

Suggested amendments to the CMI Guidelines relating to General Average – input of the Dutch Transport Law Association’s General Average Committee

Dear Sirs/Madams,

Please find below the comments of the Dutch Transport Law Association’s General Average Committee to the suggested amendments of the CMI Guidelines relating to general average.

The Committee consists of representatives of various parties active in the maritime field, including shipowners, maritime underwriters, adjusters, P&I representatives, the salvage industry, representative of the European inland navigation sector and lawyers.

The Committee would like to start by thanking the standing committee for their hard work to draft amended guidelines including security forms. The Dutch General Average Committee welcomes the CMI Guidelines as a useful instrument to explain the general average concept to those who may not often deal with the same.

The Dutch committee has made several suggestions in the attached (*) document. It also would like to make the following comments of a more general nature:

Guidelines

1. The York-Antwerp Rules do not set out which party is the party interested for general average purposes. The guidelines refer to the shipowner on the one hand and cargo owners/those concerned in cargo/cargo interests on the other. We would like to remark that the terms those concerned in cargo/cargo interest seems more correct than cargo owner, given that the laws in some jurisdictions (including Germany and Spain) provide that the party at risk is the relevant general average creditor. It should also be observed that the vessel owner is not necessarily the relevant party for general average purposes either. The party interested in the ship may also be the bareboat charterer rather than the shipowner. We appreciate that cargo owner and ship owner may be easy in the guidelines, but this may not necessarily be correct. It may be useful to reconsider the wording used and apply the same uniformly throughout the guidelines. We also note that reference is made to "vessel" next to "ship" in the GA security forms. Since the YAR refer to "ship", we would recommend to refer to "ship" throughout the Guidelines and attachments. In addition, GA is sometimes typed with capitals or in small print in the same draft forms. We suggest that one form is chosen and consistently applied.
2. The Dutch Committee is of the opinion that for a smooth and fair general average process, the way in which the average adjuster operates is of utmost importance. Against that background they very much support the explanation on the adjusters’ position in the guidelines. The committee remains, however, of the view that a rule to that effect should be included in the York-Antwerp Rules. Especially the position of the average adjuster is not universally subject to the same requirements. In fact, most jurisdictions do not have special rules on the adjuster’s position. In view of the fact that the rules will be amended in any event in respect of interest, we deem this an excellent moment to also amend the rules by including the rule that the average adjuster has to act independently and impartially.

3. The Committee notes that in para. 6 an overview is given of salvage under the Lloyd's Open Form. Although it may be useful indeed to explain the process that in addition to general average security also salvage security may be requested, the Committee does not deem it correct to include only the Lloyd's Open Form. It now almost appears to be a full page of marketing for the Lloyd's Open Form. It may be more neutral to take out the reference to the LOF and refer to salvage in general, whether or not on the Lloyd's Open Form.

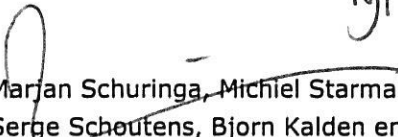
Security forms

4. The Committee understands the wish to standardize the security process. It notices, however, that there is no standard form in respect of security to be provided by those interested in the ship. Especially when there have been cargo sacrifices for a substantial amount that may include the ship's proportion in general average, it would be reasonable to also request security from those interested in the ship for their contribution in general average. We suggest that an additional form is added that can be used in that situation.
5. In the Cargo forms, the wording cargo and property are both used. The Committee is concerned that this may create confusion. The Committee suggests that the title of box 8 is replaced by: "Quantity and Description of Cargo and/or other Property".
6. In the Cargo forms, the wording "Bill of Lading" should be replaced by "Transport document" as cargo is often carried under a sea waybill or other document.
7. The non-separation agreement included in article 5(e) should be extended with the Bigham clause. The Committee does not see any reason to not include the Bigham cap, apart from the adjuster's convenience, which – with respect – does not appear a justification.
8. The Committee appreciates that the adjuster and other parties to the maritime adventure would like to be notified of remedies and defences soonest after the adjustment's publication. It doubts, however, that the second sentence in para. 4 of the security wording is the proper way to address this issue. Especially as it does not contain any sanction. Moreover, taking the date of issue of the adjustment may be difficult as it is uncertain that the parties that are requested to contribute will receive the adjustment straight away. The Committee would suggest that if the provision is maintained at all, it is amended by replacing "date of issue" by "date of receipt by the concerned in ...".
9. The Committee supports the choice of forum and applicable law that the standard security wording provides. The Committee deems it useful that rather than jurisdiction, the form provides for a forum and will also include the option of arbitration. Especially as the UK is no longer a part of the EU and decisions of foreign courts may have limited value in other jurisdictions in general, the Committee deems it useful to also give the option of arbitration.

10. Several members of the Committee are unhappy with the fall back option of English law and jurisdiction London. This may have the effect that no due consideration will be given to the law and forum that will be most suited in the given situation. They are of the view that the sentence "If nothing ... England and Wales" is to be deleted. The majority seems in favor of the inclusion of a default position.
11. In the General average bond - cargo, the last lines seem to have been deleted. To paragraph 6, the last lines of the wording as included in the general average guarantee should be added.

For our more specific comments, we kindly refer to the attached wording.

Kind regards,


19/11/22
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