

***The Star Antares*: What is Now Realistic  
and Achievable in General Average  
Claims and the Negotiation of Relevant  
Contracts?©**

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# Congenbill 1994's GA Clause

- ❖ Congenbill 1994 standard form – one of the most extensively used B/L standard forms.
- ❖ Clause (3) of Congenbill 1994:

*“General Average shall be adjusted, stated and settled according to York-Antwerp Rules [“YAR”] 1994, or any subsequent modification thereof, in London . . .”*
- ❖ YAR 1994 followed by YAR 2004 and YAR 2016.
- ❖ Are either or both a “*subsequent modification*” of YAR 1994?
- ❖ Or do YAR 1994 apply because YAR 2004 and YAR 2016 are completely new Rules?
- ❖ Received wisdom that YAR 1994 governed GA adjustments under the Congenbill 1994 form – until *The Star Antares* decision.

## Commentary on the York-Antwerp Rules 2004 by the Association of Average Adjusters (July 2004):

- ❖ CMI “*in both the International sub-committee and Plenary sessions, that the new Rules should be given the title of ‘York-Antwerp Rules 2004’ to make it clear that they were not simply an amendment to or modification of the 1994 Rules (as happened with the 1990 amendment of the 1974 Rules in respect of r.VI). Where contracts of affreightment such as Congenbill 1994 refer to ‘York-Antwerp Rules 1994 or any subsequent modification thereof....’ the 1994 Rules will remain applicable.*”

## YAR 2004:

- ❖ Refer to themselves “*a new text*”, “*These new rules*” and “*the new rules*”

## YAR 2016:

- ❖ CMI Assembly described the task leading to YAR 2016 to be “*to draft a new set of Rules*”.

## BIMCO Special Circular No. 1 of July 2007:

- ❖ Declared YAR 2004 “*to be a new set of Rules and not in anyway a modification or amendment of the 1994 Rules*”.

## Gard P&I Club Article, 1 of July 2007:

- ❖ Reported that the CMI Conference in Vancouver in 2004 had agreed that YAR 2004 were “*not an amendment or modification of the 1994 Rules, but rather was a completely new set of Rules. Thus where contracts of affreightment such as CONGENBILL 1994 refer to ‘the York-Antwerp Rules 1994 or any subsequent modification thereof’ the 1994 Rules still will apply.*”

## Lowndes & Rudolf, 15<sup>th</sup> Ed. 2018:

- ❖ “*So widespread is the view amongst practitioners that incorporating language such as that contained in the Congenbill ’94 form (“General average shall be adjusted, stated and settled according to the York-Antwerp Rules or any subsequent modification thereof in London”) does not incorporate the York-Antwerp Rules 2004 or later versions, that it is possible to contend that there is a binding practice in London to this effect. To put the matter beyond doubt, any reference to subsequent modification was removed from Congenbill 2007.*”

## Voyage Charters, 4<sup>th</sup> Ed. 2014 & 5<sup>th</sup> Ed 2022:

- ❖ *“Whilst the 2004 Rules might be regarded as being in substance a modification of the 1994 Rules, they are, technically, a new set of rules, and on balance it seems probable that the 1994 Rules continue to apply.”*

## Professor Francis Rose’s General Average 3<sup>rd</sup> Ed. 2017:

- ❖ *“Note that the contractual incorporation of a specific set of Rules will include an interim revision of existing rules (e.g. the 1974 Rules were amended in 1990) but not a different version of the Rules (albeit many of the provisions of new versions of the Rules repeat earlier provisions).”*

## Congenbill 2016:

- ❖ *“(3) General Average*

*General Average shall be adjusted, stated and settled according to York-Antwerp Rules 2016 in London unless another place is agreed in the Charter Party.”*

# Rules of Contractual Construction

- ❖ Construction against the background matrix of fact known or reasonably available to both parties at the time of contracting: *Investors Compensation Scheme v. West Bromwich B.S.* (1998), per Lord Hoffman.
- ❖ Parties' agreement that the court could properly take into account the BIMCO Special Circular no 6 dated 28 July 1993 to construe the CONWARTIME 1993 clause approved by the court: *Pacific Basin IHX Ltd v Bulkhandling Handymax AS* (“*The Triton Lark*”) (2011).
- ❖ BIMCO Circular No 9 of 6 July 1988 considered when construing the BIMCO US Tax Reform 1986 Clause: *Global Maritime Investments Ltd v STX Pan Ocean Co Ltd* (“*The Dimitris L (No 2)*”) (2012).
- ❖ History of the origin of the clause whose construction was in dispute published in The Law Society Gazette held to be “*part of what has come to be called the ‘matrix’ against which the clause has to be construed and is a legitimate aid to construction*”: *AIG Europe Ltd v OC320301 LLP* (formerly *The International Law Partnership LLP*) (2016) (CA).
- ❖ Market understanding of terms admissible for construction exercise: *Lloyds TSB Bank plc v Clarke* (2002) (PC).

# Butcher J's Ruling

- ❖ Construing “*any subsequent modification*” without reference to the publications relied on by owners, those words were “*reasonably to be understood as capable of applying to a new version of the Rules.*”
- ❖ Owners’ documents did not alter his construction.
- ❖ The AAA Commentary, the BIMCO Special Circular No. 1 & Gard P&I Club Article – not reasonably available to both parties and/or would be understood as opinion only and “*as being neither necessarily correct nor a sure guide to how a court would construe the relevant words*”.
- ❖ Lowndes & Rudolf & Voyage Charters – would be understood as opinion only.
- ❖ Argument re Congenbill 2016 balanced by Congenbill 2007.
- ❖ Congenbill 1994 applies YAR 2004 after their introduction but before YAR 2016, and YAR 2016 after their introduction.

# Consequences & Possible Solutions

- ❖ GA assessments completed under YAR 1994 that should have been completed under YAR 2016.
- ❖ 1-year time bar in Rule XXIII of the YAR 2016 does not appear in the YAR 1994.
- ❖ Danger of undermining fundamental ancient Rhodian law principle that, *“that which has been given for all should be replaced by the contribution of all”*.
- ❖ Delete *“or any subsequent modification thereof”* in Congenbill 1994 or use 2007?
- ❖ Lloyd’s Average Bond–LAB 77: determination *“under an adjustment prepared in accordance with the provisions of the contract of affreightment governing the carriage of the goods”*.
- ❖ Lloyd’s Average Guarantee – Guarantee for contribution *“which may hereafter be ascertained to be properly due in respect of the said goods”*. Note: *“This guarantee will be accepted provided that no additions, deletions or amendments are made to it.”*

Thank you for listening

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