



CMI 2015

The York-Antwerp Rules heading for
2016 - the discussion so far....

A review by:

Richard Cornah / Michael Harvey / Jonathan Spencer



A casualty scenario





A casualty scenario

The big picture:-

- Ordinary vs extra-ordinary
- Property insurers vs liability insurers
- Taking action now vs legal outcomes
- Equitable distribution of the consequences.



The CMI Process

- CMI - custodians of the YAR since 1950
- Request for or recognition of need for changes to rules
- CMI establishes IWG
- IWG issues questionnaire to MLAs and interested parties
- IWG considers responses and reports to ISC
- ISC identifies topics and proposals for further study by IWG



The CMI Process

(cont.):

- ISC considers IWG final recommendations and issues a report with proposed amendments for consideration at the CMI Conference
- MLAs and other interested parties (eg. ICS, IUMI, AMD & AAA) may issue position papers for consideration at Conference
- Proposed changes are debated by the ISC at Conference
- At the Plenary Session of Conference ISC proposals are either confirmed, rejected or amended by a simple majority of National MLAs



Rule B - Towage

- Tug & tow = common maritime adventure (except during salvage operations).

- YARs 1994 & 2004 also say:

“(2) A vessel is not in a common peril with another vessel or vessels if by simply disconnecting from the other vessel or vessels she is in safety; but if the disconnection is itself a general average act the common maritime adventure continues.”

- Silent on Port of Refuge costs



Rule B - Towage

Common peril:

(2) A vessel is not in common peril with another vessel or vessels if she disconnects from the other vessel or vessels and thereby places herself in safety; 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.



Rule B - Towage

Port of refuge:

(3) Where vessels involved in a common maritime adventure resort to a port of place of refuge allowances under these Rules may be made in relation to all of the vessels. Allowances in general average shall cease at the time that the common maritime adventure comes to an end.



Rule E – speeding up the adjustment process

1994 and 2004:

All parties 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 within 12 months of the date of the termination of the common maritime adventure.



Rule E

(cont.):

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.

The problem – do the underlined words re-start the clock?



Rule E

A possible solution:

Failing such notification, or if any of the parties do not supply particulars in support of a notified claim, or evidence of value in respect of a contributory interest within 12 months of the loss or payment of the expense, 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. This estimate shall be communicated to the party in question in writing. This estimate may only be challenged within 60 days of receipt of the communication and only on the ground that it is manifestly incorrect.



Rule E – recoveries

4. Any party to the adventure pursuing a recovery from a third party in respect of sacrifice or expenditure claimed in general average, shall so advise the adjuster and, in the event that a recovery is achieved, shall supply to the average adjuster full particulars of the recovery within 60 days of receipt of the recovery.



Rule VI - Salvage

Salvage - a “classic” GA expense incurred for the common safety

Salvage - LOF type, separately payable
- “Contract” type, paid by shipowner

In both cases under YARs 1994 and previously the total salvage is allowed as GA and apportioned over GA Contributory Values.



Rule VI - Salvage

- IUMI concerns that re-apportioning LOF salvages, (where already settled separately by ship and cargo) as GA was costly and time consuming.
- YARs 2004 therefore excluded salvage from GA.
- Major factor in rejection of YARs 2004 by shipowners.



Rule VI - Salvage

2004 Problems:

- possibility of property paying over 100% in respect of salvage and GA if salvage not deducted from CVs.
- distortions due to effect of amounts “made good” as GA and/or subsequent casualties.
- situations where owner pays part/all of salvage.



Rule VI - Salvage

Possible solution:

- (b) Notwithstanding (a) above, where the parties to the adventure have separate contractual or legal liability to salvors and have settled that liability 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 salvaged and contributory values;*
 - (ii) there are significant general average sacrifices involving salvaged property;*



Rule VI - Salvage

(cont.):

- (iii) Salved values are manifestly incorrect and there is a significantly incorrect apportionment of salvage expenses;*
- (iv) Any of the parties to the salvage shall have paid all or any of the proportion of salvage due from other parties;*
- (v) A significant proportion of the parties settled the salvage on substantially different terms [as to the gross base award or settlement (no regard being had to interest, currency correction or the legal costs of either the salvor or the contributing parties)] .*



“Financial” Issues

Commission on GA disbursements – Rule XX

- 2% from 1924 to 1994 – abolished in 2004
- Intention:
 - to provide incentive to fund GA expenses (doubted), and
 - to recompense for those providing funds for costs incurred (actual costs minimal due to modern banking practices)
- Proposal is to maintain 2004 position
- However, for Shipowner interests this was dependent upon satisfactory resolution of GA interest issue



“Financial” Issues

Interest on GA allowances – Rule XXI

- Up to 2004 interest rate set for ‘life’ of Rules – 5% from 1924 to 1974, 7% from 1974 to 1994 – general agreement that this is unsatisfactory
- 2004 Rules require CMI to fix rate annually (currently 2.75%)
- CMI established guidelines for fixing rate based on rates charged by first class commercial banks to a shipowner of good credit rating
- Now accepted that these criteria may not be realistic



“Financial” Issues

Interest on GA allowances – Rule XXI

- Current proposal:
 - b. The rate used 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 1 January of that calendar year, increased by 4%. If the adjustment is prepared in a currency for which no ICE LIBOR rate announced, the rate shall be the 12 month US Dollar ICE LIBOR.



“Financial” Issues

Cash Deposits – Rule XXII

- Amendment required to reflect realities of modern banking practices – joint bank accounts no longer available
- Proposed to shift sole responsibility for holding deposits on the average adjuster backed by a code of conduct

Currency of Adjustment

- Consideration is being given to specifying how the currency of adjustment should be established
- SDRs considered as candidate



Rule X – detention during re-stowage

X(b)(ii) The cost of handling on board or discharging cargo, fuel or stores shall not be allowable as general average when incurred solely for the purpose of restowage due to shifting during the voyage, unless such restowage is necessary for the common safety.

It has been generally understood that wages, fuel and other detention expenses continue to be allowed as GA even when the restowage itself is not a GA measure, but the Rule itself is not explicit.



Rule X – re-stowage

Possible solution:

- *X(b)(ii) The cost of handling on board or discharging cargo, fuel or stores shall not be allowable as general average when incurred solely for the purpose of restowage due to shifting during the voyage, unless such restowage is necessary for the common safety. However the provisions of Rule XI shall be applied to the extra period of detention occasioned by such restowage.*



Rule XI – definition of “port charges”

“Port charges incurred during the extra period of detention shall likewise be admitted as general average except such charges as are incurred solely by reason of repairs not allowable in general average.”

YAR do not define “port charges” and the decision in the “Trade Green”*, where tug costs additional to what a vessel would ordinarily incur were held not to be GA, has raised a question about whether a definition is desirable

*[2000] 2 LR 451



Rule XI – definition of “port charges”

Possible solution:

For the purpose of this and other Rules, “port charges” shall include all customary or additional expenses incurred for the common safety or to enable a vessel to remain at a port of refuge or call in the circumstances outlined in Rule XI(b)(i).



Rule XI(d)(iv) – anti-pollution measures

Wording introduced in 1994 addresses the cost of measures undertaken to prevent or minimize damage to the environment in connection with operations undertaken for the common safety and with entering and remaining at a port of refuge.

Over time, it has become apparent that it is inconsistent with X(b) by omitting reference to *“handling on board or discharging cargo, fuel or stores”*.



Rule XI(d)(iv)

Proposed solution – cost of anti-pollution measures will be GA when incurred:

XI (d) (iv) necessarily in connection with the handling on board, discharging, storing or reloading of cargo, fuel or stores whenever the cost of these operations is allowable as general average.

Underlined words are new.



Rule XVII – Contributory Values

- “Any cargo may be excluded from the 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.”



Rule G

- Incorporates a non-separation provision – avoiding the need to obtain a Non-Separation Agreement (NSA) where cargo is forwarded to destination.
- Under a NSA, where cargo is forwarded, allowances in GA continue as they would have had the cargo not been forwarded so that wages, fuel, port charges and (possibly) removal to a repair port are allowed as GA even though ship and cargo have parted company.



Rule G

(cont.):

- BUT cargo's contribution to expenses allowed under the NSA shall not exceed what it would have cost cargo to forward their goods (the Bigham Cap)
- Concerns:
 - The application of the Cap is unfair and should be abolished, and
 - There are variations in the practice of adjusters in applying the Cap; i.e. whether or not to include the cost of forwarding the cargo to the extent allowed under Rule F. The Rule should be amended to achieve uniformity of practice.



“Guidelines”

Filling the gaps that YARs cannot cover due to:

- jurisdictional differences
- variety of circumstances
- complexity



“Guidelines”

- a) Application of Rule VI
- b) Treatment of cash deposits (Rule XXII)
- c) General average security documents
- d) Role of the adjuster
- e) Mediation of disputes
- f) Role of general interest surveyor
- g) Any others?



Guidelines

- Standing Committee involving stakeholders to monitor and draft guidelines as necessary
- Reporting to CMI Executive Committee or CMI Assembly



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