

AN UPDATE ON THE REFORM OF THE YORK-ANTWERP RULES

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Marine property insurers are the paymasters of the general average system. Following the promulgation of the York Antwerp Rules (“YAR”) 1994 hull and cargo insurers grew increasingly disenchanted with the YAR mainly because their effect is to greatly increase the cost of handling casualties overwhelmingly at underwriters’ expense. IUMI campaigned for many years and eventually the YAR 2004 were introduced. For IUMI the 2004 YAR were a compromise but useful savings were achieved which could have reduced the cost of adjusting the costs of casualties by something in the region of 13 to 17%. However, for many shipowners any move away from the very shipowner-friendly (and, for marine property underwriters, expensive) provisions of the YAR 1994 was unwelcome and the 2004 YAR have only very occasionally been incorporated into contracts of carriage. Most of BIMCO’s standard forms continued to purport to incorporate the 1994 YAR.

When it became clear that the 2004 YAR would not be adopted by the industry the Comité Maritime International (“CMI”) (who have the custody of the rules) decided to explore whether a compromise could be found with which all parties could live. An attempt to find a solution was proposed but rejected at the CMI Conference in Beijing in October 2012. Instead it was decided to establish an International Working Group (“IWG”) to completely review the YAR under the chairmanship of Bent Nielsen. The IWG first met in Dublin in late September 2013 and determined what areas needed to be considered. Its members were divided into a number of subcommittees which were tasked with considering specific proposed amendments with a view to submitting papers for consideration at the next meeting of the IWG in Hamburg in June 2014.

Most possible interest groups are involved in this process: in Hamburg in June of the 28 who attended the IWG meeting seven were average adjusters and two represented the International Chamber of Shipping (“ICS”). Nobody could be found to represent the interests of cargo owners. IUMI was represented by Ben Browne of international law firm, Thomas Cooper LLP, London who serves on the IUMI Salvage Forum which reports to IUMI’s Executive Committee. Three representatives of their countries’ maritime law associations were also from insurance companies (Jirou Kubo, Japan, Frédéric Denèfle, France and Sveinung Måkestad, Norway).

This article will now examine the main areas which are being considered by the IWG.

(a) Salvage: Under Rule VI YAR 1994 salvage is always reapportioned in GA because in some circumstances the salvaged values differ from the GA contributory values. Under YAR 2004 salvage contributions are left to lie as they fall save that if one party pays another’s salvage contribution it is credited in GA to the payer and debited to the party on whose behalf the payment is made. It is thought (on the basis of a study of 1,800 GA adjustments in 1990s by Matthew Marshall) that if the YAR 2004 had been universally adopted, this change alone could have reduced the

amount of money moved in GA by about 10%. Although salvage is covered by marine property underwriters the ICS is opposed to the partial exclusion of salvage from GA. The IWG are now exploring a compromise whereby salvage is not covered in GA unless there was:

- A subsequent accident affecting values; or
- A “significant” GA sacrifice; or
- The salvaged values were “manifestly incorrect”.

A fourth exception, differential settlements of the salvage claim, is also being advanced by the ICS and a few national delegations but IUMI opposes its inclusion.

(b) Contributory values: Rule XVII YAR 1994 and 2004 provides that all extra charges incurred in respect of the property subsequent to a GA act should be deducted to arrive at its GA contributory value “*except such charges as are allowed in GA*”. LOF salvage payments are deducted from the property value to arrive at its GA contributory value to ensure that property interests do not pay more than 100% of its arrived value in salvage and GA payments combined. This is a very time-consuming and costly process and so the IWG members have been trying to reach agreement on a more stream-lined way of arriving at GA contributory values. One approach is not to deduct salvage payments when calculating GA contributory values: However, some adjusters warn that, in cases involving multiple interests, the hoped-for savings in time and cost might not materialise if salvage is excluded from GA. The debate therefore centres on how contributory values can be fairly assessed quickly and at least cost while preventing any realistic prospect that marine property underwriters might have to pay more 100% in salvage and GA payments. The IWG is currently debating two new wordings one of which requires salvage payments to be deducted from the value of the property only if the combined GA and salvage liabilities will exceed the total value of the contributing property; the other wording requires salvage contributions (including the salvors’ recoverable costs and interest) to be deducted from the GA contributory value but excludes the costs of defending the salvage claim which usually takes a significant time to collect.

(c) Wages and maintenance at a place of refuge: Rule XI YAR 1994 allows the wages and maintenance of the master, officers and crew while the vessel is detained at a place of refuge in general average. The 2004 YAR excluded this allowance. Although IUMI favours the position adopted in YAR 2004 it seems likely that the YAR 1994 position will have sufficient support to justify a return to the 1994 status quo ante.

(d) Port charges: Rule XI YAR allows the recovery of port charges incurred at a port of refuge in GA. In the *Trade Green [2000] 2 Lloyd’s Rep 451* the Commercial Court decided that the costs of towing a vessel on fire from a discharge berth to an anchorage where the fire was extinguished pursuant to the port authority’s instructions was not allowable in general average under Rule XI as a “port charge”. In giving judgment Moore-Bick J. said: “*I think the natural meaning of the expression “port charges” in Rule X1(b) is apt to include any charges which the vessel would ordinarily incur as a necessary consequence of entering and whilst staying at the port in question*”. It was unanimously felt by the members of the IWG that this was too narrow an interpretation of the word “port charges” in Rule XI and so an amendment to the Rule will be recommended to rectify this.

(e) Temporary Repairs: The YAR 2004 added a second sentence to the wording of Rule XIV (b) the effect of which is that recovery in general average 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. It is likely that this amendment of Rule XIV will be retained in the next YAR.

(f) Low value cargo: The IWG has noted considerable support for the proposition that the YAR should specifically endorse a procedure, already adopted by the many average adjusters, of excluding from contribution low-value cargoes, when the cost of administering the collection of security, computation of the contributory value and the collection is disproportionate to the contribution. A similar procedure is already provided for in Lloyd’s Standard Salvage and Arbitration clauses. Discussions continue as to the exactly how this might operate.

(g) Currency of adjustment: There is, at present, nothing in the YAR to enable an adjuster to determine what currency the adjustment should be done in: this is a matter of national law and, in England, the test is which currency the GA sacrifice or expense was most closely felt in. This can be difficult to assess, especially in cases where an owner incurs expenses in several currencies and pays for crew, bunkers and other operational costs in other currencies. At present in practice expenditure is converted to the chosen currency at the rate which applies when it is incurred and some months or years may elapse before the adjustment is published. During that time rates can move both for and against those claiming in GA and in extreme cases, underwriters could be asked to contribute more than 100% of the cargo’s value. As things stand it is difficult to hedge against this.

It is estimated 70% of adjustments are done in the United States Dollar but concerns have been expressed about the long term stability of that currency. The IWG has therefore been investigating whether the YAR should include a rule designed to determine in which currency all adjustments should be done. Various proposals are being considered: most members of the IWG felt the best option would be to include wording in the contract of affreightment specifying the currency of any adjustment. However, it was felt that this would be difficult to achieve on any scale and would take many years to implement. One alternative is that adjustments should be done in Special Drawing Rights (“SDRs”). The SDR is a notional unit of value based upon a basket of four currencies (made up of the US Dollar, the Pound Sterling, the Japanese Yen and the Euro). The IWG is concerned that difficulties could arise if this idea were to be implemented as no bank will open an account in SDRs. Another “blunt instrument” solution advocated by some would be to fix all adjustments in one nominated currency such as US Dollars or the Euro converted at the time the expenditure was incurred. This debate will no doubt continue.

(h) Interest: Under the YAR 1974 and 1994 interest is allowed at 7% on GA disbursements, sacrifices and allowances. Under the YAR 2004 the interest rate is fixed annually by the CMI’s Assembly. The Assembly fixes the rate by reference to Guidelines which require the rate to be “*based upon a reasonable estimate of what is the rate of interest charged by a first class commercial bank to a shipowner of good*”

credit rating". The Assembly is required to approach this exercise by starting from one year US Dollar bank to bank loan rates plus one or two percent but if the rate of interest for one year loans in sterling, euros or yen differ substantially from the interest rate applying to one year loans in US Dollars this should be "taken into account". Between January 2005 and December 2013 the average rate of interest was 4.3125% and the current rate is 2.75%. The ICS, supported by several adjusters and a few delegates, is pressing for a higher rate of interest on GA disbursements by amending the Guidelines so that the Assembly is obliged to approach the exercise of assessing the rate of interest by aiming to get to a rate which would be charged by an "average" commercial bank to a shipowner of "average" credit rating rather than a rate which would be charged by a "first class" commercial bank to a shipowner of "good" credit rating. It is estimated that this could increase the rate of interest payable on GA disbursements by as much as 2 or 3%. For this reason IUMI opposes an amendment of the Guidelines.

(i) Commission: Rule XX YAR 1994 entitles the parties to the common maritime adventure to a commission of 2% on GA disbursements except crew wages and maintenance and fuel and stores not replaced during the voyage. Commission on GA disbursements is not allowed under the YAR 2004. The practice of awarding those who advance funds on behalf of third parties varied from country to country in the 19th and early 20th centuries. In Germany for example a commission of 1% was allowed on GA disbursements; in Belgium 2% and in the United States 2.5%. But in the UK the practice was not to allow commission for advancing funds. In 1924 a demand was made that the practice of foreign countries should be introduced and embodied in the YAR and the 2% commission on GA disbursements was introduced into the YAR for the first time. At the same time interest at a fixed rate of 5% per annum was introduced by the 1924 Rules. This was raised in 1974 to 7% but the commission remained in at 2%. In recent years the practice of allowing administration costs in addition to interest and commission has become widespread and IUMI and many others argue that these allowances are being duplicated and should be reduced. The delegates to the CMI Conference in Vancouver in 2004 agreed that commission should be abolished. In the present review most members of the IWG seem to accept that commission should not be recoverable under the new YAR and even the ICS are prepared to accept this provided that their proposed amendments to the interest Guidelines are accepted.

(j) Treatment of cash deposits: Rule XXII YAR requires cash deposits collected in respect of cargo's liability for GA etc. to be paid into a special account "*in the joint names of a representative nominated on behalf of the shipowner and a representative nominated on behalf of the depositors in a bank to be approved by both...*". Most banks will not now permit joint accounts to be held or make it so difficult that it is impracticable. In practice adjusters are now holding cash deposits in their own names and have asked that the Rules be changed to regularise this practice. The IWG accept that some amendment is required but there are considerable differences of opinion as to what should take the place of the current Rule XXII: It is clearly important that depositors and creditors in the general average are protected against the possibility that they may lose their money due to the insolvency of the adjuster or the bank holding the deposit or dishonesty on the part of employees of either the bank or the adjuster. Thought has been given to the drafting of Guidelines pursuant to which cash deposits should be held incorporating regular audits, the possibility of a single deposit holder such as the CMI and possibly

a scheme of insurance to protect the depositors and GA creditors but there is a long way to go before we will know what the IWG is going to recommend.

The IWG and its subgroups continue to work towards a firm set of proposals which will be debated by the CMI at its next colloquium in Istanbul between 7 and 9 June 2015 in the hope that a wording can be agreed in principle in time for the CMI's conference in New York in May 2016 at which, hopefully a new York-Antwerp Rules 2016 can be promulgated which is acceptable to all those involved in shipping.

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6th October 2014