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Cargo Insurers' view on the 2016 revision of The York-Antwerp Rules

By

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Why have G.A.?

“The Rhodian law, the Digest of Justinian, the Court of Admiralty and the majority of common law judges have all accepted that general average contribution is based upon “common principles of justice”. “Natural justice” requires that all should contribute to indemnify for the loss of property which is sacrificed by one in order that the whole adventure may be saved, for one interested party should not be unjustly enriched at the expense of another.”

Goff & Jones: The Law of Restitution 6th Ed

Why have G.A.?

General Average is a “*nest of fraud and abuses, a lurking place for peculation and waste. It was, in its origin, a cumbrous form of partial insurance but the necessity for its use is rendered obsolete by modern underwriting.*”

Mr. Joseph Hillman, Lloyd's in a letter to The Times in 1873

Why have G.A.?

“In 1877 our largest steamers did not exceed 5,000 tons. Today we have steamers of 45,000 tons and carriers of 20,000 tons of cargo. It is not an uncommon thing, especially in our coastwise trade that adjusters have to deal with 3,000 or more bills of lading in respect of a single cargo. The time, trouble, expense and delay involved are out of all proportion to the benefit achieved and a system, equitable in theory and in other times valuable in practice has become out of harmony with the spirit of the age”.

Mr H.K. Fowler, Chairman of the AAA of the USA in 1913

Why have G.A.?

“Commerce by sea has been fettered by this growing land barnacle for nearly 3,000 years. It was useful prior to the introduction of marine underwriting, but has served its time, and should not be allowed to remain as a drag upon the interests of mankind”.

Mr M. C. Harrison, USA, in “The Abolishment of General Average” 1915

What is wrong with G.A?

- The expense of re-adjusting expenses & sacrifices is very high;
- The Rules are too intricate to be understood by most business people (especially cargo insurers and their assureds);
- The adjustment process takes too long;
- GA adds substantially to the cost of casualties (interest, commission, adjusters fees, cost of collecting and giving GA security etc.).

Reasons why G.A. is unfair

- Cargo insurers also think GA unfair because:
- Cargo has almost no right to get evidence easily to see if there has been a breach of the contract of carriage;
- Many GAs are caused by the ship's fault yet Cargo has to pay;
- Ships can limit their liability to cargo (by reference to package/unit and tonnage) but cargo cannot limit its contributions to GA (save by value) or at all;
- Many expenses are recoverable even after the ship and cargo are no longer "in the grip of a peril"
- Standard contracts of carriage impose onerous terms on cargo one of which is the YAR;

Should G.A. be abolished?

- Abolition of GA has been often proposed (e.g. Mr Harrison's "Abolishment of GA" 1915 and Knut Selmer's "The Survival of GA", 1957).
- Selmer suggests sacrifices and "common safety" expenses should be insured in hull & cargo policies;
- Salvage should be apportioned according to salvaged values and not re-adjusted;
- But although the abolition of GA would save many millions of US\$ in practice it would be impossible to achieve as so many laws worldwide would need changing in the teeth of fierce opposition from ship interests and passive incomprehension from lawmakers.

Cargo Insurers' objective for the reform of the YAR

- Reduce the costs which GA adds to casualties;
- Reduce the scope of expenses which are allowed in GA
- Reduce the time the GA Adjustment process takes;

Background to YAR 2016

- YAR 2004 were a compromise but could have reduced the money moved in GA by about 20% on average;
- YAR 2004 was not accepted by the shipowner organisations;
- BIMCO's standard forms continued to purport to incorporate YAR 1994;
- CMI's International Working Group ("IWG") established in Beijing in 2012;
- IWG composed mainly of Adjusters, shipowner representatives and hull insurers; no cargo owners could be found who wished to get involved and IUMI's sole rep. had to represent both hull and cargo insurers;
- Throughout Shipowners' position was no retreat from YAR 1994 and without their agreement no new YAR could emerge.

YAR 2016 Gains for Cargo

- Interest now fixed annually at ICE LIBOR + 4% (Rule XXI);
- Commission no longer charged at 2% on GA disbursements;
- Guidelines are a start (but could have gone further);
- Low value cargo may be excluded (YAR Rule XVII (a) (ii)).

The Curate's Eggs

- Rule E : provision of Information to Adjusters;
- Treatment of Salvage in Rule VI and contributory values in Rule XVII;
- Currency of Adjustment.



YAR 2016 less than good news for cargo interests

- Treatment of cash deposits (YAR Rule XXII);
- Wages and Maintenance while detained at a port of refuge (“POR”);
- Temporary repairs of accidental damage to ship at a POR – no Baily cap as in YAR 2004
- Scope of Port Charges allowed extended;
- The Bigham cap on Non-Separation Agreement wording in Rule G no longer applies to Rule F substituted expenses.

Summary

- GA is an outdated, costly and inefficient way of dealing with casualties which should have died with the development of sophisticated marine insurance;
- Abolition of GA is impractical;
- The YAR 2016 are a small improvement on YAR 1994 but most of the gains won for cargo in 2004 have been lost;
- Shipowner interests have a veto over all attempts to negotiate a cheaper and quicker YAR and allow little innovation.....
- So cargo has to accept whatever it can get.

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