ASSOCIATION MONDIALE DE DISPACHEURS
INTERNATIONAL ASSOCIATION OF AVERAGE ADJUSTERS
INTERNATIONALER DISPACHEURVEREIN

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REPORT OF THE

INTERNATIONAL WORKING GROUP ON GENERAL AVERAGE

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Preamble

Its members experiencing various areas of difficulty in the day-to-day administration of general average claims, particularly in relation to large container carriers, in early 2016 the Association Mondiale de Dispacheurs formed an International Working Group (IWG) to more clearly identify these, and discuss opportunities for improvement. A draft report was circulated within AMD and is now being made available in final form for reference in the context of proposals recently prepared by the Standing Committee on General Average of the Comité Maritime International (CMI) relative to a revision of the CMI's Guidelines on General Average, which it is proposed to broaden into a more comprehensive tool for those called upon to administer general average claims, and to the preparation of model general average security documents.

The work was undertaken by three subgroups with these concentrations—

Group A.	Pre-adjustment issues
Group B.	Delays during adjustment
Group C.	Post-adjustment issues

The following members of the Association participated in the work. Those identified with an asterisk (*) also are members of the CMI Standing Committee on General Average—

Esteban Vivanco – Argentina*
Marc Dekeukelaere – Belgium
Michael Steemers – Cyprus
Jörn Groninger – Germany* (chair, Group B)
Philip Groninger – Germany (co-chair, Group C)
Leena Mody – India
Stefano Cavallo – Italy
Paola Legat – Italy
Emilio Piombino – Italy
Willum Richards – New Zealand (co-chair, Group C)
Jaganath Muthu – Singapore
Michael Harvey – United Kingdom* (chair, Group A)
Tim Madge – United Kingdom
Amy O'Neill – United Kingdom (IWG vice chair)
Andrew Slade – United Kingdom
Jonathan Spencer – United States* (IWG chair)

The International Working Group puts forward the following report, conclusions and suggested action points as being worthy of further discussion—

A. Pre-adjustment issues

The recommendations of this subgroup are shown in bold in its report.

B. Delays during adjustment

Attention is invited to the Suggested Means of Remedy section of this subgroup's report.

The IWG would particularly draw attention to the recommendation that York Antwerp Rules 2016 be more widely adopted, since they introduced mechanisms enabling the average adjuster to speed the adjustment process.

Where YAR 1994 are preferred by carriers we encourage incorporation of Rule E/2016. Additionally, it might be of assistance to cargo interests if average adjusters were to be more consistent about agreeing contributory values prior to issuing adjustments.

We found that delays can arise when cargo interests intend to explore defences to contributing to a general average and therefore do not participate in the adjustment process. Vessel operators and P&I Clubs continue to require to sight a complete adjustment in order to quantify what is payable by the vessel insurers when GA is uncollectable, and we need the cooperation of cargo in providing the documentation that they promise to provide when signing general average security documents.

C. Post-adjustment issues

Attention again is invited to this subgroup's report. The experience of individual members varied, but all had experienced unsatisfactory conduct by cargo representatives.

We did not specifically address the York Antwerp Rules, but the longer interest rates remain low, the more an inherent conflict becomes apparent between a 7% interest rate under YAR 1994 and the Rule Paramount. This could be resolved by amending YAR 1994 to address interest in the same way as it is addressed under YAR 2016 (and the imminent amendment thereof necessitated by the demise of LIBOR).

Members appear to not consistently make interim pay-outs while a large general average is under collection. However, it is clearly merited in some cases.

<u>And a note about cargo representatives</u>:
The role of firms generically referred to as average agents, and law firms that undertake similar activities, was a recurrent theme in each group's deliberations. At the pre-adjustment phase, it would clearly streamline the collection of security if cargo representatives could be educated to accept that their principals' position is not prejudiced by providing general average security prior to the termination of the common adventure. This is particularly true when cargo is to be delivered at a port where a claimant in general average is unable to enforce a general average lien. The concern is addressed in the draft, model security documents, which contain a provision that they will not take effect before the common maritime adventure ends.

A lot of time is spent negotiating general average security wording. We hope that this can be resolved by the CMI adopting a model wording, agreed by the trade bodies representing the principal stakeholders, but success will depend on the robust support of the insurers' and vessel operators' industry associations.

During adjustment, we found that cargo representatives could assist by—

- More timely providing particulars of cargo values and claims settled.
- Better organizing the transmittal of information surrounding settlements under Lloyd's Open Form salvage proceedings, clearly identifying payments and payment dates in respect of each, individual interest.
- Readily providing information about differential salvage settlements.
- Facilitating the preparation of adjustments even where they anticipate contesting liability, as discussed above.

Post-adjustment—

- Adequate mechanisms exist to contest general average on legal grounds. We are perturbed by the fact that some cargo representatives' remuneration is based on their success in reducing their principals' contribution, which is not conducive to good-faith settlements, and we suggest that it should be resisted by reputable insurers.
- Insurers need to be made aware that some cargo representatives intentionally delay settlement for no valid reason.

We noted that average agents and others engaging in this activity are the only significant stakeholders to not have some form of unified representation – insurers have IUMI, salvors have the ISU, vessel interests have ICS and BIMCO, average adjusters have AMD, but the average agents do not speak with a single voice, whereas it would clearly be desirable to establish a code of conduct and best practices for their activities.

We encourage them to explore the idea of forming a trade association but meanwhile urge IUMI to take note of the significant role that these entities play in the adjustment process and themselves to explore whether it might be beneficial for IUMI also to consider how best this influential industry segment can most effectively represent the interests of its members.

Sub-Group A – Pre-adjustment issues

(As noted in the Preamble, the recommendations of this subgroup are shown in bold.)

Members: Stefano Cavallo (Italy); Marc Dekeukelaere (Belgium); Jörn Groninger (Germany); Philip Groninger (Germany); Michael Harvey (United Kingdom; chair); Tim Madge (United Kingdom); Leena Mody (India); Emilio Piombino (Italy); Willum Richards (New Zealand); Michael Steemers (Cyprus)

1. *Determining which version of YAR to use when different versions are specified in different COA's used for the same voyage*

   The group found that the majority of cases continue to provide for the application of YAR 1994. To a surprising extent, given their rapid adoption by BIMCO in its model wordings, few members have encountered YAR 2016 in practice. YAR 1974 and 1974 as amended 1990 are still encountered from time to time.

   Where different contracts of affreightment do exist, the preferred recourse is to request the parties to agree to adopt the most appropriate version of YAR, which usually is the version shown in the majority of the bills of lading. If consensus cannot be reached, some members draw up an adjustment showing the general average in accordance with however many versions of YAR apply, although this can give rise to an inequitable outcome, for example if the general average involves a detention at a port of refuge and some bills of lading provide for YAR 2004 or if the claim involves versions of YAR containing different provisions as to the amount of interest allowed on sacrifices and expenditures.

   Other members will make a determination based on what version a clear majority of bills of lading provide for, and specify that version in the security documents, effectively binding the concerned in cargo by default.

   We are of the opinion that where the bill of lading does not expressly incorporate the provisions of a charter party, the bill of lading adjustment provisions prevail. It was noted that an owner might have recourse against a charterer if bills of lading had been issued inconsistent with the provisions of the governing charter party.

   Measurable delay and expense could be avoided by a market agreement allowing the average adjuster to determine which version of YAR is most appropriate.

2. *Whether, in cases of major sacrifice of cargo or bunkers, GA security should be taken from the ship*

   The majority of the group were unfamiliar with this procedure, but we did not identify any practical objection to it. Members had experienced occasional difficulty where a GA comprised principally sacrifice of cargo, even to the point of a reluctance on the part of

owners to proceed with a general average. However, it was recognised that in certain circumstances, for example where cargo was clearly a major creditor and the solvency of the vessel interests was questionable, it would be appropriate for the vessel to provide general average security.

This was one of many facets of the IWG's discussion that was coloured by the fact that the increasing institutionalization of shipowning and insurance companies in many parts of the world has meant that parties often simply do not understand what is expected of them and lack the experience to visualize the eventual outcome of a given case.

However, average adjusters should not be placed in the position of having to decide in some cases that security should be required of the ship and in others not.

We recommend that consideration be given to adopting a practice of collecting general average security from the ship whenever a general average involves sacrifice or expenditure by parties other than the shipowner.

3. *Delay on the part of cargo interests, with resultant degradation of perishable or time-sensitive cargo, in negotiating:-*
   – G/A security wordings
   – forwarding terms and conditions

The group identified largely familiar difficulties such as whether security should contain the words 'legally due' or 'properly due' or 'legally and properly due'. Objections are often encountered to the undertaking frequently incorporated in security forms providing for contributing interests to make payments on account.

The group noted that security wordings are currently on the agenda of the CMI's standing committee on general average and deferred to the work of that entity rather than making its own recommendations.

Members noted that there is often extensive discussion of forwarding terms and conditions, resulting in delay in providing security, particularly if the forwarding circumstances are unusual or there is argument over which party should fund the forwarding costs in the first instance.

Such delays can result in degradation of perishable cargoes, or loss of market, but these of necessity fall outside the general average regime by virtue of YAR Rule C.

The group noted that a somewhat anomalous situation can arise when there is a degradation of cargo between termination of salvage services under LOF and the termination of the common adventure, leading to that cargo recovering under the general average adjustment any remuneration paid to salvors.

4. *The necessity of a GA bond in addition to a guarantee (recently raised by a London solicitor)*

   A GA bond is indispensable where cargo is uninsured. The group also noted that the bill of lading conditions of some carriers incorporates a requirement that the cargo owner provide a bond when general average is declared.

   The majority of members collect a bond as well as a guarantee, because in many jurisdictions the party claiming in general average must demonstrate the existence of an average bond before a guarantee can be enforced. The group also noted, particularly under pre-2016 versions of YAR, that it can be useful to have a direct line of communication with cargo in order to obtain commercial invoices and related documentation, where insurers prove unresponsive to requests for these.

   A possible method to circumvent this requirement is language in the guarantee specifically acknowledging that a bond was not being collected and binding the guarantor despite that.

   BIMCO average bond clauses exist for use with YAR 1994 and 2016 binding cargo to contribute to general average if general average is declared, without providing an average bond. Historically, simply out of consideration for available space and legibility, it has not been feasible to incorporate more verbiage into bills of lading. However, the increasing use of electronic bills of lading affords an opportunity to adopt the BIMCO average bond clauses, or similar language, more widely and readily.

   The group also noted that in very rare cases an attempt to enforce contribution under a bond can be used to galvanise a recalcitrant insurer into paying its contribution.

   Progress can be made in this area if issuers of electronic contracts of carriage were to incorporate the appropriate BIMCO average bond clause.

5. *The handling of consolidated cargo / LCL containers in respect of security*

   This is possibly the largest, single area of difficulty in container ship cases. Specific problems include—

   - Delays in delivering containers when security has been provided for some shipments but not all
   - Inconsistencies between the different forms of insurance available to logistics providers, which range from covering general average contribution without exception to covering it only on a contingent basis to not covering it at all
   - Reluctance on the part of vessel owners to accept bridging arrangements
   - In certain trades, a disproportionate number of LCL shipments are uninsured, necessitating the collection of cash deposits

   The group particularly noted that LCL shipments often can include very valuable cargo – more than one member reported values in the range of US$200,000 to 250,000 per box

– and in certain trades can represent as much as a quarter of the total shipments aboard the vessel thus the impact is material.

Members of the group had encountered one-off situations, for example where ship owners absorbed the proportion of general average attaching to uninsured cargo, or certain shippers concerned in LCL cargo arranged security for other cargo in the same container, but no general inference can be drawn from such instances, or recommendation made.

6. *The use of interim / bridging guarantees (to be given by charterers or freight forwarders to enable onforwarding of cargo to destination before single parties have provided security).*

   These are a valuable mechanism for avoiding delay in the delivery of cargo but problematic because charterers are often reluctant to give such undertakings. They can give rise to additional difficulty at destination if the entity charged with releasing cargo is not well-equipped to discern the difference between cargo that has gone forward under a bridging arrangement and that for which final security has been received.

7. *How to address cargo's reluctance to provide security in advance of arrival at destination.*

   To a surprising degree, cargo is reluctant to provide security before cargo is ready to be delivered at destination, and this is a major source of delay. In principle, this attitude is nonsensical because unless cargo is delivered at destination, it cannot be called on to contribute to general average and the security is without effect. This seems to be largely a matter of education, and clearly if security were to be put in place at the earliest opportunity, even if the cargo is still on the water, this would be a significant means to avoiding delay in delivery.

   A further, particular difficulty arises in the case of uninsured cargo which might have suffered damage the extent of which cannot be ascertained before arrival. The concerned are understandably reluctant to put up a cash deposit based on the full value, but an appropriate level of deposit is not readily ascertainable.

   We recommend incorporating discussion of this point in the CMI Guidelines, emphasising that the provision of security prior to arrival streamlines the administration of the general average, and avoids delay in the delivery of cargo, while no contribution will be required of cargo that does not arrive.

8. *The current relevance of lien insurance.*

   At one time lien insurance was used to enable to salvors to maintain their lien while a

ship proceeded to destination from the place at which salvage services had terminated. It protected the lien against any subsequent loss or damage to the salved property by marine perils.

The group found that it is no longer in use and has been entirely replaced by the use of ISU-2 bridging security, and it is noted here merely out of historical interest.

9. *Treatment of the costs of enforcing a possessory lien.*

There is a divergence of practice internationally. As a matter of law in a majority of jurisdictions, the group found that the costs of enforcing such a lien are normally borne by the party enforcing the lien. However, some average adjusters allow these costs as general average. On any equitable basis, it seems appropriate that the party bound to provide the security should ultimately bear these costs or that the GA might bear these costs, and this is an area where greater uniformity might be achieved.

However, the group makes no specific recommendation.

10. *Abandonment of cargo to avoid general average formalities*

The group noted that concerned in cargo sometimes will abandon their goods, perhaps because they are extensively damaged, or if a salvage security demand is very high in relation to overall value.
In such circumstances, the ship owner is left to obtain the best return possible on sale of the cargo, using the proceeds to offset any salvage and general average obligation.

The group recognized that there is no established entitlement to abandon cargo in such circumstances, and that it adds to the carrier’s administrative burden, but was unable to identify any workable mechanism to avoid or ameliorate the effects of such abandonment.

Sub-Group B – Practical problems during adjustment
Delays in issuing adjustments on large containership cases

(As noted in the Preamble, attention is invited to the Suggested Means of Remedy section of this subgroup's report.)

Members: Philip Groninger (Germany), Paola Legat (Italy), Tim Madge (UK), Amy O'Neill (UK), Michael Steemers (Cyprus), Jörn Groninger (Germany, chair)

This subgroup was formed to consider some of the practical problems that are encountered during the adjusting process, i.e. after the collection of security until the adjustment is issued, with a special focus on delays in dealing with large container- ship cases. Reasons for delay are listed sub 1. below and possible remedies suggestedsub 2. below.

1. Reasons for delay

1.1. "Adjusting process inherent"
There are a number of factors which are necessarily inherent to the adjusting process.

1.1.1. In cases with damaged cargo: surveying, refurbishing/repair, settlement of claims by cargo underwriters, and/or dealing with abandoned cargo takes time. To determine possible sacrifice allowances as well as the contributory value of damaged cargo, the actual treatment of cargo and containers must be awaited. To avoid discussions at later stages also the settlement of claims by cargo underwriters should preferably be finalized (and the adjuster notified accordingly). As a consequence, also comprehensive reporting by G/A surveyors can take very long, particularly in cases with hundreds or thousands of affected shipments.
Abandoned cargo can cause all sorts of trouble. Many of this can be seen under the heading of "pre-adjustment issues", but in case of cargo abandonment it is clear that no security will be put up. Shipowners/carriers and salvors can only do their best to obtain sales proceeds but may finally have to decide to dispose of the cargo. Dealing with authorities/customs, treating/refurbishing cargo, attempts to auction etc. can take many months and involves considerable time and trouble also for the adjusters involved.

1.1.2. Salved values (LOF termination) and possibly different G/A contributory values should ideally be agreed with very numerous cargo interests. Corresponding with a multitude of cargo owners/underwriters to obtain details on freight amounts or insurance premiums is time consuming. Before issuing the adjustment, it is sensible to inform the individual cargo interests of the calculations regarding their contributory values (and possibly also allowances in their favour) and give them the opportunity to comment. Differences between salved and contributory values (e.g., due to damage on the further voyage or sacrifice damage) are not easy to understand and may require lengthy explanations.

1.1.3. Repairs and P/A adjustment on the ship must be completed.
In cases with major damage to a big container vessel the repairs, often including tendering, preparatory works and long-haul removal, can take many months, and the proper allocation of numerous invoices and single positions can be very time-consuming.
Sometimes also temporary repairs are effected and allow the vessel to continue trading for long time, e.g. until the next scheduled dry-docking.

1.1.4. Negotiation/arbitration and settlement of a salvage award must be awaited.
In cases of "differential salvage" (e.g. under LOF) the settlement of an Article 13 salvage award can take years. There have been cases where, after lengthy negotiations with cargo representatives, amicable settlements were reached but unrepresented interests did not accept the salvors' corresponding settlement offers, thus, in the end an arbitration award still had to be sought against these.

1.2. <u>(Adjusting) "Market issue"</u>
It is apparent that large multi-B/L cases can cause at least a temporary work overload for single adjusting firms, particularly if involved with more than one case at a time.

1.3. <u>"External" factors</u>

1.3.1. Cargo interests are reluctant to provide necessary documentation.
Some cargo interests tend to take a secretive approach. They are suspicious of the average adjuster and do not provide necessary information, e.g., relating to damage and insurance settlements. Also, some cargo representatives may wish not to relay certain information they consider confidential. Sometimes a similar approach is taken by shipowners or charterers and/or their solicitors.

1.3.2. Cargo interests forget to notify adjusters of developments, damage, and settlements.

Despite initial explanations that we need comprehensive information about cargo damage, treatment charges incurred, and the like, cargo owners and/or insurers often do not inform the adjuster accordingly. Sometimes the adjuster may not even be aware of any damage. The information is then only revealed when we try to obtain confirmation of the contributory value.

Also, recoveries are not always actively communicated to the adjuster.

1.3.3. Cargo underwriters and/or representatives may suffer from work overload. Just as average adjusters, the problem of workload peaks can hit those involved with many consignments of cargo, particularly if dealing with more than one case at a time. If another case is in a more urgent stage (provisionof security, LOF settlement, etc.) then the work on details of value and damage may be put aside for weeks or months.

1.3.4. Cargo representatives have difficulties to keep track and provide necessary detailed information regarding their multiple clients' shipments.

This appears to be a general problem. Most cargo representatives are apparently keen on representing as many consignments as possible, but not all are equipped and manned (or perhaps just lose interest) to follow up on details required for all individual shipments. Often also the exchange of information is badly organized – spreadsheets do not carry adjusters' references, or there is no indication of where content has been changed compared to earlier versions of the schedule.

Sometimes more than one firm claims to represent certain cargo interests or clients.

1.3.5. The processing of salvage award payments presents some specialties:

1.3.5.1. Payment dates are difficult to obtain from cargo representatives and/or salvors' lawyers, and

1.3.5.2. Combined settlements from representatives for numerous cargo clients do not allow proper allocation to single interests.

Payment dates are needed for correctly calculating G/A interest. But not all cargo representatives keep track of the payments made by or for individual clients. Some collect payments from their clients first and then make lump-sum round-figure payments on account to salvors for numerous consignments. Sometimes amounts remain unsettled (and salvors or their solicitors accept

such shortfall) as cargo representatives cannot tell anymore whose payments are still outstanding.
Also, salvors' solicitors do not always keep proper records of the payments linked to single cargo interests.

1.3.5.3. Cargo interests or their representatives refuse to reveal amounts settled in respect of separate salvage negotiations.
Salvage settlement agreements often contain confidentiality clauses. This is understandable from the salvors' point of view, but it is information the adjuster needs to make the proper G/A allowance.

1.3.6. Legal proceedings prevent the issuing of the G/A adjustment.
In cases where fault plays an (obvious) role, cargo interests sometimes start legal action and/or try to achieve amicable settlements (either bi- or multi-laterally, including either single or all sorts of potential claims) prior to issue of the G/A adjustment. Reaching such settlements often takes a long time, and then agreements often do not cover all implications regarding G/A. This can add very considerable complications for the G/A adjustment respectively the settlement of balances amongst the parties.

2. Suggested means of remedy

2.1. Advertise the independent position of the average adjuster.
It is important to emphasize that the average adjuster is not the shipowner's servant but an independent, impartial instance dealing with cost incurred and measures taken in the common interest of all parties involved.

2.2. Make use of adjusters' position as hub for communication.
Information is key for consignees and cargo underwriters. Information and updates about practical developments and the adjustment process should go out to cargo interests. This could help to build trust and appreciation for the adjusters' services and enhance cargo interests' understanding for the sense and necessities of the process.

2.3. Provide clear guidance.
Many parties involved on the cargo side do not have deep knowledge of G/A. Adjusters should clearly communicate, at the different stages of the procedure, what information/documentation they need (e.g., on cargo damage).

2.4. We are not Facebook.
We should restrict our requests for information to the data we really need (and not make it available to other parties without very good reasons). This saves us work and will help to build up trust.

2.5. (More) Rigorous use of time limits and authorization to estimate in YAR- E.
Delays are unwanted by the industry; underwriters want to close books rather than keep reserves over years. Though it may seem harsh we should make use of the means we have to speed up the process rather than wait until cargo interests (and often their representatives bundling numerous interests) might find it convenient to respond:

- estimate values, insurance premiums, freight, as well as salvage awards or other allowances;
- in case of alleged cargo damage either rely on G/A surveyor's findings or complete the adjustment on the presumption of no damage affecting the contributory value;
- communicate estimates to cargo with a deadline for objections and use the estimates if no substantial, supported protest is raised in time.

A stringent approach by all adjusters is desirable to counter cargo interests' resistance to accept such estimates and settle G/A contributions accordingly.
Of course, also the quantum of damage to the ship can be estimated, e.g., in circumstances as described at 1.1.3. above (temporary repairs).

2.6. Adjusters should state both G/A and P/A.
In some markets H&M underwriters or underwriters' organizations adjust P/A claims.This makes the G/A adjuster dependent on their speed and quality of work. Another consequence is a high degree of double work. To avoid both delays and discrepancies in the allocation of costs the independent G/A adjuster should be instructed to state the P/A as well.

2.7. Adjusters should closely work with (and for) salvors.
In most cases the general average adjusters are also instructed to collect salvage security. The adjuster should try to actively support the salvor where possible, e.g., by providing information on cargo values as soon as feasible to speed up the salvage settlement process. Furthermore, we should actively seek to be instructed to collect, after agreement of a salvage award, the monies for salvors in order to gather the information about payments at the source.

2.8. Don't be intimidated by cargo representatives.
Their job is to promote their clients' interests and improve their position as far as possible. Adjusters should take a firm stand. The majority of this sub-group's members is prepared to contact insurers and other parties directly if their representatives do not provide necessary information or their efforts appear to go too far.

2.9. Cooperation makes us stronger.
The multitude of shipments/parties in containership cases does require specific knowledge, skilled personnel and suitable IT solutions. If any of these are lacking, or if threatened by overload, we should cooperate. It is better to share fees than to drown in work, damage one's own reputation and that of general average as a whole.

2.10. Advertise the York-Antwerp Rules 2016.
As the LOF 2011, the new YAR do include various amendments meant to facilitate and speed up the G/A process and which can be of particular benefit in containership cases – this includes:

a) the stricter provisions on adjusters' estimates in Rule E 3,
b) the express possibility to exclude low value cargo from contributing as per Rule XVII (a) (ii), and
c) the possible exclusion of "differential salvage" (such as under LOF)in the circumstances listed in Rule VI (b).

Solutions such as under b) and c) have been applied by adjusters already under the older versions, but the 2016 Rules give us a solid base for such practice. One member suggested that, if salvage is excluded from allowances, for practical reasons also no deduction of the salvage awards should be made from the contributory values (although required by Rule XVII (b), also under the YAR 2016).

Where the YAR 1994 are preferred by carriers we should at least encourage incorporation of Rule E/2016.

It is suggested that AMD should (possibly publicize the findings of all sub- groups of this working group but in any event) use the results to enter into an open discussion with cargo representatives about the issues identified.

Sub-Group C - Post-adjustment issues

Members: Marc Dekeukelaere (Belgium); Jörn Groninger (Germany); Philip Groninger (Germany; co-chair); Paola Legat (Italy); Tim Madge (United Kingdom); Willum Richards (New Zealand; co-chair); Andrew Slade (United Kingdom); Michael Steemers (Cyprus); Esteban Vivanco (Argentina).

The review was conducted by asking the members of the Group to provide data on recent adjustments issued by their offices (settled within the last 5 years) as well as anecdotal submissionson the following questions: -

i. The use of solicitors and average agents to reduce the amounts paid by cargo

ii. The time taken to settle contributions

iii. Adjusters waiting until 100% of contributions have been collected before making any distribution to creditors under the adjustment

An Appendix A to this report provided the statistical results received. These related to 82 GA adjustmentsof which 52 had 3 or less b/ls, 13 had 4 to 50 b/ls and 17 had more than 50 b/ls.

Appendix B provided anecdotal responses to questions which are discussed below. The appendices are not shown here, for brevity, but are available from the AMD Secretariat.

The following is a summary of the responses and comments prepared by the Working Group co-chairs, Philip Groninger and Willum Richards.

1.) *The use of solicitors and average agents to reduce the amounts paid by cargo*

a) Please provide personal experience in general about the involvement of solicitorsand average agents from past cases

- **Who are the main players?**
  There are evidently several regular characters who appear representing cargo. For the solicitors it is mainly Clyde & Co., Kennedys and Roose & Partners. For the Average Agents it is WE Cox and WK Webster & Co.

  Of the 82 cases in the survey, solicitors and / or average agents were involved in 53 (65%).

- **Is their approach sensible?**
  The impression is that their involvement at the security collection stage is beneficial but at the settlement stage, they are seeking to justify their involvement, and this can result in delays to settlement and difficulties with the collection of GA contributions.

- **Is there a difference between the approach of solicitors and average agents?** There were mixed responses to this question with Average Agents tending to be more commercial and beneficial at the security collection end of the process but more difficult at collection / settlement time.

b) **Does the involvement of specialist solicitors and average agents make the settlement process easier or more difficult? For example: is it easier, in your experience, to deal with a limited number of parties who are familiar with GA rather than a larger number of insurers who may not be?**

Again, some mixed responses to this question. In general, the responders found that it was easier to get quick settlements from established and knowledgeable insurers who had provided security directly. This may be because the amounts at issue for the particular insurer were not large. Solicitors and Average Agents desire to show value to their customers tended to lead to delay and difficulties in the settlement process.

c) **Are solicitors and/or average agents generally speeding up payment of contributions due?**

No

d) **On which grounds do solicitors / average agents usually try to reject payment (local jurisdiction / Rule D Defence / etc.?)**

Rule D defences without necessarily providing detailed reasoning supporting allegations of unseaworthiness at the commencement of the voyage.

e) **In your experience, do you consider solicitors and / or average agents actively delay payment?**

Yes, on occasion. This may be because they are investigating the casualty or seeking instructions from their insurer principals. In one case there was evidence that the delay was a specific strategy for no good reason.

f) **What are the arguments solicitors / average agents for reducing the contribution due, initiating or proposing commercial settlements?**

Unseaworthiness / Rule D defences. Legal proceedings with attendant delays and costs.

g) **Do solicitors / average agents succeed with their practice / do shipowners etc. actually accept their offers (possibly for commercial reasons)?**

More mixed responses with some indicating that shipowners will accept a reduced settlement as a commercial settlement to avoid the delay and costs of pursuing 100%. Of the 26 cases reported where unseaworthiness was argued by Cargo Reps, they avoided contribution in 15% and reduced the contribution in 35%. In a further 20% of cases they

were successful in getting the contribution reduced on commercial grounds. Overall, therefore, of the 53 cases where Cargo Reps were involved, they were successful in either avoiding or reducing their clients' contribution in around 45% of the cases they were involved in.

The recent decisions in The Cape Bonny [2017] EWHC 3036 and Alize 1954 & Anor. v Allianz Elementar Versicherungsa AG and Ors [2019] EWHC 481 will likely embolden the cargo interests as the standard required for denying contribution to GA has arguably shifted in their favour.

h) **Are legal steps often enforced (possibly based on local jurisdiction) to speed up collection?**

Not frequently

i) **Are there insurers from particular countries which use solicitors / average agents more or less than others?**

No major patterns observed but UK Insurers tend to appoint UK based Solicitors / Average Agents. South American, Far Eastern insurers and Indian insurers are possibly more likely to use average agents

j) **Are solicitors / average agents from any particular jurisdictions more or less aggressive than others?**

No particular trends other than a particularly aggressive approach from South American representatives, based on Chilean law (which was only alleged to be applicable).

k) **Do you have any recommendations as to how adjusters can work more effectively with solicitors / average agents in the post-adjustment phase?**

Most responders considered that the involvement and impact of solicitors and average agents was a fact of life which we just had to deal with. Objective communication (if possible) is helpful. It may also be helpful to bring forward discussions on defences etc. much sooner; if possible before the adjustment is issued, but this may be difficult / impossible to achieve and would depend on the parties, issues and P&I Club involved.

2.) <u>The time taken to settle contributions</u>

a) **What is in your experience the usual time for settlement of contributions due once the adjustment has been "agreed" by cargo?**

Varies enormously from a few weeks to several months. It is unusual to hear from cargo that they have agreed the adjustment, you either do or do not get the payment.

b) Any particular difference between

- **Guarantees given by underwriters**

  Can be quite quick but can depend on how efficiently they can find the old claims file.

- **Guarantees represented by average agents**

  Generally, longer than payments directly from insurers as there is an additional step whilst they get the funds from their clients and they occasionally wait until they have received the funds from all of their clients before making payment.

- **Uninsured cargo / cash deposits**

  No issue as you have the cash

c) How many reminders are sent out to cargo interests by the collecting adjusters and after what lapse of time?

Varies from adjuster-to-adjuster and case-to-case but generally a few weeks / a month or two.

d) When would legal steps be enforced (also based on local jurisdiction) to speed up collection?

In most cases only if either G/A debtors have expressly denied payment, or not reacted at all, or just to avoid a time bar.

e) In your experience, are insurers from any particular jurisdictions generally faster or slower than average at settling their contributions?

No consistent trends but American / European insurers (Lloyd's / Scandinavian insurers) possibly being quicker than insurers from South America and the Middle and Far East.

f) Do you have any recommendations as to how the collection of contributions could be speeded up / enforced?

Essentially – "No" under the current Y/A Rules. There is one suggestion to "black list" certain insurers who regularly cause unjustifiable issues. Until there is some incentive to settle contributions in a timely fashion, this will be very hard.

3.) Adjusters waiting until 100% of contributions have been collected before making any distribution to creditors under the adjustment

a) Are you granting payment on accounts to shipowners / other creditors to GA on per cent basis of overall collected contributions? If so, what would be the triggers for you to make such a payment?

Most responders either do or would make a POA if it was worthwhile and where a significant amount of the contributions had been received and it was anticipated there would be delays in collecting the final amounts.

b) **Do you allow the off set of sacrifice damage with contributions payable by single cargo interests / average agents (basically a payment on account) to achieve quick payments in container GAs, or do you wait to pay out compensation for sacrifices only after all contributions have been settled?**

The impression from the responses is that off-sets are allowed with a little discomfort as a practical expediency given the likely difficulty of obtaining a full contribution from an interest which would later be due a credit which might have a shortfall.

c) **Are you aware of any particular legal barriers in certain jurisdictions to the adjuster distributing on account payments prior to collection of 100% of the contributions?**

No.

d) **In what percentage of cases are your fees and expenses for the GA adjustment paid in full by the shipowner or one of the other parties to the adventure (or their insurers)?**

For most responders, in most cases.

e) **Where your fees and expenses are not paid directly by the shipowner etc., do you take your fees and expenses from the first collections received or in proportion to the collections as they are received?**

Where applicable practice varies with some responders taking from first collections and others once around 1/3rd of contributions paid or in proportion to the collections received.

f) **Do you have any recommendations as to how to improve the situation regarding partial collections in general or specifically to your jurisdiction? For instance, should permission for partial distribution be contained in the security documentation – is there any need for such a measure?**

No particular recommendations or requirement for wording in the security envisaged.

<u>Note concerning Cargo Reps billing practice.</u>

The purpose of this Working Group is to identify what some of the issues are with the delays that are experienced in resolving settlement post-adjustment and recommending potential ways forward to resolving some of these.

With regard to the use of Cargo Reps, during the course of drawing up this report, we have discovered that the basis of remuneration for solicitors and average agents may not be universally the same and may impact or explain some of their behaviour.

Previously they all worked on a 'time and trouble' basis based on agreed hourly rates with their fees generally being apportioned between their clients based on the Contributory Values of their cargoes. However, we have learned that this is no longer universally true with some average agents being remunerated based (at least in part) on a percentage of the difference between any salvage security demand and the final salvage award and a percentage of the amount that they can successfully negotiate as a reduction in their client's GA contribution.

Other than people just being slow to be organized and pay, the main factor impacting the delays appear to be in relation to the involvement of Cargo Reps and their attempts to avoid or obtain a reduction in their clients' contribution.