

T H O M A S
C O O P E R

IUMI General Average Webinar III The new York – Antwerp Rules 2016

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Ben Browne, Partner, Thomas Cooper LLP

Chairman of the ASG & IUMI's representative on GA
Guidelines Standing Committee

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Background to the Review of the YAR

- IUMI argues that York Antwerp Rules (“YAR”) greatly increase the cost of handling casualties.
- The 2004 YAR were a compromise but could have reduced the cost of adjusting casualties by 13 to 17%
- Most of BIMCO’s standard forms continue to purport to incorporate the 1994 YAR.
- CMI conference in Beijing in October 2012 established an International Working Group (“IWG”) to completely review the YAR.

Salvage

- Under Rule VI YAR 1994 Salvage is always reapportioned in GA.
- 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.
- The YAR 2016 introduces a compromise whereby salvage is not covered in GA unless:
 - One party paid another's proportion of salvage; or
 - There was a subsequent accident affecting values; or
 - There was a "significant" GA sacrifice; or
 - The salvaged values were "manifestly incorrect"
 - If there were differential settlements of the salvage claim they will be included if there is a "substantial" difference between the base global award used for the settlement and the award/other settlement(s).

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.
- How can contributory values be fairly assessed quickly and at least cost while preventing any realistic prospect that underwriters might have to pay more than 100% of insured values in salvage and GA payments?
- Rule XVII YAR 2016 provides that where salvage is not re-apportioned in G.A., salvage contributions will be deducted from the GA contributory value but not the costs of defending the salvage claim (which usually take a significant time to collect).
- Cargo’s value may be assessed on its C and F or CIF invoice value even if that includes some inland transit charges.

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 G.A..
- The 2004 YAR excluded this allowance.
- The YAR 2016 restores the YAR 1994 position.

Port Charges

- Rule XI YAR allows recovery of “port charges” incurred at a port of refuge in G.A..
- *Trade Green [2002]: “Port charges” are “any charges which the vessel would ordinarily incur as a necessary consequence of entering and whilst staying at the port.....”.*
- The cost 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 G.A..
- The IWG agreed that this was too narrow an interpretation of the word “port charges” so YAR 2016 Rule XI provides that “port charges” should include “all customary or additional expenses incurred for the common safety or to enable a vessel to enter or remain at a port of refuge or call”.

Temporary Repairs

- Under YAR 2004 Rule XIV(b) recovery in G.A. of the cost of temporary repairs of accidental damage at a port of refuge (“POR”) 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 (or, if none, the depreciation in the vessel’s value).
- $(\text{Cost of Temp repairs@POR} + \text{actual cost of permanent repairs}) - \text{estimated costs of permanent repairs@POR} = \text{maximum sum allowed.}$
- Rule XIV YAR 2016 reverts to the wording of Rule XIV YAR 1994 which occasionally gives hull insurers a windfall profit at the expense of cargo insurers.

Low Value Cargo

- Many average adjusters exclude low-value cargoes from contribution when the cost of administering the collection of security, computation of the contributory value and collection is disproportionate to that cargo's contribution.
- This is formally recognised in LOF salvage practice in cl. 15 Lloyd's Standard Salvage and Arbitration clauses (2011).
- YAR 2016 Rule XVII(a)(ii) now states:
“Any cargo may be excluded from contributing to general average should the average adjuster consider that the cost of including it in the adjustment would be likely to be disproportionate to its eventual contribution.”

Provision of Information to Adjusters

- Rule E of both YAR 1994 and 2004 states:

“The onus of proof is upon the party claiming in GA to show that the loss or expense claimed is properly allowable as GA.

All parties claiming in GA shall give notice in writing to the average adjuster of the loss or expense in respect of which they claim contribution within 12 months of the date of the termination of the common maritime adventure.

Failing such notification, or if within 12 months of a request for the same any of the parties shall fail to supply evidence in support of a notified claim, or particulars of value in respect of a contributory interest, the average adjuster shall be at liberty to estimate the extent of the allowance or the contributory value on the basis of the information available to him, which estimate may be challenged only on the ground that it is manifestly incorrect.”

Provision of Information to Adjusters (cont.)

- Rule E(3) YAR 2016 now provides particulars of value (including “made good” deductions) must be provided to the Adjuster within 12 months of the “termination of the common maritime adventure”.
- Rule E(2) YAR 2016 now provides all parties must give the Adjuster all information relevant to the contributory values/other allowances asap and in any event within 12 months of the loss or payment of the expense or termination of the adventure. Where it is impossible to provide figures within 12 months (e.g. salvages) the Adjuster still should be told of the potential allowance.
- Failing such notification the Adjuster may estimate the allowance and communicate this to the party concerned; his estimate will be binding unless challenged within 2 months.
- Marine insurers should provide adjusters with all relevant information about G.A. contributory values and sums to be claimed in GA as they receive it. Claims handlers will have to be pro-active in seeking documents and information.
- Parties pursuing recoveries from third parties must now advise the Adjuster and report recoveries within 2 months (YAR 2016 r. E(4)).

Currency of Adjustment

- At present the YAR does nothing to enable an adjuster to determine what currency the adjustment should be done in.
- In England, the test is which currency the G.A. sacrifice or expense was most closely felt in.
- 70% of adjustments are done in US\$ but concerns have been expressed about the long term stability of that currency.
- The IWG recommended no Rule governing the currency of the adjustment but the Guidelines recommend adjusters to “explain in appropriate detail the choice of currency in which the adjustment is based”.

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 the rate of interest charged by a first class commercial bank to a shipowner of good credit rating*".
- Between January 2005 and December 2016 the average rate of interest has been 3.8636% and the current rate is 2.5%.
- Rule XXI YAR 2016 calculates interest at ICE LIBOR on the first banking day of each year in the currency of the adjustment + 4% (5.17% for 2016).
- The new interest rate will rise and fall with ICE LIBOR so could exceed 7%.



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.
- Under YAR 2016 commission is not recoverable.

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 permit such joint accounts to be held or make it so difficult that it is impracticable.
- It is important that depositors and creditors in the general average are protected.
- Rule XXII YAR 2016 now provides that cash deposits should be held in a special account in the Adjuster's name but separate from the Adjuster's own funds. The account must be constituted in accordance with the law regarding client or third party funds applicable in the adjuster's domicile. The sum held will act as G.A. security. Payment out will occur against an Adjuster's certificate, either with the depositor's consent or 60 days after the depositor receives notice of his contribution from the Adjuster.
- There is no requirement in the YAR to issue a deposit receipt.
- Challenges to payments out will have to be by agreement or through the Court (if practicable).

Tug and Tow

- YAR 1994 and 2016 all provide:
 - there is a common maritime adventure (“CMA”) to which the YAR apply in tug and tow situations
 - If the tug disconnects solely to save itself and vessels are not in common peril  no G.A. for vessels;
 - If the tug disconnects when the vessels are in common peril  G.A.
- YAR 2016 now provides:

“Where vessels involved in a CMA resort to a POR allowances under these Rules may be made in relation to each of the vessels.... Allowances in G.A. shall cease at the time that the CMA comes to an end”
- Lowndes & Rudolf suggest the CMA ends for each unit when it reaches a Place of Safety;
- G.A. claims between tug and tow are usually excluded by knock for knock clauses in practice

Other amendments to YAR

- Rule G: The Bigham cap to the Non-Separation Agreement no longer applied to Rule F substituted expenses.
- Wages maintenance and stores will be allowed in G.A. during restowage of cargo, fuel and stores.
- Costs of cleaning, coating and painting will be allowed if the ship was coated/painted in the previous 24 months (previously 12 months).

Guidelines

- Guidelines have been approved by the CMI.
- They will represent “best practice” but will not be legally binding.
- They will cover:
 - Basic principles;
 - G.A. and Salvage Security;
 - The roles of G.A. Adjuster and General Interest Surveyor;
 - Notes on how Rules VI (Salvage) and XXII (cash deposits) should operate.
- No agreement has yet been reached on “approved” G.A. bond and guarantee wordings.
- A Standing Committee has been constituted to monitor the working and effectiveness of the Guidelines and recommend changes to the CMI Assembly which meets annually.

The Future

- BIMCO's Documentary Committee has approved the YAR 2016 for incorporation into its standard contracts of carriage so they should start appearing in contracts in late 2016.

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Ben Browne

Partner

Thomas Cooper LLP

Email: ben.browne@thomascooperlaw.com

Direct: + 44 20 7390 2206

Mobile: 07884 117 986

LONDON

MADRID

PARIS

PIRAEUS

SÃO PAULO

SINGAPORE

WWW.THOMASCOOPERLAW.COM

