

CMI International Working Group
On York-Antwerp Rules
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RULE F – the “Longchamp”

INTRODUCTION

1. The High Court decision in *Mitsui & Co. and others vs Beteiligungsgesellschaft LPG Tankerflotte* [2014 EWHC 3445 (Comm)] regarding the “Longchamp” upheld an adjustment of general average, arising out of seizure by Somali pirates, in which wages and fuel during the period of negotiation of the ransom were allowed as substituted expenses under Rule F of York Antwerp Rules (YARs) 1974.

Since that case other adjustments have been presented making similar allowances under Rule F when a vessel has been detained during negotiations with salvors. We understand that there has been pressure from some Shipowners to issue amended versions of piracy adjustments previously prepared prior to the “Longchamp” to allow wages etc. under Rule F on the basis of this case. It was hoped that the anticipated Appeal Court judgement would clarify many of the issues before May 2016, but it is now evident that the hearing will not take place until much later. It has therefore been suggested that the IWG and ISC participants, who have been considering possible amendments to the existing York-Antwerp Rules, should review the judgement and the issues it has raised. This paper is provided to assist that process.

2. The contents of this paper are set out under the following headings:

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A) THE “LONGCHAMP” JUDGEMENT

1. The Facts

- 1.1 The case involved a chemical tanker that was seized on 29 January 2009 by Somali pirates, and a ransom demand of US\$6m was made by the pirates. After negotiation, a final ransom of US\$1.85m was agreed on 22 March 2009 and the vessel was released. During the period of negotiation the shipowner incurred expenditure totalling US\$181,604.25 which was claimed and allowed in an adjustment as General Average.

Of the six disputed amounts, the following are relevant to the questions of principle under review:

- (2) US\$75,734.00 – crew wages during the negotiation period.
- (3) US\$70,058.70 – high risk area bonus payable to crew during the same period.
- (4) US\$ 3,315.00 – maintenance of crew during the same period.
- (5) US\$11,115.00 – bunkers consumed during the same period.

- 1.2 In his Introduction the Judge reviewed the history of General Average and the York-Antwerp Rules, noting the (negative) position taken by English law on substituted expenses (*Wilson v Bank of Victoria*, 1867) and the contrasting attractiveness of the principle to commercial interests. Where the York-Antwerp Rules apply by contract, the English law of General Average is modified by agreement (para 18.).

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- 1.3 The cargo interests appeared as Claimants seeking the repayment of cargo's proportion of these costs which they denied were properly allowable as General Average on the basis of Rule F as claimed by the Defendants. The adjustment provided the following rationale:

"Vessel's Owners and Managers together with the appointed Consultant negotiated successfully the initial demand of ransom in an amount of USD 6,000,000.00 down to an amount of USD 1,850,000.00 during a negotiation period of about 51 days, so that an amount of USD 4,150,000.00 was saved in the common interest of all property owners concerned, which would have been otherwise recoverable in General Average as per Rule A of the York-Antwerp Rules 1974. We are of the considered opinion that the expenses, which were incurred during the period of negotiation over the ransom amount, can be allowed in General Average as substituted expenses as per Rule F of the York-Antwerp Rules 1974, but only up to the amount of the General Average expense, which has been avoided."

- 1.4 The Judge (Stephen Hofmeyer Q.C., sitting as a Deputy High Court Judge) summarised the negotiations as follows (para 33):

"The negotiations were generally conducted by the Manager's CSO on behalf of the Second Defendant and by a negotiator on behalf of the pirates. At the outset, the Manager's CSO informed the pirates' negotiator that the ransom demand was too high and the pirates' negotiator assured him that the pirates wanted to settle as soon as possible. Thereafter, the Manager's CSO negotiated within parameters set by the crisis management team, namely, a target settlement figure of US\$ 1.5 million and an initial offer of US\$373,000.00. A major objective of the crisis management team was to reduce the length of the crew's captivity and to settle for what they considered to be a reasonable ransom figure. They were apparently not willing to insist on a hard and prolonged negotiation to meet the initial target settlement figure if this could not be achieved.

During the negotiations an advisor appointed by hull underwriters to assist the vessel's Managers in the negotiations informed the crisis management team that Somali pirate cases were taking more time and costing more money to settle than just a few months ago". During the same period the pirates allowed the crew to call their families. Permission was given for these calls to be made, primarily to encourage the families to apply pressure on the ship-owners. The Master also complained about deteriorating conditions on board the vessel.

After a period of negotiation which lasted in excess of 50 days, on 22 March 2009, a ransom was agreed in an amount of US\$1.85 million. The ransom was delivered in the afternoon of 27 March 2009, dropped at sea from a chartered aircraft. The pirates disembarked on 28 March 2009 and at about 08:00 hours the vessel recommenced her voyage. She proceeded first to Galle, Sri Lanka, where the crew were released and replaced."

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2. AAA Advisory Committee

2.1 In June 2010, the AAA Advisory Committee had provided an opinion that similar expenses could not be recovered under Rule A or directly under Rule XI and no contrary views were expressed in the “Longchamp” or argued by the Defendants (para. 52).

2.2 The report of the AAA Advisory Committee issued on 21 June 2012 was quoted extensively in the judgement (para 50), including the following concluding passage:

“The flaw in the argument put forward is that, before a substituted expense can be allowed in General Average, the hypothetical alternative scenario must involve greater costs which would have been allowable as GA. The hypothetical alternative in this case is that the matter might have been settled earlier for the higher amount of ransom demanded, before negotiation reduced it to the amount actually paid.

The original rationale was that the detention costs during the period of negotiation leading to the actual settlement should be treated as having been substituted for the reduction in the ransom demand achieved by the period of negotiation. The difficulty with this suggested reasoning is that, if the ransom ultimately agreed and paid is treated as the reasonable amount to have paid, then by definition any greater amount, even if settled earlier, must be regarded as unreasonable to the extent that it exceeds the amount actually settled. Thus there can be no excess which can constitute savings against which the putative substituted expenses can be allowed in General Average.

It is noted that Mr. [X] subsequently (see para. 15 in the Appendix) advised that he was in agreement “in principle with [Y]’s premise that only when the negotiations reach a point where the requested ransom would be considered “reasonable” could any argument for a substituted expense start”. This would appear to be a concession that the original adjustment was incorrect in taking the first ransom demand as the starting point for the substituted expense argument.

He then goes on to identify the difficulty of deciding at what point in the negotiation a “reasonable” amount would have been reached. The Panel did not find this to be a difficulty at all. That point is reached when the negotiation arrives at a figure which is at once the highest amount the Owners are prepared to pay and the lowest amount the pirates are prepared to accept; it is, in short, the amount for which the ransom was actually settled.

In the circumstances there can be no savings against which any detention or other costs during the negotiation can be allowed as substituted expenses.”

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2.3 The Judge noted:

“It is common ground that neither the Opinion of the Advisory Committee nor the Advisory Committee Report is binding on the Court. The Claimants contend that the Court should nevertheless have regard to them and treat them as being of some persuasive value. When pressed during oral submissions, Counsel for the Claimants, Mr Toms, did not seek to uphold the reasoning of the Advisory Committee in their Report.”

It is not immediately clear why Counsel for the Claimants took this view, given that he appeared to be advancing a similar argument.

3. The Arguments

- “57 *The Defendants' case in respect of Rule F is simply stated. The expenses were incurred in order to reduce the amount of the ransom demanded by the pirates and, accordingly, were incurred in substitution for another expense (i.e. the saving between the ransom demanded and the ransom paid) which would have been "reasonably ... incurred" and thus would have been allowable pursuant to Rule A. The Defendants further say that reasonableness must be assessed on the hypothetical assumption that the alternative course (i.e. to negotiate the amount down) was not an available option.*
58. *The Claimants disagree. Their primary argument proceeds as follows. Rule F applies only if, on the hypothesis that the substituted expenses had not been incurred, the costs or expenses that would have been incurred (i.e. the hypothetical costs and expenses) would have been allowable as general average. Costs and expenses are only allowable as general average if, inter alia, they are "reasonably ... incurred" within the meaning of Rule A of the York-Antwerp Rules 1974. If the Defendants had made payment of the pirates' initial ransom demand of US\$6 million without attempting to negotiate, the sum of US\$6 million would not have been allowable as general average expenditure because the expenditure would not have been "reasonably ... incurred". In the premises, because the original demand of US\$6 million would not, had it been paid, have been reasonably incurred, the costs and expenses in the sum of US\$181,604.25 were not substituted expenses falling within Rule F.*
59. *The Claimants make three further submissions in respect of the Rule F claim. First, they contend that Rule F is not engaged because the expenditure has not been incurred in place of the expense of a ransom payment but, rather, in addition to the expense of a ransom payment. Second, they contend that the expenditure is not "extra" within the meaning of Rule F. Third, they contend that bunkers are not recoverable under Rule F as they are not "expenses", which are recoverable under Rule F, but losses, which are not recoverable under Rule F.”*

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4. The Decision on the main issue

- “94. *The Claimants' first contention is that Rule F is not engaged because the expenditure which has been allowed in the Adjustment was not incurred in place of the expense of a ransom payment but, rather, in addition to the expense of a ransom payment. This contention can be dealt with shortly. There can be no doubt that the expenditure was incurred in substitution for the saving in ransom, i.e. the difference between the ransom initially demanded and the ransom ultimately paid. This is sufficient to engage Rule F.*
95. *Shorn of unnecessary detail, the essential question separating the parties is whether the hypothetical expenditure in substitution for which the expenses referred to in subparagraphs 42(2) to 42(5) above were incurred "would have been allowable as general average" within the meaning of Rule F. The Defendants contend that, had the hypothetical expenditure been incurred, it would have been allowable in general average. The Claimants contend that, had the hypothetical expenditure been incurred, it would not have been allowable in general average because it would not have been "reasonably ... incurred" within the meaning of Rule A. The Claimants contend that the expenditure would not have been reasonably incurred because, in the circumstances prevailing at the material time, there was a natural and logical alternative open to the Defendants, namely, negotiating a reduced ransom. The Claimants contend that the only reasonable course of action was for the ship-owner to negotiate to a lower price.*
96. *In support of their contention the Claimants relied on four particular facts and matters:*
- (1) *The initial demand was reasonably understood by the ship-owner as being a starting shot in a negotiation and, therefore, the amount of the ransom payment would inevitably be reduced by a process of negotiation.*
 - (2) *The amount of the ransom was significantly reduced by the process of negotiation.*
 - (3) *Immediate acquiescence in the sum demanded might well have led to a higher sum being demanded.*
 - (4) *At the time of the ransom demand, the amount of the demand (i.e. US\$6 million) was broadly commensurate with what the Defendants understood to be the total value of the property which would have been saved by the payment of the ransom (i.e. about US\$6.35 million). Any reasonable ship-owner would have regarded the payment of a ransom in the amount of the value of the property saved to be grossly excessive.*

The Claimants also referred to the Association of Average Adjusters' Advisory Committee Report although, ultimately, they did not seek to uphold its reasoning. I return to deal with these specific facts and matters below.

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97. *The Claimant's contentions proceed on the assumption that US\$1.85 million was a "reasonable" ransom and that US\$6 million would not have been a "reasonable" ransom, When asked by me during oral submissions where the line was to be drawn between a "reasonable" and an "unreasonable" ransom and on what basis the line falls to be drawn, Mr Toms, on behalf of the Claimant, was unable to provide cogent and satisfactory answers. As I have already indicated, he did not seek to support the reasoning of the Association of Average Adjusters' Advisory Committee Report that the only "reasonable" ransom would be the amount actually agreed and paid. In my view, he was right to make this concession. I have no difficulty in rejecting the suggestion that there is some sort of "market" in ransom payments and that the point in a negotiation at which a "reasonable" amount is reached is "when the negotiation arrives at a figure which is at once the highest amount the Owners are prepared to pay and the lowest amount the pirates are prepared to accept".*
98. *I did not find Mr Toms' inability to provide cogent and satisfactory answers to my questions at all surprising because I have the most profound difficulty with the concept of a "reasonable" ransom. At least in one sense, no ransom payment could ever be described as "reasonable" Pirates are criminals engaged in extortion and their demands are unlawful and deplorable. How can a payment extorted by pirates be described as "reasonable"? In my view, it cannot. The idea of a "reasonable ransom" is radically misconceived and the term an oxymoron.*
99. *This conclusion does not create a conundrum, as I see it, because the essential question is not whether a ransom in a particular amount is or is not "reasonable". The essential question is whether in particular circumstances the payment of a ransom was "reasonably ... incurred". Once it is appreciated that this is the appropriate question, it becomes obvious that, save in exceptional circumstances (e.g. where the amount demanded clearly exceeds the value of the property involved in the maritime adventure), it would not be reasonable to say of a ship-owner under an obligation to proceed with the utmost dispatch who is faced with a demand for a ransom made by pirates who have detained his ship and her crew and cargo that the payment of the ransom was not "reasonably ... incurred". Pirates are not reasonable people. In the minds of most right-thinking people their behaviour is seldom rational. Even if it may be said that, by January 2009, a pattern of dealing between Somali pirates and ship-owners had developed, as described by David Steel J in **Masefield AG v Amlin Corporate Member Ltd** [2010] 1 Lloyd's Rep 509 at paras. 19, 23, 25 and 26 (affirmed on appeal: [2011] 1 WLR 2012), such a pattern would not remove the potential for unreasonable, irrational and illogical behaviour. Just as, in a particular set of circumstances, it is possible that a ransom amount might be negotiated down, so it is also possible that, in a different set of circumstances, a ransom amount might end up being negotiated up. There is no means of knowing or predicting with a sufficient degree of certainty how particular negotiations will progress. For this reason, I do not accept the Claimants' assertion that it was inevitable that the amount of the ransom would be reduced by a process of negotiation.*

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100. *It is true that, with the benefit of hindsight, it can be said that the amount of the ransom in this case was significantly reduced by the process of negotiation. However, for the reasons which I have identified, it was not possible to state with reasonable certainty when the ransom demand was made that the amount of the ransom would inevitably be significantly reduced by the process of negotiation. Further, the contention that immediate acquiescence in the sum demanded might have led to a higher sum being demanded is no more than speculation.*
101. *The value of the property involved in the maritime adventure is undoubtedly a relevant factor in the assessment of whether a ransom payment was "reasonably ... incurred". If the amount of the demand clearly exceeded the reasonably understood value of the property involved in the maritime adventure, it would be unlikely that, if the payment was made, it would have been reasonably incurred. However, the same cannot be said of the situation where the amount of the demand was clearly less than the reasonably understood value of the property involved in the maritime adventure and where a saving would be made if the amount of the demand was paid.*
102. *For the reasons set out above I have come to the conclusion that it is not possibly reasonable to conclude that a ransom payment of US\$6 million would not have been "reasonably ... incurred" within the meaning of Rule F of the York-Antwerp Rules 1974.*
103. *In reaching this conclusion, I derive comfort from the fact that the rule of contribution which has been invoked in the Adjustment under consideration has its foundation in the plainest equity and that the circumstances of this case were such that natural justice requires that all should contribute to the substituted expenses incurred by the Second Defendant. The reduction in the amount of the ransom was only achieved by a process of negotiation which necessarily involved the ship-owner incurring expenditure.*
104. *For these reasons, I am unable to accept the Claimants' contentions on this issue and it is unnecessary for me to proceed further with an analysis of the question whether the hypothetical expenditure in substitution for which the expenses were incurred "would have been allowable as general average" within the meaning of Rule F.*
105. *For completeness, let me just add this. If it is legitimate, in the context of the application of Rule F, to adopt the approach which the House of Lords in *The Bijela* adopted in the context of the application of Rules X and XIV of the York-Antwerp Rules 1974, the resolution of the primary issue in this case becomes simpler. The question would become, what would have happened on the hypothetical assumption that the substitute expenses had not been incurred? The answer to that question is simple. Unless the voyage had been abandoned, which would have been an unreasonable course for the ship-owner to adopt in the circumstances prevailing when the demand was made, the amount demanded would have been paid. (The position is a fortiori if, in answering the question, it is appropriate to make the hypothetical assumption that incurring the substitute expenses was not an available option. However, in the light of the decision of the House of Lords in the *The Bijela*, it would clearly not be appropriate for me to make this hypothetical assumption.)*

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106. *The Claimants also contend that the expenditure claimed under Rule F and allowed in the Adjustment was not "extra" within the meaning of Rule F and, accordingly, that it should be disallowed for this reason. I do not agree. In the context of Rule F, as I have held above, all that is required is that the substituted expense which has been undertaken has resulted in additional financial outlay which would not ordinarily have been incurred. That is precisely what happened in this case.*

107. *Finally, in this context, it is contended on behalf of the Claimants that the cost of bunker consumption is not recoverable under Rule F because the consumption of bunkers are losses and not "expenses". I have already dismissed the suggestion that the consumption of bunkers is not the incurring of an "expense" within the meaning of Rule F. Accordingly, the consumption of bunkers was properly allowed in the Adjustment as an "additional" expense.*

5. Rule F – meaning of “extra”

The Judge had commented earlier (para. 89):

“In my view, this is to read too much into the word “extra” in Rule F. The word should be given its ordinary and natural meaning, namely, “additional”, which is the word which has been used in substitution for the word “extra” in the York-Antwerp Rules since 1994. When the change from “extra” to “additional” was introduced in 1994, it was reported that no change in meaning or practice was intended, merely clarification to express what has always been the intention and also is expressed in the French text, which uses the word “supplémentaire”. Properly construed, the phrase “extra expense” is intended to indicate no more than that the substituted course which has been undertaken has resulted in additional financial outlay which would not ordinarily have been incurred.”

6. Rule F – meaning of “expenses”

It was argued by the Claimants that the consumption of bunkers was a “loss” to Shipowners (rather than an expense) and therefore falls outside the scope of Rule F. The judge disagreed noting that the YARs refer else-where to consumption of fuel as an expense (e.g. Rule XI).

7. Summary

7.1 At para 69 the Judge set out the following requirements for an allowance under Rule F:

“69. Whilst there is no English authority in which Rule F has been applied, it is generally accepted that Rule F imposes the following requirements:

- (1) First, the Rule is concerned only with “expenses”;*
- (2) Second, it is only those expenses which can be described as “extra” which qualify;*

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- (3) *Third, there must have been an alternative course of action which, if it had been adopted, would have involved expenditure which could properly be charged to general average; and*
- (4) *Fourth, the extra expenses must have been incurred in place of the alternative course of action.”*

It is suggested that all of the above follow conventional thinking and that no new principles were applied in reaching his decision, which was essentially a question of fact arising from the circumstances of the case.

As he put it in para 99 *“The essential question is whether in particular circumstances the payment of a ransom (in the amount first demanded by the pirates) was reasonably incurred.”*

Although no expert evidence was put forward by the Claimants, the Judge had referred to *Masefield v Amlin* [2010 1 LR 509] which set out the familiar pattern of negotiation in such Somali cases. Many therefore found his decision to be surprising, since nobody should recall a Somali piracy case where the first ransom demand had been paid and experts invariably advised strongly against doing so.

With hindsight, the AAA’s Advisory Committee’s conclusion (see 2.2 above) may have given a misleading impression of exactitude which is clearly impossible in such cases. The Committee said that they found no difficulty in saying that a reasonable level of settlement could be ascertained:

“That point is reached when the negotiation arrives at a figure which is at once the highest amount the Owners are prepared to pay and the lowest amount the pirates are prepared to accept; it is, in short, the amount for which the ransom was actually settled.”

In practice, before the actual payment is agreed, the parties involved will consider whether that amount falls within a range of figures that could all be described as reasonable if a knowledgeable by-stander was invited to consider the circumstances. That range might be quite wide, as those closely involved balance the possibility of further reductions in the agreed ransom against the implications of further delays; but there are also experts available who could offer a credible opinion that a proposed settlement “looked about right”.

It remains to be seen what the Court of Appeal makes of this point, but it would seem that any decision will revolve around consideration of the factual circumstances rather than the principles to be applied.

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7.2 Meaning of “expenses”

The point at issue was simply whether the consumption of bunkers was a loss or expense and the Judge decided in favour of the latter. The point does not appear to have been argued with regard to wages but it is assumed the same conclusion would have been reached.

It is interesting to note that no other running expenses, such as insurance, management costs etc. were put forward in addition to the fuel and wages. In recent adjustments where detention expenses while negotiating with salvors have been claimed under Rule F, port charges have also been included.

7.3 Meaning of “extra”

The argument that the word “extra” in the YARs 1974 should be read as “extraordinary” appears to have been advanced chiefly by the editors of the 11th Edition of Lowndes and was set out with typical clarity by John Wilson in this 1988 Chairman’s Address. The view was not shared by many practitioners and the introduction of the word “additional” in place of “extra” in the YARs 1994, appeared to be the end of the matter. In the YARs 1974 context, the Judge had concluded (para 89):

“Properly construed, the phrase “extra expense” is intended to indicate no more than that the substituted course which has been undertaken has resulted in additional financial outlay which would not ordinarily have been incurred.”

This definition is also consistent with the invariable practice of adjusters of crediting (for example) the ordinary costs of completing a voyage before making an allowance under Rule F for transshipment expenses, so that only the “extra” cost is allowed; however that is not at issue here.

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B) RULE F

1. Background

Notwithstanding the judgement in *Wilson v Bank of Victoria* (1867), commercial interests clearly welcomed the useful idea of substituted expenses and in 1876 the Association of Average Adjusters agreed two new Rules of Practice dealing with towage and forwarding of cargo from a Port of Refuge. These were incorporated into one rule in the YARs 1890 that provided that the extra cost of towage, transshipment or forwarding, up to the amount saved, shall be payable by the parties to the adventure in proportion to the extra-ordinary expense saved. This rule (Xd) remained in the YARs 1924 but was supplemented by a new Rule F:

“Any extra 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 but only up to the amount of the general average expense avoided.”

(It will be recalled that the YARs 1924 were the first to have lettered rules setting out general principles).

2. Development in YARs

In 1950 Rule F was changed from its 1924 form in order to confirm existing practice that savings to other interests were ignored:

“Any extra 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 expenses avoided.”

In 1994 the term “extra expense” was replaced by “additional expense”.

3. Discussion

As noted above, the Judge construed the words “extra expense” in Rule F to indicate: *“no more than that the substituted course which had been undertaken has resulted in additional financial outlay which would not ordinarily have been incurred.”*

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It is suggested that the definition given above begs the question of what expenses are in fact “ordinarily incurred” on a voyage, when it has long been recognised that *“the services of the crew during the whole voyage are due to the cargo, being, like the use of the ship itself, purchased by the engagement to pay freight. The shipowner must take the chance of a longer or shorter voyage”* (Lowndes Law of General Average, 1888). This principle still holds good, subject to two possible provisos: firstly, that the early debates about crew wages took place when crews were paid off at the end of each voyage rather than forming a continuous overhead unless the ship is not laid up; secondly, that the English law position on some of the issues must be viewed as subordinate to the YARs themselves.

It is probably fair to say that many practitioners felt unhappy with the “Longchamp” case, not only because of the decision on the facts, but also because they felt that the running expenses of a vessel arising from a delay in the voyage did not “belong” in general average if they were not specifically provided for under Rule XI. Their analysis would probably be that there are actually three types of “expenses”:

a) “ordinary” expenses

These are the expenses that a Shipowner would have in mind when calculating the anticipated return on freight or hire for a voyage, on the basis of “all going well”.

b) “enhanced ordinary” expenses

If all does not go well and the voyage is prolonged due to bad weather, strikes or other contingencies, the Shipowner’s expenses in earning freight will increase, eating into or perhaps extinguishing any profit on the voyage. This is a commercial risk that the Shipowner takes.

c) “extra” expenses

Some of the most common types of expenditure claimed under Rule F, namely transshipment and towage to destination, fall clearly outside the Shipowner’s obligations under the contract of affreightment (absent any special terms) so that it is easy to identify them as costs not “ordinarily incurred”.

However many sacrifices and expenses commonly allowed under the YARs could be said to be in fulfilment of safeguarding the ship and cargo, which is a contractual obligation, but they fall within the term “extra-ordinary” used in Rule A. See *Hobhouse J in the “Bijela”* (1992, 1 LR 637):

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“Accordingly the ‘prima facie’ position is that the expenses of repair were particular average expenses incurred by the Shipowners in the course of fulfilling their contractual obligations under the contracts of carriage. The existence of the obligation is not decisive of the question before me. Many types of general average expenditure are incurred by the master in the fulfilment of his duties to the interests involved in common adventure, including to the cargo-owners, and the function of general average is to provide a superimposed scheme for the sharing of the burden of that expenditure in an equitable fashion. It is simply the starting point.”

See also Lowndes para F 20 (13th ed), also commenting on the “Bijela”:

“The present editors continue in the view that it is not necessary for the course of action to fall completely outside the contractual obligations; if the intention were otherwise the more generalised terms of r.F would be largely unnecessary. However, in the context of the rule an “additional” expense must at least be something that goes beyond the ordinary voyage expenses that might have been contemplated when the common adventure began. Those anticipated voyage expenses would normally include some element for contingencies, such as additional fuel consumed during bad weather or expenses arising out of problems such as port congestion. Such costs of earning freight may be enhanced by factors outside the shipowner’s control but this is a commercial risk that is taken as part of earning freight. The requirement to repair accidental damage to the ship and complete the voyage in a timely manner also remains part of the obligations under the contract of affreightment so that to qualify under r.F as “additional” any expenses incurred in this regard must involve something that is beyond the normal or standard means of conducting that repair. In practice, one is therefore left in some instances to decide questions on the basis of degree and impression.”

It should be noted that what is considered “ordinary” can change over time. In the past, the extra costs of airfreight over seafreight might have been considered as a Rule F allowance on the basis of Rule XI expenses saved. However for many years now, use of airfreight is considered to be the norm and the full cost is born by the hull and machinery insurer.

4. If the correct construction of the words “extra expense” is that anything other than a) above is “extra” and can be included, the question arises as to why only wages and bunkers have been put forward. If, in particular, wages are admissible then it is difficult to see why other running costs such as insurance and management charges should not be included. The fact that wages are allowed in specific circumstances under Rule XI does not seem to provide the answer, because Rule F is concerned with expenses that are not allowable as general average.

Further, it would also be open to any party to the adventure to put forward expenses of a similar kind.

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C) RULE C

1. Background

If it is considered that wages and bunkers (consumed while the vessel is detained under circumstances not covered by Rule XI) and perhaps other running costs can potentially be allowed as “extra” or “additional” expenses under Rule F in appropriate circumstances, the question then arises as to whether the provisions of Rule C prevent such allowances. There is a subsidiary issue of whether the answer to this question is different under YARs 1974 and YARs 1994.

2. Development in YARs

Since its introduction in 1924, Rule C has appeared in the following forms.

The first paragraph remains the same in all versions:

1924, 1950, 1974, 1994, 2004

Only such losses, damages or expenses which are the direct consequence of the general average act shall be allowed as general average.

Variations in the other paragraphs are:

1924: *Damage or loss sustained by the ship or cargo through delay on the voyage, and indirect loss from the same cause, such as demurrage and loss of market, shall not be admitted as general average.*

1950: *Loss or damage sustained by the ship or cargo through delay, whether on the voyage or subsequently, such as demurrage, and any indirect loss whatsoever, such as loss of market, shall not be admitted as general average.*

1974: *Loss or damage sustained by the ship or cargo through delay, whether on the voyage or subsequently, such as demurrage, and any indirect loss whatsoever, such as loss of market, shall not be admitted as general average.*

1994: *In no case shall there be any allowance in general average for losses, damages or expenses incurred in respect of damage to the environment or in consequence of the escape or release of the pollutant substances from the property involved in the common maritime adventure.*

Demurrage, loss of market, and any loss or damage sustained or expense incurred by reason of delay, whether on the voyage or subsequently, and any indirect loss whatsoever, shall not be admitted as general average.

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With regard to these changes the following comments are to be found in Lowndes (13th ed):

“1950:

Under the 1924 Rule the express exclusion of loss by delay was limited to delay on the voyage. In Wetherall v The London Assurance where the shipowner claimed loss by detention of the vessel during repairs of general average effected after the end of the voyage, it was held that the rule did not exclude such a claim. In other countries, however, it had been held that the rule did, by clear implication, exclude a claim for loss by delay after the end of the voyage. In order to resolve these doubts, the words on the voyage in the second paragraph of the rule were changed to on the voyage or subsequently.

1994:

Apart from the new paragraph dealing with pollution liabilities, certain improvements of a drafting nature were made in the rule. In particular the discrepancy between the apparent scope of the first paragraph (which refers to losses, damages or expenses) and the last paragraph (which referred only to loss or damage) has been eliminated; and the somewhat misleading reference to loss of market as an example of indirect loss has been altered.”

The lettered rules first appeared in 1924 at the Stockholm Conference which was convened with the objectives of:

- “(1) A revision of the York Antwerp Rules to bring them into line with modern requirements;*
- (2) the embodiment in the revised rules of a general declaration of the principles underlying the rules of practice therein contained, so that such principles may be accepted and applied in those cases which are not provided for in such rules.”*

The essentials of the lettered Rules have remained largely unchanged; addition of the Rule of Interpretation in 1950 made it clear that the numbered rules had primacy over the lettered rules. However Lowndes PRE.09 (13th ed) includes the following:

“If a claim in general average can be established under one of the numbered rules, it does not follow that all the lettered rules must be disregarded in relation to that claim. In the first place, if a claim is advanced under one of the numbered rules “it is the wording of the numbered rule which has to be construed but it should be construed taking into account the general principles of the York-Antwerp Rules as stated in the lettered Rules. (Hobhouse J. in the “Bijela”) Secondly, the Rule of Interpretation requires that the numbered rules shall override the lettered rules only to the extent that there is inconsistency between them in any particular case. It should not be assumed that inconsistency exists, and an attempt should be made to reconcile all the provisions of the Rules so far as possible.”

RULE F – the “Longchamp”

3. Discussion

Although the remarks of Hobhouse J and the editors of Lowndes suggest a need to take account of general principles, there are no obvious authorities to help with the matter of whether any lettered rule has priority over another, and the Rule of Interpretation is silent on the point. However, it is evident that there must be a relationship between the lettered Rules so that they do not function independently. For example:

- Rule D applies to all cases, as do the first two paragraphs of Rule G.
- Rule E is applicable to all claims put forward whether under lettered or numbered Rules.
- The Rule C (first paragraph) test of direct consequences can be applied to claims under Rule A or under the numbered Rules.

Should it therefore be assumed that the final paragraph of Rule C which also potentially applies to a claim under Rule A, must equally be applicable to Rule F?

There are two schools of thought. The first would argue that the intention of the lettered Rules is to provide a coherent set of principles for the adjustment of G.A; these principles seek to reconcile and embody different national practices as far as possible, but in any event provide uniformity by being contractually incorporated. The general approach has always been to exclude losses and expenses due to delay from general average because:

- many were matters that formed part of the Shipowner’s commercial risk.
- the effects of delay were felt by all parties (whether in the forms of losses or additional expense).
- quantifying the effects of delay would be difficult and time consuming.

This view is therefore that it makes no sense to allow expenses incurred during a delay in the voyage through the “back door” of Rule F.

RULE F – the “Longchamp”

The contrary argument is quite simply that one cannot ignore the commercial objective of Rule F which is to save time and expense for all parties by incurring any expenses which are not themselves general average. If any of the expenses arise from a delay during the voyage, this is immaterial if G.A savings are achieved.

D) EXAMPLES

At this point, it may assist to broaden the range of examples where these issues may arise.

1. A piracy example

Essentially the “Longchamp” scenario:

- a) Pirates make an initial ransom demand.
- b) The Shipowner incurs expenses while the ransom is successfully negotiated downwards, consisting of fuel consumed and crew wages which are allowed in Rule F in substitution for the alternative of paying the first demand.
- c) The shipowner also continues to incur normal running costs of management fees, insurance and finance.
- d) (i) The vessel is put off-hire during the detention period so that the owner loses hire during that period or,

(ii) The terms of the charter party are (as happened in some earlier Somali cases) such that the vessel remains in hire during the period, so that the time charterer pays for fuel, wages and hire.
- e) The cargo receiver requires the cargo for a major project and has to keep some construction equipment on standby and purchase some replacement items to reduce project downtime.

2. A salvage example

A vessel is salvaged by a Canal Authority that is notorious for making ambitious demands in respect of salvage services and taking time over negotiations before releasing the vessel.

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While the negotiations proceed over a period of 20 days, the same expenses as outlined in example 1 are incurred by the parties, with the addition of port charges etc. as the vessel waits at anchorage.

3. The temporary repair example

A loaded vessel sustains damage on the USA West Coast on passage to China. Temporary repairs in the USA are allowed under Rule XIV in view of significant savings achieved by the avoidance of discharging, storing and reloading cargo. Because of the nature of the temporary repair, the vessel cannot proceed at normal speed and Class impose certain routing requirements, extending the distance sailed by 20%. The following additional costs are incurred by the Shipowner:

- a) Additional wages
- b) Additional fuel consumed
- c) A claim from the time charterer for reduction in hire due to slow steaming and the longer distance sailed.

If the vessel remained on hire, claims for b) and c) could equally be presented by the time charterer. As with example 1, the Shipowner will have also incurred extra operating overheads in addition to wages, and cargo receivers may have to incur additional expenses, perhaps re-arranging inland transport.

E) SUMMARY

- 1) Examples 1 and 2 require a preliminary debate on the facts as to whether the hypothetical alternative of paying the level of ransom or salvage that is first demanded can be considered reasonable and therefore potentially allowable as G.A.

The third example is more akin to the “Bijela” in that the alternative course of action (in that case doing permanent repairs at New York) being allowed as G.A could be taken as read.

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It is difficult to envisage any change to the drafting of Rule F that would enhance the process involved in reaching this preliminary determination and perhaps the law of unintended consequences would loom large over any proposed amendments.

- 2) After that preliminary stage, all other issues identified above relate to quantum – what can be included under Rule F before you apply the ‘cap’ of what would otherwise have been allowable as G.A?

The answer to this question would appear to be governed by two factors:

- Firstly, what can be considered to be an “extra” (YARs 1974) or “additional” (YARs 1994) expense.
- Secondly, whether and to what extent the provisions of Rule C’s exclusions [relating to “Loss or damage...through delay...and any indirect loss whatsoever” (YARs 1974) or “any loss or damage sustained or expense incurred by reason of delay” (YARs 1994)] have on that figure.

With regard to the second factor, the opposing ends of the spectrum could be simply described as:

- Considering Rule C to be irrelevant.
- Applying the terms of Rule C similarly to Rule F.

Current practice (and opinions do differ as has been seen by the reaction to the “Longchamp”) is probably more nuanced than either alternative. For example if a parcel of cargo is put in storage, so that a ship can sail with only temporary repairs, and the cargo has to wait a month for a suitable transshipment vessel, the storage costs would very probably be included in the Rule F calculations although arising from a delay. The whole Rule F approach is based on commercial expediency, and flexibility is an important requirement to achieve this objective; not forgetting that the ‘cap’ represented by the hypothetical substitute G.A allowances provides an overall safeguard.

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Historically, the view of Hobhouse J that general principles should not be lost sight of when constructing any particular Rule, tends to set a boundary in the way Rule F allowances are normally made by adjusters so that the spirit, if not the letter, of Rule C is kept in mind. Such boundaries may have been exceeded in the “Longchamp” to the extent of fuel and wages, but as noted previously there was no attempt to bring in other running expenses in a way that might have been strictly logical.

Given the commercial nature of Rule F it is perhaps up to the main stakeholders to consider whether the present position is satisfactory or whether amendments need to be considered regarding the issues of quantum outlined in this paper.

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