

Notes for the full membership of meetings of the GA Sub - Committee of the Association of Average Adjusters held at 14.30 on 5th July and at 14.30 on 24th July 2013

Present were:

Keith Jones
Richard Cornah
Richard Sarll (on 5th July)
Keith Sturges
John Macdonald (Convener)

Willum Richards's notes on the CMI Questionnaire were before the committee.

The Sub - Committee's views on the CMI Questionnaire were as follows:

1. The Big Picture

1.1.a) No

1.2.a) No

b) No

2. Rotterdam Rules

a) & b) The Rotterdam Rules seem to the Sub - Committee to affect only the capacity of creditors in GA to recover the contributions otherwise due to them, and to have little bearing on the subject matter dealt with in the YAR viz: whether a GA situation exists, and, if so, what the proper GA allowances should be, which parties should contribute to them, and on what basis.

3. Definitions

a) Pace the *Trade Green*, the Sub - Committee felt that practitioners were on the whole fairly clear on the meaning of terms used in the YAR. They consider that a definition section would add to the bulk of the Rules and would run the risk of creating confusion rather than resolving it.

b) Clarification, where considered necessary, might better be included in the specific Rules where it is thought to be required.

4. Scope

The Sub - Committee was firmly of the view that any temptation to try and make the YAR an all embracing and self contained code ought to be resisted. If contracting parties fear that the courts dealing with their potential disputes have limited knowledge of GA, their difficulty may perhaps better be dealt with by amendment of their jurisdiction clauses.

5. Format

The tidying up provisions inserted in the YAR 2004 should be maintained.

6. Dispute Resolution

Both the AAA and the AMD have in their Rules arrangements for resolving disputes concerning GA on the relatively rare occasions when matters are not resolved by negotiation and discussion between parties. It seems unlikely that CMI would be easily able to arrange for a tribunal of greater expertise than exists within these bodies.

7. Enforcement

The members of the Sub - Committee were wary of including any provision concerning security or enforcement within the YAR themselves, because of the likelihood of conflicts with the law at destination or provided for in the contracts of affreightment. They feel, however, that the subject might benefit from further discussion if any of the parties involved had strong views on the matter.

8. Absorption Clauses

Absorption Clauses have successfully played a significant role in avoiding uneconomic security collections, and their near universal appearance in hull policies has been welcomed by this Association. However, such Clauses appeared to the Sub - Committee to concern solely questions of insurance, and, as such, to lie outside the scope of the YAR.

9. Piracy

- a) The Sub - Committee considered that whether or not piracy and ransom lay within GA was already adequately dealt with in the existing YAR.
- b) The Sub - Committee noted that, in English Law, the payment of a ransom to pirates was not unlawful, unless it constituted a payment to terrorists. The obtaining of this kind of information from other jurisdictions would undoubtedly be beneficial, but may not have any direct bearing on the text of YAR.

10. Costs

The Sub - Committee considered that the opportunity afforded for forthcoming CMI meetings to discuss these matters should be taken - particularly in relation to the costs of collecting security - but did not feel it had a bearing on the text of the YAR.

11. Other matters

Section 2. Introductory Rules

1. Rule of Interpretation

The Sub - Committee does not favour any rewording of this Rule

2. Rule Paramount

The Sub - Committee does not favour any rewording of this Rule which has not been seen to give rise to any difficulties in practice, given that it is consistent with the broad requirements of Rule A. It appears to be generally understood that the test of “reasonableness” should be applied on the basis of circumstances prevailing at the time, and without undue benefit of hindsight.

The problem of the “innocent” cargo interest has not been encountered in practice by any of the members of the Sub Committee.

3. Rule of Application

The Sub - Committee noted that the question of inserting such a Rule in the YAR had arisen only as a result of the unpopularity of the 2004 Rules, and hoped the 2016 Rules would attract sufficient mutual agreement between the parties to make such a Rule unnecessary.

Section 3. Lettered Rules

1. Rule A

No change

2. Rule B

2.1 There was no uniform view on the desirability of retaining the current Rule B. Further discussions may be required to determine whether problems have been encountered internationally with the “common safety” aspects of Rule B, and whether express provisions need to be made in Rule B or Rule XI regarding the treatment of detention expenses.

2.2 Ditto

3. Rule C

3.1 No – it has long been agreed that financial losses are too remote and difficult to quantify. The additional costs and room for dispute if such losses were to be considered far outweigh the inequity that may sometimes occur.

3.2.a) Yes

3.2.b) Yes

4. Rule D

No amendment to the present text.

There was, however, some discussion of whether this might be an appropriate location for a further paragraph aimed at emphasising the requirement for parties to the adventure receiving recoveries – whether from parties inside or outside the common adventure – in respect of items of general average sacrifice or expenditure to report such recoveries to the average adjuster so that they may be apportioned between parties who had paid a contribution.

5. Rule E

5.1 The length of limitation periods is a matter for commercial interests

5.2 Para 3 should be amended so as not to restart the limitation period

6. Rule F

6.1 No

6.2. a) Having considered the question at some length, the Sub - Committee concluded that the Rule should not be amended to include “loss”, as this might lead to unintended consequences.

6.2.b) No

6.3 The Sub - Committee doubted whether a provision allowing the costs of forwarding or of towage to destination, without regard to savings in GA, would find favour with cargo interests, but that such a provision might perhaps be inserted in individual contracts of carriage, if it was felt to be desirable by the parties and their insurers.

7. Rule G

7.1 The Sub - Committee is in general happy with the present non - separation provisions in this Rule, and cannot identify a better formula to determine the reasonable cut off point for allowances.

7.2 The Sub - Committee believes that the normal practice of average adjusters is to terminate non-separation allowances when the vessel actually begins to trade following her repairs. They note that the actual wording of the Rule (and of the original non-separation agreement) suggests that such allowances should continue until she would - hypothetically - have returned to her original port of refuge (if she had indeed removed from there to do repairs), reloaded her cargo and regained position, but, being conscious of the fact that, in reality the vessel had actually again begun to trade some while before, decline to grant the shipowner a windfall profit, and therefore normally terminate the allowances at that earlier point. An alternative method of adjustment, short-circuited by the above practice, would be to make the full allowance on the basis of the non-separation wording, and then credit back the earnings of the vessel during the intervening period. The Sub - Committee concluded that there may well be occasions when the circumstances of an individual case call for a different solution and would therefore not wish to suggest any amendment to the existing wording which might deprive them of the necessary discretion in such cases.

7.3 No problems in practice

7.4 The Sub - Committee notes that the 13th Edition of Lowndes & Rudolf prefers 7.4.a). They would prefer no change to the wording in this respect.

7.5 The Sub - Committee could identify no “equitable cut off point for such allowances” and therefore suggests that the Rule remain unchanged.

7.6 The Sub Committee discussed the proposition that the NSA and Bigham Clause wording in Rule G might better give effect to the decision in the “City of Colombo” by amending the final para of the 1994 Rule as follows:

“The proportion attaching to cargo of the allowances made in general average *by reason of cargo’s proportion of the costs of forwarding their merchandise under the terms of Rule F and* by reason of applying the third paragraph of this Rule shall not exceed the cost which would have been borne by the owners of cargo if the cargo had been forwarded at their expense”

Discussion of this suggestion was inconclusive.

Section 4 - Numbered Rules

1. Rule I

No change

2. Rule II

No change

3. Rule III

No change

4. Rule IV

The Sub - Committee has no objection to the replacement of these picturesque archaisms if suitable wording can be found. The principle seems clear; therefore no need to change wording.

5. Rule V

The Sub - Committee felt that, in the campaign against archaism, it might be thought desirable that “run on shore” should become “run aground”, and “driven on shore” should become “driven aground”. Otherwise, no change.

6. Rule VI

The Sub - Committee felt that it had little input in what it regarded as essentially a political debate. However:

6.1.a) Option iv)

6.1.b) None identified

6.1.c) Yes

6.2.a) Not necessary

6.2.b) Not clear how this would encourage co-operation.

7. Rule VII

Yes

8. Rule VIII

8.a) Yes

8.b) Yes

9. Rule IX

No issues

10. Rule X

10.1 The Sub Committee considered no change was needed

10.2 The Sub Committee considered the Rule was well enough understood by average adjusters, but if commercial interests and insurers felt express guidance was necessary or desirable there should be further discussion on this matter.

11. Rule XI

11.1 The Sub committee considered the 1994 version of the Rule should be retained but suggested that, for greater clarity the following addition might be made to it:

“When a ship shall have entered or been detained in any port or place in consequence of accident, sacrifice or other extraordinary circumstances which render that **entry and/or detention** necessary for the common safety, or to enable damage....”

11.2 The Sub Committee considered that, as a result of the decision in the *Trade Green*, para 3 of the Rule would benefit from amendment to confirm normal adjusting practice.

They also thought that consideration might be given to the possibility of amending para 5 of XI (b) to avoid problems experienced in deciding when a “voyage “ should be regarded as terminated if the common adventure in a particular case involved only a shipowner and his time charterer.

11.3 The Sub committee’s view was that no change was needed

11.4 Ditto

11.5.a) The Sub Committee thought this was not really a question for average adjusters, given that it reflects a compromise between property and liability insurers.

11.5.b) See d) below. In all other aspects the Sub Committee noted that consideration of Rule XI(d) often involved significant sums and that therefore some disputes were inevitable. However, attempts to amend the wording might prove counter-productive and give rise to fresh differences in interpretation.

11.5.c) Agree

11.5.d) Sub Rule XI(d)(iv) should be amended to read:

“necessarily in connection with the **handling**, discharging, storing or reloading of cargo **or bunkers** whenever the cost of those operations is admissible as general average”.

12. Rule XII

No change

13. Rule XIII

No change

14. Rule XIV

14.1. The 2004 amendment should be retained since this was felt to produce a more equitable result when the cost of particular average repairs can differ so widely according to location.

14.2 No difficulties in practice noted

15. Rule XV

No issues

16. Rule XVI

The Sub Committee suggests the insertion of the following sentence after the words, “shipped value” in para 1:

“Such commercial invoice shall be deemed to reflect the value at the time of discharge irrespective of the place of final delivery under the contract of carriage”

17. Rule XVII

The Sub Committee further suggests the insertion of the following sentence after the words, “shipped value” in para 1:

“Such commercial invoice shall be deemed to reflect the value at the time of discharge irrespective of the place of final delivery under the contract of carriage”

17.1 The Sub Committee felt that it was not necessary to enshrine the discretion they now exercise in a specific provision in the Rules.

17.2 Having considered various scenarios capable of giving rise to possible inequities (eg Christmas trees arriving in January), the Sub Committee took the view that the introductory words of the Rule (enjoining the average adjuster to adopt the “actual net values of the property”) may be employed to justify the exercise of discretion in cases in which a strict adherence to the invoice value is considered to result in inequity. The Sub Committee noted that the introduction of the invoice value as the yardstick in 1974 was intended as a measure to reduce time and costs rather than a departure from the general principle of property contributing on the basis of its arrived value. They considered that this discretion should

remain in place but that any attempt to codify individual possible exceptions might prove to be unnecessarily prescriptive.

18. Rule XVIII

No issues

19. Rule XIX

No issues

20. Rule XX

The Sub Committee considered that this was a question for commercial interests

21. Rule XXI

The Sub Committee was content that the interest rate to be applied by YAR should be fixed annually by a working group of CMI but felt the following changes were necessary:

- a. The criteria for arriving at the rate should aim not at what might be available to a “shipowner of good credit rating” but to the shipping industry in general, and ought, in equity, to also take into account additional costs of raising money, such as arrangement fees etc.
- b. The commercial realism of the working group should be encouraged by including in its membership members of the ship owning, cargo owning and banking professions

The Sub Committee further considered the possibility of using SDRs as the currency of adjustment but concluded that the choice of an adjustment currency might better be left to the insertion of such a provision in the currency clause in the contract documents.

22. Rule XXII

The Sub Committee agreed that the reference to joint accounts had become an anachronism. They suggested that the first sentence of the Rule should conclude as follows:

“...such deposits shall be paid without any delay into a special account *to be held by the average adjuster on behalf of general average interests*. The sum so deposited...”

23. Rule XXIII

The Sub Committee, while not unduly enthusiastic about this provision, felt it might result in a greater degree of certainty, and could be retained.

