150 YEARS OF REFLECTION
YORK-ANTWERP RULES

Presentation given by
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For the second lecture today, I have been tasked with reflecting on the last 150 years of general average, and in particular the York-Antwerp Rules. When Richard first mentioned this to me, I thought "no problem", I can keep the audience engaged on the developments of the York-Antwerp Rules since 1869 for 2 or three hours. I was then advised that I had 20 minutes in which to meaningfully reflect on a century and a half's worth of law and development of YAR. So, I am pleased to say that this is the abridged version!

Whilst I believe that the value in reflection is about looking forwards, it is worthwhile giving some thought to where we were way back yonder. With this in mind I went to the first port of refuge in the 20th century, Google, in the hope of finding some kind of visual representation of the development of the York-Antwerp Rules. Unfortunately, the only thing that I discovered was that in the 150 years since Robert Lindley was practising, fashion seems to have come full circle.

Most people in the room, at one time or another in their careers, have been regaled with tales of Ancient Greek merchants jettisoning cargo willy-nilly in order to avoid a ship sinking with everything lost. To hear the stories, this was a fairly everyday occurrence. This idea of the sacrifice of one to the benefit of all, is the root of general average as we know it, and the concept has been recognised in virtually all seafaring nations for a couple of many hundreds of years at the least. In fact, I have recently been told that the first codified concept of GA appeared in the laws of the Republic of Dubrovnik in the 10th century – although I have not yet had a chance to verify this "claim to fame".

In any event most countries had GA in one form or another, but this could vary dramatically and therefore there was a great deal of uncertainty as to the outcome should a GA event actually occur. For example, in English Courts GA was only recognised insofar as removing the ship and cargo from the immediate peril. Once at a port of refuge the GA would come to an end. The allowance of 'common benefit' expenses (i.e those expenses incurred once the ship and cargo were safe in respect of doing things to complete the voyage to destination) were considered a 'Continental' concept. Boris Johnson would no doubt welcome this regulatory disparity with our European partners.

Clearly this position was untenable and the various parties wanted a level of uniformity in order to achieve certainty when it came to GA.

It is worth pausing at this stage to consider the legal environment that existed in the mid-19th century. In short, and in contractual terms, it was very much the Wild West. The stronger parties (normally the shipowners at that time), could include wide-reaching exclusions and effectively have their cake and eat it. There were no protections in the form of international conventions, and standard forms of charterparties/ bills of lading etc were quite limited and not in wide use.

In 1860 the underwriting Association of Liverpool brought the call for uniformity to the fore with a letter to the grandly named National Association for the Promotion of Social Science. One excerpt from that letter neatly encapsulates the unsatisfactory nature of the position around that time:

> "*The system of general average is one which, to prevent confusion and injustice, requires that the same principles should be acknowledged amongst the chief maritime nations. So far is this from being the case, however, that some of the most important rules vary not only in the same country, but in the same port. Uncertainty in law is always an evil: and, in regard to general average, the evil is peculiarly felt. The ship may be owned in one country, insured in another, her cargo owners and insured in several, and the port of destination, where the general average is to be made up, may be in a country which has different rules to any of the others."*

This rather poetic call to arms was well received and shortly followed by the Glasgow Resolution which was effectively the bedrock on which the York-Antwerp Rules was founded. Only four years later we had the York Rules (1864), and a mere thirteen years after that, the first York Antwerp Rules (1877).

You will be pleased to hear that I do not intend to dissect these Rules (and all later versions) in detail. Instead, I think it is worth commenting on the process of drafting and updating the Rules themselves. The problem with achieving uniformity is that is requires consensus on the part of the various parties concerned. In the case of general average, the primary affected parties are the ship and cargo owners. To a large extent these are directly competing interests. Ship interests clearly would like to recover as much of their expenses following a GA act as possible. Cargo interests would like to limit this as much as possible.

Prior to the YAR, and as mentioned earlier, there was a significant difference between the UK and Europe (and most of the rest of the world for that matter) as regards common benefit expenses. These common benefit expenses primarily consisted of detention costs at a port of refuge. At first glance it would seem that cargo owners would have no interest in GA covering such costs. However, there was a recognition that limiting GA to the immediate peril situation, does not really help if the ship and cargo are then stuck at a port of refuge. In short, it was in everybody's interest to see the voyage completed as expeditiously as possible. By allowing the 'common benefit expenses', shipowners would be encouraged to use everything at their disposal to see this happen.

So, what appears at first to be a conflict is actually easily resolved when the motivation behind the costs is considered. But of course, compromise is often required to reach any form of agreement, so who are the parties compromising? Whilst it may seem that it is the ship and cargo owners that need to strike a balance, the reality is that the vast majority of property afloat at any given time is insured. Hence why it was actually property insurers that first began to call for a unifying set of rules to govern GA. This is not unreasonable as in order to assess a

risk, it is important to know how that risk will ultimately be calculated in the event of an insured event.

Having discussed why uniformity was desired, it is next necessary to considering how this might be achieved. With so many competing interests how do you find a set of Rules that meets everybody's needs (at least insofar as possible)? Of course, you have the various bodies representing shipowners and property insurers but they will have vested interests. Therefore, intermingled with the actual stakeholders (excuse the buzzword) are Average Adjusters, or men learned in maritime law as they were then known. I for one prefer the title 'learned man' over 'average adjuster'.

The role of the average adjuster has evolved over time, as has the form that their work takes (I am reliably informed that leather bound adjustments written with a quill are all but extinct). However, at its heart the profession is simply that of a service provider to the shipping world and those that insure it. In other words, we are just a resource that can be called on to resolve difficult points of marine insurance law and general average and one that is not bound to take an adversarial role in an industry where commercial relationships are king. For the most part, and much like doctors, our clients would rather not have the need to get in touch with us!

Perhaps nowhere is the intermediary nature of the role better demonstrated than in navigating the difficult path towards drafting a universally accepted set of rules governing general average. Adjusters should have no axe to grind, but instead offer contributions and advice to achieve the result asked for by the interested parties.

So, fast forward a little and the York-Antwerp Rules are firmly established. However, the maritime trade does not stand still and therefore neither can the rules which govern those relationships. In fact, the early part of the 20th century saw a radical change in legal environment with governments taking a much more interventionist role in ensuring that the various contractual relationships are balanced. Not least of the revolutionary steps was the introduction of the Carriage of Goods by Sea Act (in various incarnations around the world), which was also bolstered by various international conventions and the advent of the Hague Rules in 1924.

The Hague Rules attempted to rebalance the scales so that owners could no longer use broad exemptions to excuse them from actionable fault. Whilst the strict liability of owners was effectively replaced by a standard reasonable care, owners could longer introduce broad exclusions into the bills of lading to the detriment of cargo owners. Like the York-Antwerp Rules, this is an ongoing process and various versions of Rules relating to Carriage of Goods have been enacted since. It is fair to say that the most recent set, the Rotterdam Rules, have struggled.

The York-Antwerp Rules was not to be left behind and periodic reviews brought new versions of rules to reflect not only changing technology (motor powered ships taking over from sail for example), but also to tease out erroneous unintentional consequences of the Rules which were highlighted by particular cases and judgements. As a passing comment, it is fair to say that the common understanding on the application of the Rules was not always reflected in the interpretation of the courts.

The Makis being a fine example of this. In that case the ship's foremast collapsed causing a derrick to fall into the hold. Repairs, which were necessary for the safe prosecution of the

voyage, were effected and the detention expenses during this period were allowed in general average. The court held that these cannot be recoverable as at no time were ship and cargo in a position of peril in accordance with Rule A. This interpretation was at odds with the generally understood relationship between the numbered and lettered Rules. To remedy this position the Rule of Interpretation was introduced in effect giving primacy to the numbered rules.

A further unintended consequence of the drafting, which was revealed by the courts arose in the "Alpha". In that case the master of a grounded vessel used his engines in an attempt to refloat, despite this having no prospect of success and later being objectively assessed as being unreasonable. As the relevant lettered rules do not contain any reference to reasonableness it was held that the allowance in GA for sacrifice damage to the engines should stand. Prior to this decision, there was a widely held belief that a prerequisite of all GA allowances was that they were reasonably incurred.

Following this decision the Rule Paramount was included which provides for an overriding test of reasonableness to be applied to all GA allowances.

As the above demonstrates, the York-Antwerp Rules are not perfect and require constant caretaking (at least every 20 years or so) in order to ensure that they are fit for purpose.

Adjusters, and on occasion lawyers, are testing the Rules on regular basis in the course of their practices and every so often the courts are scrutinising these practices to check that they match what the Rules actually say. As a result we can monitor that the Rules are fit for purpose, and where appropriate, modify them so that they continue to reflect both the needs of the parties that ultimately rely on them and the practices that may have developed in the intervening period since the last version.

Over the years, it could be said that adjusters have however become prone to reliance on 'practice'. The correct use of this term should denote something that is so widely used and understood so that there is no doubt as to how something should be interpreted and applied. However, over-reliance on such practices becomes difficult as these are not always universally accepted and in fact there is often an alternative approach or view that can be taken. This is demonstrated by the different methods used in the application of the Bigham Clause incorporated into YAR by Rule G and in particular what costs should rank towards the 'cap'. Whilst not all may agree to the approach taken, the application of Bigham Cap (under Rule G) was clarified in the recent CMI guidelines.

One of the most widely discussed GA cases of recent times, the "Longchamp", highlights the pitfalls of adjusters; practices well, and in fact Lord Sumption had the following to say:

> *"In the absence of a comprehensive body of case law (general average rarely reaches the courts), adjusters have adopted a variety of practices or rules of thumb to supplement the Rules. This is perhaps inevitable, but such practices are not law and there is a tendency in this field for them to lose sight of the basic concepts expressed in the Rules themselves."*

This criticism might be a little harsh, and the term of 'Rule of Thumb' does not do justice to the amount of thought and study that goes into developing adjusting practices. However, there is certainly some truth to Lord Sumption's comments.

This brings us back to the need for regular review and modification of the York-Antwerp Rules so that as little as possible is left to doubt and subjectivity. However, that is only half of the necessary process. It is one thing to have a well-drafted set of Rules, it is another to ensure that those that are using them possess the necessary skills and understanding to correctly apply them.

Following the drafting of the 2016 Rules the CMI, in conjunction with various adjusters representing national associations, published some guidelines. This is a great step in de-mystifying general average. The guidelines do not contain everything required to understand the various nuances and complexities of a general average case but certainly do go some way to explain the process behind the application of the Rules.

In wrapping up I would like to spend a minute or two on what comes next. In 2004 a new set of York-Antwerp Rules was published. With these Rules the balance possibly swung too far in the favour of one party (the removal of wages at a port of refuge was a particular bone of contention,) and therefore the Rules were not widely taken up. The 2016 Rules seem to have corrected this imbalance, however I for one am not seeing many contracts of carriage which incorporate the most recent YAR, despite the enthusiastic support of BIMCO and the incorporation of the latest version of the Rules in stand forms of bill of lading and charterparty. The effort and time that goes into each version of the Rules is immense, and without support from the various stakeholders, the inclination of suitably increased professionals to become involved in such an arduous task will diminish.

However, at present we have a robust, tried and tested mechanism to deal with the fallout from marine casualties. Over the years there has been various calls for GA to be abolished, but the rebuttal to this is always “and replace it with what”. In fact, the calls to do away with GA have often been in the context of casualties involving the now monolithic container vessels plying their trade around the world. However, nowhere are the YAR better stressed tested than under these circumstances. And so far, I would argue that they have not been found wanting. Of course, the apportionment of risk may shift from time to time, and operators and their insurers respond to this accordingly. However, the underlying principles which govern such situations, in GA terms, remain the same. That said, the caretaking process must continue and the Rules must adapt, but it would seem to me that the adjusting profession continues to be in a good position to assist in this process.