YORK-ANTWERP RULES 2016 and GUIDELINES

By Jonathan S. Spencer[1]

On May 6th 2016 in New York City, at the General Assembly of the Comité Maritime International (CMI)[2], the **York-Antwerp Rules 2016** were approved by 42 countries in attendance, with none opposed and none abstaining.

Background

The Rules are the culmination of some three years' work by a CMI International Working Group (IWG) comprised of the following people—

Bent Nielsen (Denmark) (Chairman)
Richard Cornah (UK) (Association of Average Adjusters) (Co-Rapporteur)
Taco van der Valk (Netherlands) (Co-Rapporteur)
Andrew Bardot (UK) (International Group of P&I Clubs)
Ben Browne (UK) (IUMI - International Union of Marine Insurance)
Frédéric Denèfle (France)
Jürgen Hahn (Germany)
Michael Harvey (UK) (AMD - Association Mondiale de Dispacheurs)
Kiran Khosla (UK) (ICS - International Chamber of Shipping)
Jirou Kubo (Japan)
Sveinung Måkestad (Norway)
John O'Connor (Canada)
Peter Sandell (Finland)
Jonathan Spencer (USA)
Esteban Vivanco (Argentina)

Those shown in **bold** are practicing average adjusters, who contributed significantly to the successful outcome of the IWG's work, which began in 2012. It should also be noted that ICS worked closely with BIMCO[3].

[1] Jonathan Spencer is a New York-based average adjuster. Although 90% of his caseload involves particular average on hull and cargo, and marine liability claims, he enjoys grappling with general average issues. The scope of this paper is introductory and he welcomes requests for further clarification, at jss@jssusa.com

[2] The CMI was established in 1897. It is a non-governmental not-for-profit international organization established in Antwerp, whose object is to contribute to the unification of maritime law in all its aspects.

[3] Self-described as 'the world's largest international shipping association, with more than 2,200 members globally [providing] a wide range of services to our global membership – which includes shipowners, operators, managers, brokers and agents.'

The York-Antwerp Rules for the Adjustment of General Average[4] (YAR) have existed since the 1860's and have been the subject of revisions at approximately 20 to 25 year intervals. Early versions of the Rules were drafted by commercial interests and average adjusters, to bring uniformity to the adjustment of general average; since the late 1940's revisions have taken place under the auspices of the CMI, which is often described as their "custodian". The Rules do not have the force of law (although different versions have been incorporated at different times into the national laws of countries as diverse as the Soviet Union, Egypt, and Norway) and they become binding on the parties to a common maritime adventure by reason of their incorporation into the contract of carriage, typically embodied in a charter party or bill of lading, and their application is near-universal.

Historically, each successive revision has replaced the one that preceded it; this was not the case with the prior revision of the Rules in 2004, which did not have the support of vessel operating interests, largely because crew wages were no longer allowed while a vessel was detained at a port of refuge after a general average act and because of the revisions to Rule VI, dealing with salvage, discussed below under a separate heading; most model charter parties and bills of lading have continued to provide for the application of the extant, 1994 Rules. The only significant entities that adopted the 2004 Rules were various oil majors and US Government departments and there is no clear indication whether this was a policy decision or simply a practice of adopting the most recent version. Most average adjusters have not encountered a case falling under the 2004 Rules

Nevertheless, the CMI was perturbed at the lack of uniformity arising from the co-existence of the 1994 and 2004 Rules and resolved to develop a revision acceptable to all stakeholders. It is therefore of note that the proposed text that was brought before the New York Assembly enjoyed the unanimous support of the vessel-owner representatives, being ICS and BIMCO, and of IUMI which, although its membership comprises both hull and cargo insurers, has been the voice of the cargo interests in this forum.

This was the product of an extensive review process, which began with a questionnaire that was circulated to national maritime law associations and trade and professional associations representing the various stakeholders. Twenty-six responses were received; notably, there was no support from any quarter for the proposition that general average should be abolished.

A set of **CMI Guidelines for the Adjustment of General Average** also were adopted in New York. This is a new document developed by the IWG, in preference over a suggestion that the York-Antwerp Rules should be expanded to include a set of definitions, and its stated intention is to "*to assist in dealing with general average cases and to provide:*

- *general background information*
- *guidance as to recognized best practice*
- *an outline of procedures.*"

[4] The word "average", in this context, comes from a proto-Indo-European root meaning marine damage. Rule A of the York-Antwerp Rules gives the following definition—

> There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure.

It is written very much with the non-practitioner in mind, and its operation and effectiveness will be monitored by a Standing Committee representing stakeholders and practitioners.

YAR 2016 and the Guidelines are available on the CMI website at http://comitemaritime.org/Review-of-the-Rules-on-General-Average/0,27140,114032,00.html, together with all the documents generated during the work of the IWG.

A number of changes were made to YAR simply for clarity, and a consistent numbering protocol was adopted. This commentary will concentrate on the substantive changes.

YAR are organized in a group of lettered rules (A-G), setting out broad principles as to what constitutes general average, and twenty-three numbered rules dealing with specific instances of sacrifice – the giving of property in time of peril to preserve the interests involved in a common maritime adventure, and expenditure – the giving of money, for the same purpose in the same circumstances.

Streamlining

The general average regime has been criticized as being too time-consuming. Rule E.2 has been amended to provide that "All parties to the common maritime adventure shall, as soon as possible, supply particulars of value in respect of their contributory interest and, if claiming in general average, shall give notice in writing to the average adjuster of the loss or expense in respect of which they claim contribution, and supply evidence in support thereof." Formerly it additionally provided that if such information was not provided within twelve months of a request for it, the average adjuster could estimate the information. There was concern that the 12-month clock was reset each time the adjuster chased the information, and it has been re-written as follows:

> Failing notification, or if any party does not supply particulars in support of a notified claim, within 12 months of the termination of the common maritime adventure or payment of the expense, the average adjuster shall be at liberty to estimate the extent of the allowance on the basis of the information available to the adjuster. Particulars of value shall be provided within 12 months of the termination of the common maritime adventure, failing which the average adjuster shall be at liberty to estimate the contributory value on the same basis. Such estimates shall be communicated to the party in question in writing. Estimates may only be challenged within two months of receipt of the communication and only on the grounds that they are manifestly incorrect.

Additionally, average adjusters have reported having to re-adjust claims, a time-consuming and expensive process, because one or more parties to the adventure did not advise that they had made a recovery from a third party in respect of a loss allowed in general average. Rule E.4 has been introduced with the intention of averting these situations:

> Any party to the common maritime adventure pursuing a recovery from a third party in respect of sacrifice or expenditure claimed in general average, shall so advise the average adjuster and, in the event that a recovery is achieved, shall supply to the average adjuster full particulars of the recovery within two months of receipt of the recovery.

Rule XVII deals with contributory values and, in the case of intermodal cargoes, where the commercial invoice shows the price of the goods at their ultimate, inland destination, average adjusters have struggled to establish the value at the termination of the maritime adventure. Rule XVII(a)(i) has addressed this problem by providing that the "commercial invoice may be deemed by the average adjuster to reflect the value at the time of discharge irrespective of the place of final delivery under the contract of carriage."

Rule XVII(a)(ii) has gained new wording to endorse an existing practice, consistent with the position that exists under Clause 15 of the Lloyd's Standard Salvage and Arbitration Clauses, providing—

> 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.

Modernizing

Rule XIII, dealing with the deductions "new for old" to be made from the cost of repairs to sacrificial damage to the vessel, has been amended to allow half the costs of bottom painting if the ship had been painted within the 24 months preceding the date of the general average act rather than 12 months as previously, to reflect the longer service life of current bottom coatings.

Financial issues

Through YAR 1994, under Rule XX – Provision of Funds, a commission of 2% was allowed on general average disbursements. This has been eliminated as being inconsistent with modern banking practices[5].

Under Rule XXI, interest is allowed on general average sacrifices and expenditures. Under YAR 1994 the rate was 7% per annum, which had become unrealistically high. Under a formula adopted in YAR 2004 interest was established annually at a rate that most shipowners considered too low.[6] Rule XXI(b) now contains a formula accepted as realistic by the principal stakeholders:

> The rate for calculating interest accruing during each calendar year shall be the 12-month ICE LIBOR for the currency in which the adjustment is prepared as announced on the first banking day of that calendar year, increased by four percentage points. If the adjustment is prepared in a currency for which no ICE LIBOR is announced, the rate shall be the 12-month US Dollar ICE LIBOR, increased by four percentage points.

Rule XXII – Treatment of Cash Deposits, needed to be amended because its requirement that deposits be held in an account in the joint names of the shipowners and the depositors cannot be met under current banking regulations. Funds are now required to be held by the average adjuster in a special account

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[5] Under United States practice, advancing commission of 2.5% is allowed. Contracts of affreightment occasionally provide that general average be adjusted per YAR "and, as to matters not provided for in those Rules, in accordance with the laws and usages of the Port of New York" (or other US port); the Association of Average Adjusters of the United States and Canada has not taken a position on how they will approach commission under YAR 2016, though it seems probable that any allowance would in many cases be inconsistent with YAR's Rule Paramount.

[6] The historical rates can be found at http://comitemaritime.org/York-Antwerp-Rules-and-General-Average-Interest-Rates/0,2754,15432,00.html

"constituted in accordance with the law regarding client or third party funds applicable in the domicile of the average adjuster. The account shall be held separately from the average adjuster's own funds, in trust or in compliance with similar rules of law providing for the administration of the funds of third parties."

Clarification

Rule B deals with tug and tow cases and was amended in 2016 to provide greater clarity about "disconnection" cases and to briefly address port of refuge expenses, as follows:

> 2. If the vessels are in common peril and one is disconnected either to increase the disconnecting vessel's safety alone, or the safety of all vessels in the common maritime adventure, the disconnection will be a general average act.
>
> 3. Where vessels involved in a common maritime adventure resort to a port or place of refuge, allowances under these Rules may be made in relation to each of the vessels. Subject to the provisions of paragraphs 3 and 4 of Rule G, allowances in general average shall cease at the time that the common maritime adventure comes to an end.

Rule G deals with the situation where cargo is forwarded from a port of refuge in a different vessel and general average allowances continue to be made under a non-separation agreement, the so-called "Bigham Clause" in Rule G.4 providing that the proportion thus attaching to cargo "shall be limited to the cost which would have been borne by the owners of cargo if the cargo had been forwarded at their expense." Differences in practice among average adjusters emerged as to whether the cap applied to the entire amount claimed as contribution from cargo or whether allowances made under the substituted expenses provision of Rule F[7] should be excluded. The 2016 Rule now includes the clarification, "This limit shall not apply to any allowances made under Rule F.**"**

Rule XI(c)(ii), dealing with expenses at a port of refuge, was added to address an unsatisfactory English case[8] involving additional tug assistance at a port of refuge where the judge decided that the term "port charges" related only to the charges a vessel would ordinarily incur in entering a port. The Rule was therefore re-worded to reflect prevailing practice—

> For the purpose of these Rules, port charges shall 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 in the circumstances outlined in Rule XI(b)(i).

Salvage

The allowance of salvage expenditure as general average was introduced in YAR 1974 and rapidly became controversial with cargo interests, who in many cases thought that they were being asked to contribute to substantial adjusting fees while the financial outcome was often no different than had the salvage expenditure been allowed to lie where it fell when settled under the applicable mechanism for determining the quantum of the salvage. IUMI insisted that salvage be dropped from YAR 2004 and average adjusters, who are trained to achieve an equitable distribution of losses, found this very hard to accept.

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[7] "Any additional expense incurred in place of another expense which would have been allowable as general average shall be deemed to be general average and so allowed without regard to the saving, if any, to other interests, but only up to the amount of the general average expense avoided."

[8] *Trade Green* [2000] 2 Lloyd's Rep. 451, 456

The principal difficulty arises because payments to salvors are assessed on the value of the property at the time the salvage services terminate, whereas contribution to general average is "adjusted as regards both loss and contribution upon the basis of values at the time and place when and where the common maritime adventure ends[9]." The contributory value for general average purposes includes "the amount allowed as general average for property sacrificed.[10]" An inequity arises if a piece of property with significant value is sacrificed before or during the salvage operation. Having no value, it contributes nothing under the salvage settlement but the amount of its sacrifice is made good in general average. In an adjustment under YAR 2004, it is actually in a better financial position than the cargo that was saved, since it receives its sacrifice made good, but does not contribute to the salvage expenditure.[11]

The solution adopted under YAR 2016 is to allow salvage under the general adjustment if to do so materially affects the outcome of the case. Under Rule VI(b), "salvage shall only be allowed should any of the following arise:

(i) there is a subsequent accident or other circumstances resulting in loss or damage to property during the voyage that results in significant differences between salved and contributory values,
(ii) there are significant general average sacrifices,
(iii) salved values are manifestly incorrect and there is a significantly incorrect apportionment of salvage expenses,
(iv) any of the parties to the salvage has paid a significant proportion of salvage due from another party,
(v) a significant proportion of the parties have satisfied the salvage claim on substantially different terms, no regard being had to interest, currency correction or legal costs of either the salvor or the contributing interest."

Where salvage remains outside the general average adjustment, settlements made by the parties still rank as a deduction from contributory value and Rule XVII(b) has been amended to clarify that such "deductions in respect of payment for salvage services shall be limited to the amount paid to the salvors including interest and salvors' costs" with the effect that the adjuster does not have to make inquiry of the contributing interests regarding ancillary expenses, such as costs of providing security and of legal representation.

Guidelines

The reader is commended to download and review the CMI Guidelines. The first major endeavor of the Standing Committee, on which this writer serves, is anticipated to be the development of model general average security documents; it may be anticipated that this should be in place in time for adoption at the CMI's next Assembly, scheduled to take place in Genoa in September 2017.

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[9] Rule G.1
[10] Rule XVII(b)
[11] Certain learned commentators have asserted that principles of hypothetical salvage should apply in such a case but it is not believed that such principles have ever been applied in practice.