

Draft Rule & Guidelines concerning the role of the Average Adjuster

Draft Numbered Rule

“In adjusting the General Average and in all activities associated therewith (such as collecting security, publishing the Adjustment, exercising discretion and all other aspects of the role of an Adjuster) the Adjuster shall act independently and impartially in the interests of all parties to the common maritime adventure. Guidelines shall give examples of best practice for Adjusters.”

Draft Guidelines for examples of best practice for Average Adjusters

Adjusters should:

1. Genuinely act in the interests of all parties to the Common Maritime Adventure (“CMA”);
2. Make available copies of vouchers and relevant contracts (e.g. for repairs) relating to expenses allowed in the Adjustment;
3. Where appropriate collect G.A. security from all those interested in the CMA (including the ship and time charterers' bunkers) as well as the cargo so that no party to the CMA is left un-secured should it turn out they are creditors in the Adjustment;
4. Explain in appropriate detail the reason for the currency of the Adjustment;
5. Investigate (and state in the Adjustment) the steps which the parties to the CMA have taken and, if applicable, are taking to effect a recovery which might result in a re-adjustment;
6. State upon the basis of which YAR rule each expense or sacrifice is allowed in the Adjustment (this is the subject of an AAA provisional Rule of Practice);
7. Explain and justify the basis upon which GA contributions are claimed: this will usually (but not always) be a contract of carriage and, if it is, then the Adjuster should explain in the Adjustment if necessary pursuant to which contract of carriage the Adjustment is done and the reason why other contracts are not being relied upon (e.g. why is the G.A. clause in the Voyage C/P being adopted rather than the B/L?);
8. Not seek payments on account before the CMA has been completed;
9. If the adjuster is aware that there has been a substantial cargo sacrifice, offer the cargo parties interested the opportunity to check the wording of security given by the other main contributing parties to the CMA;

10. Accept GA security wording which provides that payment is only made when properly and reasonably due;

11. Not obtain the shipowners' approval of the adjustment before it is distributed (a draft adjustment may be circulated but, if it is, it should be sent to all parties or at least all legally represented parties to the CMA and not just the shipowner);

12. Arrange the collection of the contributions on behalf of all parties to the CMA.

IUMI

29/04/2015

Notes of the meeting of the GA subcommittee of the Association of Average Adjusters on 11th May 2015 to consider the working papers of the IWG of CMI for its meeting in Istanbul in June 2015.

Present were:

Keith Jones
Keith Sturges
Willum Richards
John Macdonald (convener)

The sub-committee's views on the material set out in the working papers were as follows:

A. Draft Rules

1. Rule B

The subcommittee had no uniform view on whether the present text would benefit from redrafting. They considered that the insertion of wording to clarify questions concerning port of refuge costs would be beneficial, but were happy to leave the drafting of appropriate wording to the IWG.

2. Rule E

Limitation period.

The subcommittee preferred amended text B in respect of E.2., but considered that, in order not to give too firm an impression of the availability of time, the 12 month limit should be transferred to E.3., and replaced in E.2 as follows:

All parties to the adventure shall, *as soon as possible*, supply particulars of value

They suggested that E.3. should then read (subject to comments under Rule XVII (b) below):

Failing such notification, or if any of the parties shall fail to supply evidence in support of a notified claim, or particulars or particulars of value in respect of a contributory interest *within 12 months of the date of the termination of the common maritime adventure*, the average adjuster shall be at liberty to estimate the extent of the allowance or of the contributory value on the basis of the information available to him.

The subcommittee considers that the final words of the IWG's draft requiring such estimate to be communicated to the party concerned and giving them 2 months to challenge it was likely to be a recipe for open ended delay, and should be omitted.

Recoveries

The subcommittee supports the suggested final paragraph of Rule E. They are against either of the possible amendments to this paragraph suggested in para 3.2, on the grounds that to specify that the expression "party to the adventure" includes Insurers or others in this Rule might lead to the deduction that, in another Rule, which was silent on the point, they were therefore not included.

The subcommittee did not agree with the suggestions in 2.4 and 2.5.

3. Rule G

Allowances which are subject to the “Bigham” cap.

Although it appears that the combined wordings of G.3 and G.4 in the present Rule provide for the cap to be applied only to allowances introduced by G.3 (ie allowances made under the non-separation wording), part of the subcommittee indicated that they applied the cap also to allowances made in respect of forwarding costs allowed under Rule F. The subcommittee were happy for the IWG to clarify the matter if they concluded that this would be beneficial, but were happy with the status quo.

4. Rule VI

The subcommittee prefers the suggested text in DN 5.3 subject to the following:

- Proposed Rule VI (b) (i) should refer to “property”, not simply “goods”.
- Significant differential salvage settlements ought, in principle, to be re-apportioned as GA.
- Throughout the Rule the interpretation of the word “significant” should be left to the discretion of the average adjuster.

5. Rule X

The subcommittee supports the wording suggested in DN 6.2.

6. Rule XI

If clarification is thought to be needed, the subcommittee supports the first of the possible suggested wordings in DN 7.

Port charges

The subcommittee supports the suggested new wording for XI (c) (ii) in order to reinstate the perceived *pre Trade Green* position.

Rule XI (d) (iv)

The subcommittee supports the suggested amendment to the wording of this paragraph to bring it into line with X (b).

7. Rule XIII

The subcommittee agrees that the IWG should conclude this matter on the basis of technical engineering advice.

8. Rule XIV

The subcommittee continue to support the wording quoted in para 12.3.

9. Rules XVI & XVII

The subcommittee continue to support the suggested wording at DN13.

10. Rule XVII (a) (ii)

The subcommittee supports the suggested wording at DN 14.2.

11. Rule XVII (b)

The subcommittee agrees that, in some circumstances, failure to deduct salvage payments - which have been excluded from GA under Rule VI - could result in distortion and inequity. They therefore consider that such payments should continue to rank as deductions for the purpose of arriving at contributory values for GA purposes. They are uneasy, however, with the facility imputed to them by para DN 15.4. It may well be that the information they will need will be available - say - from Salvors solicitors, but they think they might also be assisted by a further amendment to E.3 to this effect, recognising that such amendment would have to take into account the fact that the required information would be likely to become available to the party obliged to supply it to the average adjuster some time after the end of the 12 month limitation period.

12. Rule XVII (e)

The subcommittee accepts that, in the interests of uniformity with LOF2011, wording such as that proposed at the end of DN 16 should be used.

13. Rule XX

The subcommittee agree that the present XX (a) should be deleted

14. Rule XXI

The subcommittee takes the view that the method by which the interest rate is fixed is a matter for the parties, as long as the resultant method of fixing it is equitable and realistic.

15. Rule XXII

The subcommittee approves the text proposed at para 22.2, subject to the following additions/amendments:

- XXII (1) should have the following text added

...the appointed average adjuster, *who holds the funds on behalf of General Average interests.*

- in XXII (2), the word "legislation" should perhaps be changed to "law" to take account of the fact that in England, for instance, legislation normally means only statute law and does not include the decisions of the courts.

- for clarity, the text of XXII (3) should be amended to read:

...or in the absence of such approval within a period of 60 days *from the date of the request*.

- the subcommittee supports the insertion of wording obliging the average adjuster to issue a receipt

B. Other matters.

1. Currency of adjustment

Of the choices presented at para 1.7, the subcommittee supported (a).

2. Role of Average Adjusters

The subcommittee regard a large proportion of the suggested requirements as representing what any qualified average adjuster ought to do. However, some of the suggested requirements seemed to represent an effort to draw the average adjuster into the fields of causation and liability; they take the view that Rule D makes it undesirable that average adjusters should take a position in these areas, and that the objectivity they require in order to properly discharge their main function might be prejudiced by any such extension of their activity.

The subcommittee regard the suggestion in requirement no. 12 as suggesting a possible misunderstanding of the average adjuster's activity: when a shipowner is shown a GA adjustment prior to issue, he is not asked to approve the adjustment, but only the allowances made for his credit, and the contributory value of the ship, and possibly the bunkers and freight at his risk. In the event of material sacrifices by cargo interests, they too would normally be approached on the same basis prior to issue of the adjustment.

On the question of obtaining security from parties interested in the ship and bunkers, the subcommittee suggests that it may, on occasion, be possible for other parties who have made substantial GA sacrifices to ask for GA guarantees from the insurers of the ship and her bunkers. The IWG may wish to discuss what form such security should take, and whether GA Guarantees from appropriate insurers ought to be accompanied by Average Bonds from the parties themselves.

The subcommittee was firmly of the view that no provision on the role of the adjuster should form part of the Rules, but that, if the CMI agreed to provide a set of Guidelines on various topics, this might be an appropriate place for such provisions.

C. CMI Guidelines

The subcommittee would support the use of such Guidelines on the following topics:

- Interest rates
- Standardised security documents

- Role of the average adjuster
- Role of the General Interest Surveyor

They agree that such guidelines would need to include:

- a suitable preamble to make clear that they are separate from the Rules themselves and not contractually or otherwise binding
- a mechanism for updating when required

Attachment 3 – Rule B

(Section A, DN1 refers)

Following the February IWG meeting, an ad hoc group has been considering possible ways forward. Contributors have been Michael Harvey, Peter Sandell, Jonathan Spencer and Ben Browne.

The following notes are an amalgamation of their comments and views. There has not been sufficient time to circulate this in draft form, so I apologise in advance if I have misrepresented anybody:

Background

Michael Harvey noted that although this Rule was 'new' in 1994, in 1981 AIDE (AMD) had identified the problem of diverse and inconsistent legal regimes applying to the transport of goods by barge and, in particular, the application of general average to tugs and tows and had established a working party to investigate the position. Their working group presented an interim report in 1983 and its final report in 1985. The report found little guidance in national legislation, confusion in case law and inconsistency in the wording of towage contracts. This confusion and uncertainty led to the introduction of Rule B to achieve uniformity of practice; unfortunately it is not perfect and, it requires amendment either to exclude all tug and tow cases from general average or to make the Rule easier to understand and apply.

Peter Sandell reviewed the international scene and said "the materials which I have studied however reveal that there is very little to add to the cases already analyzed in the latest version of Lowndes & Rudolph.

I have studied the Scandinavian Maritime Cases thoroughly and found nothing of value but the "Alppi", which has already been carefully analyzed by Richard and which has been taken into consideration when 1994 rule B was drafted. A collection of Canadian tug & tow cases did not involve any such cases we are after either.

Having found nothing new in English cases – as expected, I turned to Scandinavian Average adjusters decisions as I remembered having met at least something during the time while I was in training at the previous Finnish average adjusters office. The only Finnish GA/tug & tow case which I found in the archives related to the topic (between 1975-2015) was decided 1981 using rule A in 1974 rules. This was quite easily decided by Rule A and is not of great value for our exercise. Same applies to after 1998 Swedish average adjusters decisions which were easily accessible. In Sweden there is no GA tug & tow cases among the Average Adjusters decisions between years 1998-2015. Therefore I do not see much basis for a report to be circulated as we are in a situation that we do not have cases after the latest "Alppi" to analyze - And the 1994 rule B was already an attempt to answer to that and the confusion created by the earlier case law.

I am of the opinion that as we have no case law after 1994 which guides (or misguides) the interpretation of rule B 1994(or 2004), we have a clear table to decide if we are willing to develop the Rule B further. This is never going to be a great issue for the great majority, and definitely the lack of case law (and average adjusters decisions as well at least in

Finland/Sweden) supports that view, but abolishing tug & tow from YAR is not an alternative in my opinion.”

Jonathan Spencer listed the somewhat confusing USA cases as follows:-

- JP Donaldson (1897) – tug towing sailing barges cast them off to save herself from going ashore in a storm, barges went ashore and were lost, not GA because each barge had its own master
- Loveland 33 (1963) – tug and two barges, one of which was run on shore to prevent its sinking – held to be GA although of no benefit to the tug or the other barge
- Northland Navigation v Paterson Boiler Works (1983) – Canadian case, tug cast off barge and cargo to save herself, barge and cargo stranded, only barge and cargo were required to contribute to GA.

Proposals on common safety

The version of Rule B that was introduced in 1994 and retained in 2004 reads as follows:-

“(1) There is a common maritime adventure when one or more vessels are towing or pushing another vessel or vessels, provided that they are all involved in commercial activities and not in a salvage operation.

When measures are taken to preserve the vessels and their cargos, if any, from a common peril, these Rules shall apply.

(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.”

Although the difficulties inherent in this topic were acknowledged, the sub-group was unanimous in agreeing that simply writing tug and barge GAs out of the YARs would be inequitable and was not an acceptable option.

Ben Browne and Michael Harvey suggested that one alternative would be for the words “if by simply disconnecting” should be replaced by the words “if she disconnects” and later the words “and thereby places herself” replace the words “she is” so that the first part of Rule B (2) would read:

“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.”

On this basis the second part of Rule B (2) could either remain as in the 1994 and 2004 Rules or the amended version below could be adopted if the second part of the present Rule B (2) is felt to require clarification.

Another option is for Rule B (2) sentence 1 to be as per Michael Harvey's suggested amendment

"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;..."

And additionally instead of the words "but if the disconnection is itself a general average act the common maritime adventure continues" the paragraph would continue "...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".

In summary this option is that Rule B (2) could read:

"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".

Proposals on ports of refuge

It is noted that the present Rule B only deals with common safety issues and begs the question of how detention expenses are to be dealt with. Michael Harvey commented that there are two sides to this.

Firstly, if the tug and tow are detained at a port of refuge whilst repairs to the tow which are necessary for the safe prosecution of the voyage are effected, should the port charges and crew wages and maintenance and fuel and store referable to the tug be allowed in general average?

Secondly, if the detention is on account of repairs to the tug, should the port charges during the period of detention (and the wages and maintenance of the crew if she has one) referable to the tow be allowed in general average?

The answer to these questions seems simple to me. If we accept that, for the purpose of the rules, a voyage involving a tug and tow is deemed to constitute a common maritime adventure, then it should follow that they should be considered as a single entity for allowances under all rules and X and XI in particular. Thus the answer to both questions should be yes.

If this is agreed, what is required is an additional sub-rule that enshrines the principle without attempting to cover all eventualities. Perhaps something along the following lines:

"Where the tug and tow resort to a port or place of refuge allowances under Rules X and XI may be made in relation to both of the vessels. Allowances in general average under Rules X and XI shall cease at the time that the common maritime adventure comes to an end."

On the above basis Rule B would read:

- (1) *There is a common maritime adventure when one or more vessels are towing or pushing another vessel or vessels, provided that they are all involved in commercial activities and not in a salvage operation. When measures are taken to preserve the vessels and their cargos, if any, from a common peril, these Rules shall apply.*
- (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.*
- (3) *Where vessels involved in a common maritime adventure resort to a port or place of refuge allowances under Rules X and XI may be made in relation to all of the vessels. Allowances in general average under Rules X and XI shall cease at the time that the common maritime adventure comes to an end.*

An alternative solution was proposed by Ben Browne in respect of a possible B (3):

"If a general average act occurs allowances will continue to be made in general average in accordance with these Rules until either:

- (a) *One or more of the vessels are reported or reasonably believed to be lost; or*
- (b) *21 days has elapsed after the disconnection or the termination of any salvage services to any of the vessels involved in the common maritime adventure, whichever is the later; or*
- (c) *The time when the last of the vessels reaches a port of refuge or is reasonably believed to be lost.*

whichever is the first of these to occur."