Star Axe I LLC v Royal and Sun Alliance Luxembourg SA, Belgian Branch and Others [2023] EWHC 2784 (Comm)

Which iteration of the York-Antwerp Rules?

General average as a loss sharing and dispute resolution mechanism may have its roots in ancient times, but the modern form is quite distinctive in its operation. It relies on the incorporation of the York-Antwerp Rules (YAR), a set of rules periodically revised by the Comité Maritime International, in most carriage contracts, by standard language. In this case, the question was which revision of the YAR was intended where the parties were bound by Congenbill 1994.

The facts

The facts were exceedingly simple. The claimant carrier Star Axe was the issuer of seven bills of lading dated in September and October 2021 for cargo on board M/V Star Antares. On 19 November 2021, following an incident in which the vessel sustained damage from striking an unknown submerged object, general average was declared. The defendants were numerous cargo insurers who had issued Average Guarantees to the claimant on 26 November 2021, by which they undertook to pay the claimant or the claimant's average adjusters any contribution to general average, salvage or special charges that might be legally and properly due and payable in respect of the goods covered by the bills of lading.

The dispute

A dispute arose as to whether the rights and obligations in general average were governed by YAR 1994 or YAR 2016. The relevant clause in Congenbill 1994 read:

"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." (Emphasis added.)

Were the York-Antwerp Rules 2004 and 2016 "subsequent modifications" or new sets of rules? The content of these sets of rules is different enough for the question to be of some importance.

Butcher J held that the parties would be taken to have agreed that the relevant general average adjustment was to be conducted under YAR 2016. The judge, doubtless as a result of how the case was presented by the parties, focused solely on interpretation of the clause, holding that the word "modification" ordinarily signified a change that did not alter the essential nature or character of the thing modified. In contrast, when used in the context of a written instrument or set of Rules it ordinarily had a wider connotation than "amendment", extending to changes in approach, and being less focused than the word "amendment" on textual change. YAR 2004 and YAR 2016 were to be regarded as "modifications" of YAR 1994.

Comments

It is a distinct feature of the usage of the YAR that older forms remain in use- parties stay attached to a version for many years after a new one is brought out, just as with NYPE. In The Polar1 (heard by the Supreme Court on 4to 5 October 2023), some of the bills of lading incorporated the 1974 version; others the 1994 version. One should not therefore lightly conclude that the parties wanted updates, especially not comprehensive ones with new features. However, market evidence was curiously absent from the ruling.

The claimant carrier relied notably on observations in the standard practitioner work Lowndes & Rudolf,2 according to which the YAR [YEARX] is to be viewed as the title of the terms, so that YAR [YEAR Y] is not a modification of or amendment to the earlier version but a new set of terms, even if in part with the same content. The claimant also highlighted a footnoted observation in Rose to the same effect.3 Both works consider that the 1974 iteration was "modified" in 1990 but that modification is not otherwise the norm.

In the quoted segment,4 the authors of Lowndes & Rudolf observe the potential for ambiguity in incorporation arising from language such as that at issue in this case, but venture as far as saying that such language will not include re-numbered versions and that "it is possible to contend that there is a binding practice in London to this effect".5 With this in mind, it is all the more surprising that there was no market evidence in the litigation.

While the ruling is troublesome for the market and arguably makes it more, not less difficult to predict which iteration of

YAR is to be applied in a dispute, there are clearly contractual solutions to this issue. The question is what they are. The judge referred to the language in Congenbill 2007, where the "subsequent modifications" language is absent so that it cannot be argued that anything other than the originally adopted version of YAR 1994 should apply.

It is nevertheless arguably unsatisfactory that unsophisticated parties incorporating standard terms should bear the onus of paying attention to the finer points of distinction between "amended", "modified" and plain YAR.

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1 Herculito Maritime Ltd v Gunvor International BV (The Polar) [2021] EWCA Civ 1828; [2022] 1 Lloyd's Rep 375.

2 Richard Cornah, Lowndes & Rudolf: The Law of General Average and the York-Antwerp Rules, 15th Edition, 2018, para 30.30, quoted at para 11.

3 Francis Rose, General Average: Law and Practice, 3rd Edition (2017), para 1.26, quoted at para 11.

4 At para 11.

5 Judgment, claimant's argument at para 11.