

General average - English and US law and practice, against the background of the York-Antwerp Rules 1994

By John Macdonald of Macdonald Hebditch & Co., Ltd, President of the Association Internationale de Dispatcheurs Européens (AIDE)

Introduction

Ninety nine percent of general averages are adjusted according to the York-Antwerp Rules (YAR) of whatever vintage. These do not, however, cover every matter which can arise in relation to a general average (GA) case; the gaps have to be filled by appropriate national legal provisions. In addition, the YAR themselves have been known to attract differing interpretations in particular jurisdictions. It will, therefore, be clear that the question of what system of law is to be applied may become important in any GA case.

To ascertain which is the applicable law, the average adjuster will first look to the contract of affreightment. Where this is silent, he will probably seek to apply the GA provisions of the law of the place where the voyage ends. In the not uncommon circumstance that there are no such provisions, he may be obliged to adopt a "pragmatic" approach in his choice of law.

It is probably true that most of the contracts of affreightment in use around the world call for the adjustment of GA to be done in London, and, whether correctly or not, this frequently means that English law is applied, this being a convenient solution because of the substantial body of law on the subject which is available.

A number of contracts of affreightment, however, and particularly those employed by US carriers, call for the YAR to be supplemented by US law and practice. The potential importance of the particular provisions of US law on the subject of GA is therefore clear. The well-known author Leslie Buglass¹ also draws attention to a specific application of US law to the subject: "When an insured vessel is proceeding in ballast and under charter, American practice does not recognise the general average clause in the contract of affreightment as governing the adjustment of general average and it follows that general averages occurring when the vessel is in ballast may have to be adjusted according to American law and practice, an option provided for in American policies on vessels. This is true whether the vessel is under charter or not."

It will be evident that there are many possible laws applicable to a GA adjustment. This article restricts the possible comparisons to one between interpretation of the principles of general average and of the YAR under English and US law. The point of mutual reference in respect of each is taken as the present, 1994, York-Antwerp Rules.²

The basic principle of GA

An important distinction exists, which, in the light of the present discussions at the Comité Maritime International,³ may assume increasing relevance.

English law, like Rule A of the YAR, insists that a GA act is something done to preserve the property from physical peril.

Under US law and practice, on the other hand, the required object of a GA act is only the joint benefit of the ship and cargo for the safe completion of the adventure.

1 General Average and the York-Antwerp Rules 1974: American Law and Practice.

2 In identifying the differences detailed below, the writer has had the advantage of advice from an eminent American average adjuster, Mr Howard Myerson, whose help he gratefully acknowledges.

3 See article "No common benefit - IUMI proposals for review of the York-Antwerp Rules" in this issue of Gard News.

Tugs and tows

The new Rule B of YAR 1994 represents the YAR's first effort to grapple with the general average implications in towage operations. Its aim - the success of which is yet to be tested - was to achieve some uniformity in the presence of varied - and to some extent eccentric - legal authority in the US and Norway. Taking as its model Rule XXV of the Rhine Rules (which deal with GA on that river), YAR 1994 Rule B systematically seeks to establish, first whether the tug and barge can, in the circumstances of the case, be regarded as involved in a common maritime adventure, and then, whether they are both subject to a common peril. When the criteria for both these conditions are satisfied, the mutuality required for GA contribution is said to exist.

Most of the case law on this topic is found in the US, but unfortunately it is difficult to deduce much in the way of uniform principle from these decisions.

In the UK there is no authority on the point, and text writers are forced to consider the matter from the basis - uncomfortable from the point of view of a common lawyer - of principle. It would appear, however, that the new Rule B is thought to be attempting to give expression to principles with which English law may be sympathetic.

Substituted expenses

US law shares with English law an aversion to such allowances as are made on this basis under Rules F and XIV of the YAR.

Damage caused in extinguishing a fire

Since 1974, Rule III of the YAR has not excluded from allowance damage to cargo, or a part of the vessel which had already been touched by fire.

US practice was similar to the provisions of the 1950 YAR which excluded such damage. Interestingly, the American delegation at the Sydney Conference at which the 1994 YAR were agreed put forward the suggestion - which was not accepted - that the 1950 provision be reintroduced.

In the UK the Rules of Practice of the Association of Average Adjusters were amended to bring them into line with the terms of Rule III of YAR in this respect. So far as English law on the point can be ascertained, it appears from obiter dicta in *Greenshields v. Stephens*⁴ that cargo which retains some value at the moment it is damaged by the extinguishing operation may still be the subject of a GA allowance.

4 [1908] A.C. 431.

Loss sustained by cutting away wreck

The 1994 YAR endorse the principle that it is not possible to sacrifice something which is already lost or incipiently valueless. In this respect, Rule IV endorses a principle recognised by English law as having become established in a series of 19th century cases.

Loss or damage resulting from cutting away wreck is allowed in GA under US law and practice if the remains endanger the common safety.

Voluntary stranding

Rule V of the YAR 1994 makes it clear that, where there is an intention to run the vessel aground, the specific location and method of the grounding do not have to be those chosen by the Master.

This reflects what is taken to be the position in English Law, although - curiously - there is no case law on

the subject.

US law, on the other hand, appears to be rather more restrictive, requiring the voluntariness of the act to be rather more positively asserted, with the Master actually exercising some control over the place and method of the grounding which actually occurs.

Damage to machinery when the vessel is afloat

Rule VII of the YAR lays down that, when the ship is afloat, no damage caused by working the propelling machinery is to be allowed in GA.

So far as English law is concerned, there are a number of 19th century cases suggesting that under the contract of affreightment, while the vessel remains afloat full use should be made of the sails or machinery to extricate the cargo from danger. Whether this is capable of being elevated to a principle requiring destruction of the ship's equipment in an attempt to save the adventure without the resulting loss attracting GA contribution perhaps leaves room for doubt.

In US law and practice there is a right to GA contribution in these circumstances as long as the facts come within the US definition of general average.

Removal to a second port because repairs can not be effected at the first port of refuge

Rule X (a), second paragraph, says that, in such circumstances, the second port is to be treated as a port of refuge for the purpose of making allowances in respect of wages, fuel and port charges.

The complexities of English law on the subject of port of refuge expenses need not detain us here, other than to draw attention to the points that, on the one hand, English law recognises no allowance for wages (these being regarded as losses resulting from delay), while, on the other, the decision in the *TROILUS*⁵ suggests that, within the restrictions as to allowances imposed by English law, in the circumstances the second port might be regarded as a port of refuge.

5 [1951] A.C. 820.

Under US law and practice, if the ship discharges her cargo at the first port of refuge before proceeding to the second port, the cost (port charges) of leaving the first port, proceeding to and entering the second, leaving the second port after repairs and returning to the first port, are treated as part of the cost of repairs and apportioned accordingly.

Expenses of deviation to a port of refuge

Rule XI (a) of YAR provides for the allowance of wages and fuel, while port charges are recovered under Rule X (a) during the deviation to a port of refuge.

Under English law, wages would not be recovered in GA, while fuel and port charges during the departure from the port would be treated as a charge to freight where the deviation to the port of refuge had been for the purpose of effecting repairs not recoverable in GA.

In US law and practice, the allowance for wages and maintenance of crew, etc., ceases when the vessel is, or should have been made, ready to resume her voyage.

Wages allowances

Under YAR, Rules X (a) and XI (b), an allowance for wages and maintenance of crew may be made for the extra period of deviation and detention.

It is normal for English average adjusters to round the resulting figure either up or down to the nearest

half day.

Under Rule of Practice XVIII of the US Association of Average Adjusters, "a period of less than twelve hours, either alone or in excess of a number of complete days, shall be disregarded and a period of twelve hours or more, either alone or in excess of a number of complete days, shall be treated as a whole day".

Cost of funds used for GA expenditure

Rule XX of the YAR provides for an allowance of 2 per cent advancing commission on GA disbursements.

English law supported the allowance in respect of the costs of a bottomry or respondentia bond obtained in order to raise money to pay for general average items. With modern forms of banking and communication, it seems likely that the only allowance which could be similarly justified would be on the bank charges for effecting the remittance of the amounts allowed in GA.

In US law and practice, on the other hand, a 2.5 per cent advancing commission is allowed on GA disbursements.

Interest on GA disbursements and allowances

Rule XXI of YAR provides for 7 per cent interest to run until a date three months after the date of issue of the adjustment.

English law recognises, in principle, the right to interest of a claimant to a GA contribution as being one of the exceptions to the normal common law rule that excludes any award of interest by way of damages or compensation for late payment.

In US law and practice interest is allowed for the estimated period of the outlay - which period is taken to continue until such time as settlement is expected, usually two or three months after the issue of the statement - at the legal rate prevailing at the place of adjustment.

Collecting commission

This is unknown to the YAR, and probably to English law on the subject.

In US law and practice, however, a 2.5 per cent commission for collecting and settling the general average is allowed on the full amount of the GA.

Non-separation agreements

Since 1994 Rules G and XVII of YAR have included the essential elements of the wording of non-separation agreement recommended by the American Institute of Marine Underwriters (i.e., they include elements of the "Bigham" clause, which is omitted from the standard form approved by the London market).

The "Bigham" wording makes allowances under the non-separation agreement subject to a cap of the amount that it would have cost cargo interests to take delivery of and forward their own merchandise from the port of refuge. Because of the inclusion of this wording, it may become critical which items are allowed in GA without the assistance of the non-separation wording, and which become allowable only under its terms. In US practice, where cargo is forwarded to destination from a port of refuge, and the cost of forwarding is claimed in GA, such cost is treated as allowable only under the non-separation wording, and is therefore subject to the "Bigham" cap.

In the UK, however, there is substantial sympathy for the view that, as forwarding costs are allowed as substituted expenditure under Rule F of the YAR, whether or not a non-separation agreement applies,

such allowance is not made under the terms of the non-separation agreement and is therefore not subject to the cap.

Particularly in cases under the 1994 YAR, which, unlike their predecessors, incorporate a non-separation wording, the issue is nicely balanced.

EDITOR'S NOTE:

A further distinction in the manner US and English courts deal with one aspect of general average should be mentioned. While under English law a party against whom a GA contribution is claimed may refuse to contribute if "actionable fault" by the party claiming contribution is proved (see article "Crankcase - Long case - Recovery of general average contribution" in this issue of Gard News), under US law a carrier can not recover a GA contribution if the casualty was caused by negligence of his servants, even if such negligence was not "actionable fault" under the contract of carriage. It is therefore necessary for the carrier to include in the bill of lading or other contract of carriage a "New Jason Clause", which permits him to claim GA contributions in situations where he is "at fault", but nevertheless not liable under the Hague or Hague-Visby Rules. Liabilities, losses, costs and expenses resulting from the carrier's failure to include the "New Jason Clause" in his contract of carriage (where its inclusion would otherwise have enabled him successfully to claim a contribution) are not recoverable from his P&I underwriter.

Gard News is published monthly by Gard & Theodor, a division of A.P. Moller-Maersk.