

## **Which York-Antwerp Rules Apply?**

by

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There are about 50,000 merchant ships trading internationally and a fair estimate would be that these generate between 1,000 and 1,500 declarations of general average each year. These declarations result in adjustments which cost hull and cargo insurers many hundreds of millions of dollars annually so it is in the interests of marine property underwriters that the adjustments are done on the most restricted basis; this will normally mean using the York Antwerp Rules 2004. Because the 2004 Rules are seldom used hull and cargo underwriters worldwide are paying many millions of dollars more in general average each year than they would under the 2004 Rules. This Article seeks to show that in some cases adjustments done under the York Antwerp Rules 1974 and 1994 should have been done under the 2004 Rules which could have saved property underwriters significant sums.

According to an estimate based on a study of about 2,000 GA adjustments by Matthew Marshall (last updated in 2002), if the York-Antwerp Rules 2004 were universally adopted the amount moved in General Average each year could be reduced by around 17 to 21% as against the 1994 and 1974 Rules. The main changes are the removal of salvage in most instances from GA, the reduction in the interest rate and the abolition of 2% commission of most disbursements. The 2004 Rules also introduced a one year time limit from publication of the adjustment and a backstop six year time limit from the termination of the voyage. It is not therefore surprising that many take the view that the choice of rules is of some importance.

The York-Antwerp Rules have to be incorporated into contracts of carriage if they are to apply (unless they are imposed by national law which is quite rare).

Standard form contracts of carriage contain two basic types of incorporation clause. Before 2004 clauses saying G.A. would be adjusted “according to York-Antwerp Rules 1994 and any subsequent modification” (GENCON 1994) or something similar were frequently employed. Since 2004 the simpler and more unambiguous “according to York-Antwerp Rules 1994” has been employed in most BIMCO standard contracts. Most adjusters take the view that the words “and any subsequent modification thereof” or “amendment thereof” cannot incorporate the 2004 Rules because those Rules are not a “modification” or “amendment” to the 1994 or 1974 Rules. However there are a number of reasons why this view may not be correct.

- The words used by the CMI when adopting the 2004 Rules referred to them as “amendments which have been made to the York-Antwerp Rules 1994”;
- In the “MARINOR” [1996] the English High Court held that the Canadian COGSA 1993 enacting the Hague Visby Rules was “an amendment” to the earlier Canadian COGSA enacting the Hague Rules;
- In the “VECHSCROON” [1982] it was held that the words “the Brussels Convention and any subsequent amendment thereto” incorporated the Hague Visby Rules after they had been promulgated;
- Many of the papers leading up to the CMI’s decision to adopt the 2004 Rules referred to the need for “reforms” or “amendments” to the York-Antwerp Rules 1994;
- The author of the Third Edition of Voyage Charters considers that the effect of the incorporating words in GENCON 1976 (and any subsequent medication thereof..) “is to incorporate the York-Antwerp Rules 2004 in relation to any casualty which arose after the latter rules were adopted.”

It is therefore easy to see why, in 2005, BIMCO published a bulletin announcing that their standard documents would only refer to the York-Antwerp Rules 1994 and that the words “or any subsequent modification thereto” would no longer be used in the G.A. clauses in their standard forms.

In these circumstances it seems quite likely that there are a number of GA adjustments under the 1974 and 1994 Rules which should in fact have been adjusted under the 2004 Rules.

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