

YORK-ANTWERP RULES 2016: A SUMMARY



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Introduction

On 5 May 2016 a new version of York-Antwerp Rules, the contractual regime governing the ascertainment of general average contributions, was settled at a conference convened by Comité Maritime International¹. The new rules, entitled York-Antwerp Rules 2016, are the culmination of a drafting process which began in 2012. Having been approved by the shipowners' association, BIMCO, these rules stand a good prospect of being adopted in place of York-Antwerp Rules 1994, the rules which are at present most commonly incorporated by reference into charterparties and bills of lading. In so doing, York-Antwerp Rules 2016 will fill the gap created by the failure of the 2004 Rules which, whilst promoted by cargo concerns, never found acceptance in the ship-owning community.

In reflection of the efforts made to resolve the controversy between ship and cargo, York-Antwerp Rules 2016 makes few, if any, 'root and branch' changes to the principles according to which general average is presently adjusted. Rather, the changes are mostly concerned with improving, from the point of view of both time and expense, the processes by which general average is adjusted and contributions collected, including through the prescription of a strict one-year timebar. In addition, two features of the 1994 Rules which were especially deprecated by cargo as outdated – the 2% commission on disbursements and the 7% fixed interest rate – have now been redressed through abolishing the former and by making the latter variable.

For the first time, the new rules are also accompanied by a guidance document entitled

¹ Both the Rules and the CMI Guidelines may be found on the website of Comité Maritime International at www.comitemaritime.org



"CMI Guidelines relating to General Average". These guidelines, which are not intended to be of binding force, provide information as to the basic principles of general average adjustment and the collection of security. They also explain the rôles of the average adjuster and the general interest surveyor and, in so doing, seek to set out best practice.

This following summary aims to review the main changes.

Expedition of procedures

Two principal changes have been made with the aim of reducing the time taken in adjusting general average and collecting contributions.

Since 1994, Rule E has afforded the adjuster the power to make assumptions as to the amounts of allowances and contributory values in order to fill in gaps in the information available. Where such assumptions are made, the status of the adjustment is no longer merely a matter of non-binding opinion, but instead of incontrovertible fact. The time limit which must elapse before this power arises has been tightened up in the new rules (particulars of value and particulars in support of a claim to GA contribution must be provided within 12 months failing which the adjuster shall be at liberty to make such estimations) and there is now also an express obligation to supply to the adjuster full particulars of any recoveries from third parties within 2 months of receipt of the recovery.

In addition, York-Antwerp Rules 2016 has taken up the time bar first contained in the 2004 Rules. This extinguishes rights to general average contribution unless an action is brought within a period of one year after the

date upon which the general average adjustment is issued. There is then a "long stop date" for commencement of proceedings within six years from the date of termination of the common maritime adventure. This rule, which applies also to claims under average bonds and guarantees, marks an important departure from the current position. Not only does it impose a short one-year time bar, but the use of the "long stop date" foreshortens the limitation period which would otherwise be applicable to claims under average bonds and guarantees. Ordinarily, a six year time period, counting from the date of the adjustment, would otherwise apply to claims under GA security -- *The "Potoi Chau"* [1984] 1 AC 226.

Treatment of salvage

It has been an especially vexed question whether or not to allow salvage remuneration in general average. Whilst salvage might seem the quintessential general average expense, there is a concern that, if the ship and cargo have already paid salvage separately (in particular under Lloyd's Open Form of Salvage Agreement, or "LOF") based on salved values at the termination of the salvors' services, the allowance of salvage in general average, requiring re-apportionment over contributory values assessed at the termination of the adventure, may only give rise to additional cost and delay. Whilst, in the 1994 Rules, salvage was generally allowable, under the 2004 this allowance was radically curtailed.

In the 2016 Rules an attempt has been made to reach a compromise. If the parties to the adventure have a separate contractual or legal liability to salvors (i.e. under LOF or under the common law, but not under e.g.

Wreckhire '99 where payment is made solely by the shipowner) salvage remuneration will only be allowed in general average if one or more of certain stipulated criteria are fulfilled, and if they are significant. Despite attempts at the drafting stage, no definition has been provided of the word "significant", which appears five times in the new rule. It is therefore anticipated that the adjuster will exercise his or her discretion when judging whether a criterion is fulfilled.

One of the criteria is the situation of so-called 'differential salvage' whereby 'a significant proportion of the parties have satisfied the salvage claim on substantially different terms'. That general average adjustment should seek to equalise advantages obtained by one party through the strength of its negotiating might seem surprising to some. Indeed, it was the subject of debate at the Conference. However, such equalisation was already a feature of adjustment under the 1994 Rules, and can come to the assistance of parties who are not in a position of parity as regards their powers of negotiation with salvors.

The intention of the new rule is clearly to avoid the cost of re-apportionment if the difference in result would not merit it. Whilst the wording is new, it has been suggested that the difference in practice will not be great. As the CMI Guidelines explain, many leading adjusters will, when appropriate, already propose to the parties that if re-apportionment of salvage as general average would not produce a meaningful change in the figures or would be disproportionately costly, salvage should be omitted from the adjustment. As such, the new rule serves primarily to approve and regularize this practice.



Express recognition for the discretion of the adjuster

Rule VI, with its undefined references to "significance", is by no means the only new rule which invokes the exercise of the adjuster's discretion. The discretion of the adjuster is expressly alluded to on numerous occasions. The fortified power of the adjuster to make binding assumptions and estimations has already been noted above. In addition, it is now stated in Rule XVI that the average adjuster may deem the commercial invoice to reflect the value of cargo at the time of discharge irrespective of the place of final delivery under the contract of carriage – a provision which may assist in cases of multimodal bills where there is subsequent transportation by land. Even more significantly, under Rule XVI it is now provided, "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" – an idea borrowed from the assessment of salvage awards under clause 15 of the Lloyd's Standard Salvage and Arbitration Clauses.

Even if the exercise of discretion has doubtless been a feature of adjusting since time immemorial, adjusters have been afforded express powers under York-Antwerp Rules 2016 which were not mentioned in previous versions. A proposal that the Rules should therefore explicitly state that the adjuster must act impartially and independently was not adopted. Instead, such pronouncements have been left to the CMI Guidelines which state some best practices, including that the adjuster is "expected to act in an impartial and independent manner in order to act fairly to all

parties involved in a common maritime adventure."

Resolving points of uncertainty

As may be expected, the new rules additionally seek to resolve certain points of controversy, although the number of these clarifications is relatively few.

The most important concerns the operation of the cap (also known as the "Bigham clause") on cargo's contribution to general average allowances made under the Non-Separation Agreement element ("the NSA") in Rule G. Whilst the NSA has the advantage of permitting cargo owners promptly to recover their cargo in circumstances where delay might otherwise ensue whilst at the same time obliging them to contribute to general average for as long as it would otherwise be owing, the Bigham clause places a cap on cargo's contribution to such allowances by providing that they "shall not exceed the cost which would have been borne by the owners of the cargo if the cargo had been forwarded at their expense".

As explained in the working papers produced for the CMI meeting in Istanbul on 6-7 June 2015, an issue requiring clarification was whether the cap should apply only to allowances made under the non-separation agreement wording, or else whether it should apply to both those allowances and to allowances under Rule F, such as the expense of forwarding cargo to destination aboard substitute tonnage.

By way of example, suppose a ship has put into a port of refuge, and it is estimated that repairs necessary for the safe prosecution of the voyage will last some considerable time. Instead of the cargo languishing during the period of the repairs, it is decided to

forward it to destination. By virtue of the NSA in Rule G, the cargo owner will be obliged to contribute to general average as though the cargo remained in situ; such allowances could include detention expenses and cargo handling costs. In addition, the forwarding expenses would themselves be allowable in general average under Rule F, insofar as they avoid general average expenses which would otherwise have been incurred at the port of refuge. The question was whether the amount of cargo's contribution to allowances made under Rule F and under the NSA in Rule G should be aggregated before applying the cap, or else whether the cap should only apply to cargo's contribution to allowances made under the NSA. In the new wording it has been confirmed that the cap should apply only to the latter, endorsing the view which had been held by most British adjusters.

Financial matters

Principal amongst cargo's complaints about the York-Antwerp Rules 1994 were the high interest rate (at a rate of 7 per cent per annum until three months after the date of issue of the general average adjustment) and the allowance of a commission for the provision of funds (2 per cent on general average disbursements).

York-Antwerp Rules 2016 has done away with the commission, which was considered by many to be an unnecessary anachronism, and a boon for shipowners. As for the high level of interest, this has now been pegged at 4% above ICE LIBOR (or US Dollar ICE LIBOR where the adjustment is prepared in a currency for which no ICE LIBOR is announced) and is, as such, no longer fixed but floating.



In addition, new provisions have been made for the treatment of cash deposits, in particular through the constitution by the average adjuster of a special account to be held separately from its own funds. This replaces the previous practice of setting up of joint accounts, a practice which was not routinely followed and which had been made more problematic by recent anti-money laundering legislation.

Conclusion

A drafting process of 3 ½ years' duration, in which unprecedented access was granted to stakeholders via the CMI website, has concluded with the formulation of York-Antwerp Rules 2016. The new rules withdraw certain advantages from shipowners (in particular the old commission and interest rate) but they have also reinstated some of the allowances which had been restricted in the 2004 Rules (salvage under Rule VI; crew wages and maintenance during a general average detention at a port of refuge under Rule XI; and temporary repairs to accidental damage under Rule XIV). It is suggested that no radical change has been made to the principles according to which general average is adjusted, even when taking account of the important alterations to Rule VI. Rather, the achievement of this project has been to negotiate a compromise with which representatives of ship and cargo are in principle content. In so doing, advantageous changes have been made adjectivally which, it is hoped,

will promote efficiencies in time and cost. It remains to be seen whether these rules will now become universally adopted.

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