NORTON ROSE FULBRIGHT

Transport, Trade and Logistics Update

General average: Court holds that more progressive Rules apply
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General Average, simply put, is the contribution by the parties to a maritime adventure to extraordinary costs incurred by a carrier to get the cargo to its intended port of discharge. It is one of those maritime minefields that helps set marine insurance apart. The are often born out of spectacular casualties (*MSC Napoli*, *Hanjin Pennsylvania*), acts of piracy (could a ransom payment to release the ship and cargo be recovered as part of a GA?) or common or garden engine breakdowns. As and when the vessel arrives at its intended port or place of refuge, cargo interests, charterers and their insurers are then faced with further drama as shipowners refuse to release cargo unless they are secured by way of general average bonds and guarantees. The wait for the various adjustments to determine what contributions are required from the various parties could take years to resolve.

Fortunately, the dark arts often associated with General Average (GA) have been regulated by a series of rules dating back to the 1880's – the York-Antwerp Rules (YAR). Various iterations of the YAR each attempted to reflect changes in shipping practice, or developments elsewhere in other areas of shipping law, such as salvage.

Like any set of rules that never remains static, care needs to be taken when parties conclude their agreements to make sure that there is no ambiguity as to which version of the YAR applied to the particular contract of carriage.

The issue has now been addressed in the English courts in the *Star Antares* reported as [2023] EWHC 2784 (Comm).

The court had to decide which version of the York-Antwerp Rules ('YAR') is applicable to a 2021 event pursuant to clause (3) of the standard Congenbill 1994 form – a very common form of charterparty for the carriage of bulk products - that provided:

> "General average shall be adjusted, stated and settled according to York-Antwerp Rules 1994, or any subsequent modification thereof, in London unless another place is agreed in the Charter Party".

The Claimant (the contractual carrier) contended that it is the York-Antwerp Rules 1994 ('the YAR 1994').

The Defendants (insurers of the cargo) contended that it is the York-Antwerp Rules 2016 ('the YAR 2016').

The Claimant carrier issued seven bills of lading, on the Congenbill 1994 form, acknowledging shipment on its vessel, the mv *Star Antares*, of cargoes of ferro chrome loaded in Maputo and Richards Bay.

As the vessel was proceeding to her second discharge port, Luoyan in China, on 3 November 2021, she allegedly struck an unknown submerged object, sustaining damage. General Average was declared on 19 November 2021 by Independent Average Adjusters Ltd.

The cargo insurers issued Average Guarantees dated 26 November 2021 to the Claimant, undertaking to pay the Claimant or the Claimant's average adjusters any contribution to general average and/or salvage and/or special charges which might be legally and properly due and payable in respect of the goods covered by the Bills of Lading.

The carrier referred to numerous textbook authorities and industry advices on the YAR. These authorities and advices all gave an opinion that the YAR 2016 was not a modification of YAR 1994, but an entirely new set of rules. They submitted that clause (3) of the Congenbill 1994 form would have been understood in the relevant trade at the time of the agreement as applying YAR 1994. If the parties had intended to incorporate YAR 2016, rather than YAR 1994, they would either have used the Congenbill 2016 form, or would have amended clause (3) of the Congenbill 1994 form to incorporate YAR 2016 instead.

The insurers, in turn, relied upon the following uncontested factual matrix:

1 Shipowners and charterers are in the habit of using contract wordings for many years, even after newer wordings have been published. There could have been no assurance, when drafting a wording such as Congenbill 1994, that the market would only use it until such time as an updated wording became available.

2 The YAR constitutes a code for regulating the adjustment of general average. The first version of the Rules appeared in 1877, their aim being to harmonize the treatment of general average by the principal seafaring nations.

3 The YAR have been periodically revised, with further versions being published in 1890, 1924, 1950, 1974, 1994, 2004 and 2016. At least since 1950, the revisions have been overseen by Comite Maritime International (**CMI**). Following a consultation process, the new version will be approved at a CMI meeting and published in the CMI yearbook.

4 In addition to these further versions, an amended version of the 1974 Rules was issued in 1990, in order to take account of the Salvage Convention 1989.

5 Apart from that specific instance, the periodic updating of the YAR is, in general terms, to be explained by a desire for the adjustment of general average to march in step with developments in shipborne commerce and to suit the changing expectations of ship and cargo interests.

Insurers argued that, against that background, when the Congenbill 1994 was drafted, the parties would reasonably have anticipated that there would have been a further version of the YAR before the Congenbill was updated or fell out of use. The drafters would have considered it desirable for the wording to incorporate the latest version of the YAR, not one that was outdated, for otherwise developments in shipborne commerce would not be properly reflected.

The Court agreed that the insurer’s submission that the word 'modification' ordinarily signifies a change which does not alter the essential nature or character of the thing modified. When used in the context of a written instrument or set of Rules it has a wider connotation than 'amendment'. The clause contains the words 'any subsequent modification'. The use of 'any' emphasises that it is all 'modifications' to the YAR 1994 which are to be incorporated.

The words are reasonably to be understood as capable of applying to a new version of the Rules. The court did not consider that a reasonable person possessed of that background knowledge, and without regard to the materials relied on by the carrier, would understand the parties to have meant only amendments to the 1994 version of the Rules which were identified as such, rather than a new version of the Rules that included some changed provisions. A reasonable person would not, in the court’s view, have understood the parties to have been drawing that somewhat technical distinction, without its being expressly articulated. On the contrary, had the narrower effect been intended the parties would not have used the words 'any … modification'.

There is no difficulty, the court found, as a matter of the ordinary use of language, in describing YAR 2004 or YAR 2016 as 'modifications' of YAR 1994. Each was produced by the same body, was directed to the same end, and contained many of the same provisions, but introduced some changes.

With regard to the reliance on textbooks as authorities, the judge commented that “even assuming that one should regard this text book material as being known to the parties at the time of contracting, it does not point to the conclusion that the relevant words would have been reasonably understood to have the meaning for which the [carrier] contends. The reasonable person considering what the parties meant, would have regarded these expressions of opinion as just that; and would rather have understood the parties to have meant what the words, taken in the context of what I have called the 'uncontroversial' factual matrix, conveyed.”

The Judge further commented that: “In my judgment, that meaning is the one for which the Defendants contend. The relevant words would have incorporated into a putative contract comparable to the contract(s) at issue here the YAR 2004 after their adoption and before the adoption of the YAR 2016. Those words are effective to have incorporated the YAR 2016 into the contract(s) with which the present case is concerned”.

So which clauses are incorporated as “modifications”? The Court said in this regard: “…, I do not draw a distinction between the effect of the relevant words on the incorporation of the YAR 2004 and YAR 2016. But, as [insurers] submitted, the incorporation of the YAR 2016 is, if anything, the stronger case, as those Rules command a broader consensus, Baltic and International Maritime Council (**BIMCO**) has not made about them statements similar to those which it made about YAR 2004 which I have referred to above, and the arguments that they are not at least a 'modification' of the YAR 1994 are weaker.”

The Court therefore held that the relevant general average adjustment was to be conducted under YAR 2016.

The importance of this decision, apart from the clarity it brings, is that the 2016 YA Rules are a considerable improvement on the 1994 YA Rules and on the widely ignored 2004 YA Rules. Perceived as owner-friendly, expensive to adjust, and allowing adjustments to drag on for up to a decade, the 1994 Rules are out of step with commercial reality.

The 2016 Rules, while preserving the underlying principles of GA, do make adjustments more expeditious and certain.

On the timing issue, particulars of the value and particulars in support of a claim to GA contributions must be provided within 12 months failing which the adjuster is empowered to make an estimate. Parties pursuing recovery have two months from receipt of the recovery to notify the adjuster. The party claiming GA (usually the shipowner) has 12 months from the issue of the adjustment to commence proceedings against contributing parties who have not yet paid and, in addition, these proceedings must be brought within six years of the termination of the voyage giving rise to the declaration of GA.

The 2016 Rules also seek to settle the differing approaches to salvage taken by the 1994 and 2004 Rules. Shipowners and cargo interests who have paid a salvage award separately are entitled to seek a reduction in their GA contributory value. This used to require a lengthy and expensive re-apportionment of values. That Rule has been ameliorated by providing that salvage awards are only applicable in GA if certain criteria are met, and those criteria are significant. This leaves considerable discretion in the hands of the adjuster, but does reduce the delay and cost of re-apportionment.

The adjuster has been given far more discretion with the term “significant” appearing in several of the Rules relating to values, GA expenses and allowances.

In addition, clarity has been provided on the Bigham clause which limits cargo owners’ contribution to an amount equivalent to the costs which the cargo owners would have paid in order to forward the cargo to final destination at their own expense. This flows from the incorporation of a non-separation agreement in the GA bonds and guarantees which provide that even if the cargo is forwarded by the owner/carrier on another vessel, the contract of carriage is treated as having been completed by the original carrying vessel. The 2016 Rules have clarified that this cap on contributions applies only to expenses allowed under the non-separation agreement and not to all of the expenses. Although this increases the exposure of cargo interests by allowing detention and cargo handling costs to fall outside the Bigham limitation, it does create certainty.

The 2016 Rules have abolished the 2% commission charged on the provision of cash deposits and has capped interest at SOFR plus 4%.

The South African insurance market has dealt with numerous casualties giving rise to GA, some of which were significant including the mv *MSC Napoli*, the mv *APL Austria* and the mv *Kota Kado*. The last of these resulted in GA payments of 100% of the value of the saved cargo. The first of these which took six years to finalise, was reopened two years after that finalisation. Fortunately, this is in order to make a partial refund of GA contributions as a result of a recovery by shipowners and charterers. We have been involved in every casualty affecting the South African marine insurance market over the last several decades and are well positioned to provide guidance and assistance when dealing with the little understood rules that apply to an adjustment. Fortunately, as a result of this judgment that guidance, in most cases, will relate to a relatively commercially-minded set of YA Rules.