Special compensation payable to a salvor by the shipowner under Art. 14 of the said Convention to the extent specified in paragraph 4 of that Article or under any other provision similar in substance (such as SCOPIC) shall not be allowed in General Average and shall not be considered a salvage payment as referred to in this Rule.

(f) For the purpose of applying this Rule VI the term “salvage payments” shall mean payments made in respect of salvage services and for which there is contractual and/or legal provision for apportionment and payment between the salved interests upon termination of the salved services independent of these Rules.

Delete Rule XI (c) (i) & (ii) of YAR 2004 and replace with

Rule XI (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, the wages and maintenance of the master, officers and crew reasonably incurred during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage shall be allowed in general average. Fuel and stores

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

(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 the wages and maintenance of master, officers and crew and fuel and stores consumed and port charges incurred during the extra detention for repairs to damages so discovered shall not be allowable as general average, even if the repairs are necessary for the safe prosecution of the voyage.

(iv) When the ship is condemned or does not proceed on her original voyage, the wages and maintenance of the master, officers and crew and fuel and stores consumed and port charges shall be allowed as general average only up to the date of the ship's condemnation or of the abandonment of the voyage or up to the date of completion of discharge of cargo if the condemnation or abandonment takes place before that date.

Rule of Application

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.

Examples of redistribution of salvage payments in GA

(Prepared by Bent Nielsen)

In many cases it will make no difference if salvage payments are allowed in GA. The salved parties shares of the reward will be approximately the same and the allowance in GA will be useless as it will not result in any noticeable redistribution.

It is only in the following 4 situations the allowance of a salvage payment in GA will result in a significant redistribution :

1) Where there are 2 or more casualties during the voyage leading to a significant difference between the values in the first port of refuge and the final destination.
2) Where there are differential settlements with salvors.
3) Where damage to vessel or cargo has been allowed in GA.
4) Where it is subsequently realized that a salved value was wrongly assessed.

The following examples of such cases may assist in evaluating the problems which could be caused if a salvage reward is not allowed in GA.

It should be noted that the fact that the examples all have the result that the ship-owner's share of the reward is increased in the redistribution does not mean that this will happen in all cases. Other examples may be construed in which the ship-owners gain and the cargo interest loose by the redistribution.

All examples relate to a winter-voyage from Antwerp to Montreal with a project cargo of which one large item is carried on deck. The ship's sound value is USD12mio. The total cargo value is USD10 mio. of which the value of the deck cargo is USD5 mio. The vessel suffers an engine failure and grounds on rocks near Ushant. Salvage tugs pull the vessel off and tow it to Brest. After repairs of the engine and bottom damage the voyage is resumed. The total costs of repairs are USD2 mio. The total salvage reward is USD 4 mio. It is shared in proportion to the salved values i.e. cargo USD10 mio and ship USD 10 mio (sound value at USD12 mio. minus repairs at USD 2mio.) Consequently the ship-owners and the cargo interests each pay USD 2 mio to salvors.
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EXAMPLE 1) Two or more casualties during the voyage are leading to a significant difference in the values between the first port of refuge and the final destination.

In this example it is assumed that the deck cargo is lost overboard in heavy weather on the voyage from Brest to Montreal. Under YAR Rule XVII a. the contribution to GA shall be made on the basis of the values in the port of destination.

Cargo value in Montreal USD 5 mio. Vessel value USD10 mio. If salvage is allowed in the GA the ship-owners share is 10/ 15 of the reward or USD 2.67 mio. while the cargo interests share is USD1.33 mio. Thus the shipowners must now pay USD 0.67 mio. more and cargo interest USD 0.67mio. less of the reward.

EXAMPLE 2) Differential settlements with salvors.

In this example it is assumed that the ship-owners soon after the casualty settle their share of the reward at USD 1 mio. while the cargo interests insist on arbitration where their share is fixed at USD 2 mio.

If salvage is allowed in GA the total reward at USD 3 mio. is redistributed on the basis of the values in Montreal at USD 10 mio for the ship-owners and the cargo interest respectively. Thus the ship-owners must now carry USD 1.5 mio. of the reward and pay USD 0.5mio.of the arbitration reward against the cargo interest.

EXAMPLE 3) Damage to vessel or cargo has been allowed in GA.

In this example it is assumed that the vessel's bottom is heavily damaged as a result of the refloating and that USD 1 mio. of the costs of repairs relate to this. This refloating loss is allowed in GA .However, under YAR Rule XVII b. such an allowance shall be added to the value of the ship when its contributory value is assessed.

If salvage is allowed in GA the total reward at USD 4 mio. is redistributed on the basis of the ship's contributory value at USD 11 mio and a cargo value at USD 10 mio.

Thus the ship-owners share is 11/21 of the reward and the ship-owners must now carry about USD 2.1 mio and pay about USD 0.1 to the cargo-interests

EXAMPLE 4) A salved value was wrongly assessed.

In this example it is assumed that the deck cargo was considered undamaged when the salvage reward was settled. Subsequently however, serious faults are ascertained and the contributory value of the deck cargo assessed to USD 1 mio.

If salvage is allowed in GA the total reward of USD 4 mio. is redistributed on the basis of the ship's contributory value at USD 10 mio. and a cargo value at USD 6 mio.

Thus the ship-owners' share is 10/16 of the reward and the shipowners must now carry USD. 2.5 mio. of the reward and pay USD. 0.5 mio to the cargo-interest.