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RESPONSE BY THE ITALIAN MARITIME LAW ASSOCIATION TO THE CMI QUESTIONNAIRE ON GENERAL AVERAGE

Section I

1. There are no indications of a trend towards the abolition of the General Average. On the contrary:

   a) the market tends to strike a balance through mechanisms which in different ways (Small GA Clauses, preventive Club's involvement etc.) often avoid cases where costs are disproportionate o litigation is likely to arise;

   b) the modern communications technologies (exchanges of instructions and guarantees by email, etc.) have largely reduced, compared to the past, the most cumbersome elements of the procedure, except perhaps for accidents involving a large number of units (container ships).

2. Reserving a further assessment of the impact of the Rotterdam Rules and, in general, on the evolution of the liability regime of the carrier, the mechanism based on Rule D - which has always favoured YAR 's success - should not be abandoned: YAR regulate the general average, leaving undecided (being beyond the scope of the YAR) liability issues.

3-4. All the attempts made to redraft clauses or rules internationally adopted have proven too ambitious, either because they aimed at encompassing too much, or because they tended to introduce definitions which have never been accepted by the market, and they have been eventually rejected (such as, in marine insurance, the IHC o the ICBR).

5. See above. Amendments driven by the sole desire to reach a "perfect" definition would be probably difficult to accept by the shipping community. These kind of forms can succeed only if continuity is ensured.

6. If the disputes concerned the regulation of the general average, there is no indication of requests for arbitration specifically related to YAR or CMI. If the disputes were those related to liability, it would be contrary to the approach that has boosted thus far YAR's success: see comment under 2 above.

7. As regards question (a) it is worth repeating what pointed out under 2: it is better to maintain the traditional approach for YAR being limited to the general average regulation. Moreover, some of the above mentioned legal issues differ from jurisdiction to jurisdiction, and one cannot see how (or on which basis) the YAR could regulate them within an uniform regulation.

As to proposal (b) there are, in principle, no objections, even though the wordings of Average Guarantee are today standardized on the English form. As for the Average Bond, its real meaning and use is controversial even in the English legal system, therefore it would be even more complex to export such a model into other legal systems.

8. The matter of Small GA Clause is mostly related to insurance. An adaptation of the texts (very different among them) currently used could be desirable, but one cannot see how YAR could host them.

9. The approach has been based thus far on the application of the general principles to these new (or renewed) issues. After several hesitations the practice seems having taken a direction, but - to answer to the question (a) - a specific rule could be useful in order to remove the remaining uncertainty on (i) the general average nature of the ransom paid and the related requirements [purpose of common safety and so forth etc.] and (ii) limitations to the admission [for instance excluding that the detention under pirates control is equal to the release into a port of refuge, which would seem obvious but the English Adjusters Association, felt necessary to stress the point in order to stop the abuses]. It would be worth however to draft a new Rule on the topic.

10. As for point (b) costs of collection of the guarantees are usually considerably reduced thanks to the new technologies. Except for cases involving large quantities of goods, for which we refer to the comments raised under point 1(a), there is no indication of specific requests as regards points (c) and (d).

11. No further comments.

Section II

Rule of interpretation

There is no indication of requests for revision.

Rule Paramount

The Rule has proven effective as a tool for balancing interests, for example preventing the parties from putting forward unrealistic scenarios and justify provisional repairs in ports of refuge as alternative solution to them, seeking the admission of these costs under Rules F or XIV.

The proposal under the second paragraph is interesting, but the case is extremely rare (usually the only "victim" of a behaviour which turns out unreasonable is the shipowner who so acted) and one should ask whether it could justify the complications which may arise from its application.

Rule of application

See what mentioned under 2 of Section I.

Section 3

1 – Rule A

There is no indication of requests for revision.

2- Rule B

The Rule is not frequently applied. One of the criticism put forward by the practice seeks a more precise definition of the common safety situation (or the same degree) of the peril.

3 – Rule C

As regards point 3.1. the general exception of "loss of market", and in general the limitation set out by Rule C must be absolutely preserved. In practice Rule C is often the best defence to challenge the attempts to enlarge unreasonably to scope of general average, by including costs, expenses and losses not directly arising from the average.

4 – Rule D

See comments under 2 Section 1: the limit sets out by Rule D is one of the traditional reasons for the success of the YAR and should be preserved.

5 - Rule E

In most cases the provisions work well. The only problems known in practice refer to cases where the final repairs of the ship (which must be taken into account for the assessment of her value), are postponed for a long time. The provisions of Rule XVIII should be however sufficient to cope with this problem. In practice, one cannot see how cargo interests may need more than one year to inform about the existence or the extent of damages, or raise claims.

6 – Rule F

6.1-6.2. There is no indication of requests for revision.

As regards the proposal under 6.3, the admission seems attractive in order to simplify the process but it would open the door to the admission of costs of towage at port of destination which are incurred only due to commercial reasons (i.e. the need to speed up delivery). It is a temptation which frequently arises in practice, and losing this dike could be dangerous.

7. Rule G

Points 7.1, 7.4 and 7.5
Sometimes the problem arises in practice and it is a delicate issue due to the discrepancies existing between English law and the position existing in other jurisdictions. The solution under (b) of 7.4 is usually the preferred one. A provision suitable to clarify the matter would be attractive, but it would interfere with doctrines like frustration or abandonment which do not belong to general average.

7.2 The solution adopted in the Italian practice is already in the sense indicated; the obvious principle that GA cannot result in unfair advantage for owners should be sufficient to confirm it. There is no evidence of disputes on the issue.

7.3. If the GA involves a single cargo, or a few lots, cargo interests, whenever are known, are always informed. There is no indication of particular difficulties in doing so.

Section 4

1. Rule I

There is no indication of requests for revision.

2. Rule II

Ditto

3. Rule III

Ditto

4. Rule IV

The case is extremely rare. In the very few occasions where the rule has been applied, the formulation was found perhaps old-fashioned, but nonetheless suitable. The principle should be maintained, in order to avoid admitting to contribution the sacrifice of goods which are already devoid of value as consequence of previous damages.

5. Rule V

There is no indication of requests for revision.

6. Rule VI

The Italian practice was not contrary to limit re-apportionment in General Average only to those cases where the entire salvage remuneration is paid by one of the parties of the adventures, also on behalf of the other parties, and conversely, in case of individual settlements, to lie payments where they fall. It is true that the practice often achieves the same result, but Rule VI of YAR 1994 can offer to those who have reached a bad settlement with the salvors ground hardly disputable, albeit selfish, to ask nonetheless for re-apportioning.

The solution adopted in YAR 2004 remains valid in this perspective. It is unlikely that this change was behind the failure of YAR 2004. One may therefore consider to insist on it (abandoning the extremely complicated mechanism of 'compromise' envisioned in the 2012 project) (proposal (ii) of the Questionnaire).

7. Rule VII

There is no indication of requests for revision, and there is no evidence that the terminology has created problems thus far.

8. Rule VIII

Ditto

9 Rule IX

Ditto

10. Rule X

10.1. The practice already considers such a condition necessary, but it could be useful to specify it.

10.2. Same as above. Strictly speaking, however, the issue concerns only the extra cost of discharge compared to the ordinary costs which would have been incurred anyway at unloading port.

11. Rule XI

The restrictions introduced in this Rule, along with those introduced in Rule XIV, were the main reason for the failure of the 2004 edition. On should realistically acknowledge that and accept to return to the previous system.

12. Rule XII

There is no indication of requests for revision.

13. Rule XIII

Ditto

Item 14 - Rule XIV

Same comment as per paragraph 11 above. It should be noted that Rule Paramount is already limiting many borderline cases of admission for temporary repairs at a port of refuge (this has no consequences for the owners, and there is therefore no objection on their part, because it shifts the admission on the particular average).

15. Rule XV

There is no indication of requests for revision.

16. Rule XVI

In practice, reference is made to the invoice CIF value of the goods, i.e. almost invariably the value at destination (except of course, for goods in bulk, the separation in various lots and the sale in domestic market). There is no indication of objections to this approach. An amendment which takes into account the current practice could be nonetheless useful.

17. Rule XVII

There is no indication in the Italian practice of exclusions of low value cargo just because it would be too complex or expensive to find out the value. If anything, reference is made to estimates or average values based on experience (for instance the value of the container boxes). The only known examples concerns cargo actually deprived of commercial value on account of their final destination (es. 'charity goods').

18. Rule XVIII

There is no indication of requests for revision.

19. Rule XIX

Ditto

20 and 21 - Rules XX and XXI

In terms of financial logic and fairness the proposed deletion is indeed justified. One should however realistically acknowledge that such a provision, along with the fixed interests rate under the Rule XXI of the YAR 1994 is one of the reasons why YAR 1994 are favored by owners who usually anticipate the costs of general average, and is conversely one of the reasons for the failure of YAR 2004.

22. Rule XXII

This is the solution already invariably adopted in international practice. There are no objections, but a ratification would be no doubt appropriate.