



Institute of Seatransport
海運學會 - Workshop
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INSTITUTE OF CHARTERED SHIPBROKERS HONG KONG BRANCH
HK SCA
HONGKONG SHIPBROKERS ASSOCIATION

 **AMAdj**
Asia Maritime Adjusting

**SUBSTITUTED EXPENSES IN GENERAL AVERAGE
per York-Antwerp Rules**



VENUE

No.1 Conference Room
37/F., China Merchants Tower
Hong Kong

*The Institute of Seatransport
would express heartfelt
gratitude to the
China Merchants Group
for the support throughout*


THE
LONGCHAMP

SPEAKER: RAYMOND T C WONG 王德超



raymond.wong@averageadj.com

<http://www.averageadj.com>

•Fully qualified in 1980 by stringent examination, becoming the first Chinese Fellow of the British Association of Average Adjusters (better-known as AAA). He is currently sitting on the Advisory & Dispute Resolution Panel of the AAA.

•Raymond started his career in 1966 with the oldest average adjusting firm, William Richards & Sons (currently named Richards Hogg Lindley). He was an equity partner of Richards Hogg prior to its incorporation and following its acquisition by Charles Taylor plc., he was appointed to sit on the latter's Board of Directors, 1999/2008. Since retirement from the firm he had worked for some 45 years, Raymond has continued his service and commitment to the maritime and insurance communities and launched, in conjunction with colleagues in the region, the average adjusting services under the umbrella of Asia Maritime Adjusting (Hong Kong) within TCWong Average Consulting Ltd.

•Raymond is a regular lecturer/speaker on general average and maritime claims related topics. He is a founder member and former chairman of Marine Insurance Club (established in 1979); currently chairman of Institute of Seatrtransport (established in 1984) which is an institutional member of the Hong Kong Maritime and Port Board, an honorary advisor of the HK Logistic Management Staff Association (established in 1986), and a founder member of HK Maritime Law Association (established in 1987).



AGENDA

- Recapitulation
 - Legal position - English
 - York-Antwerp Rules vary position
 - Examples and Practice
- Law -v- Practice
 - Precedent law cases
- "The Longchamp"
 - Casualty and GA Adjustment per YAR 1974
 - Views of AAA Advisory Committee
 - The High Court Decision [2014]
 - The Court of Appeal Decision [2016]
 - The Supreme Court Decision [2017]
 - Note-worthy issues
 - Report of AAA Advisory Committee
 - Questions and Feedbacks from participants



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SUBSTITUTED EXPENSES 替代费用

“As the name implies, substituted expenses are the expenses incurred in respect of a course of action undertaken as an alternative to - or in substitution for – *the expense that would be allowable as general average.*”

F.01 14th Edition of Lowndes & Rudolf

The term “*hypothetical alternative*” course of action refers to one where the expense would have been allowable as GA.




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Not tenable at English law

Wilson v Bank of Victoria (1867)

- Pre-dates the York-Antwerp Rules
- Auxiliary sailing ship
- Voyage: Australia to Britain (laden)
- Struck iceberg, sustained damage, demasted
- Put into Rio de Janeiro
- View prohibitive permanent repair cost, only Temporary Repairs effected to
 - allow vessel to proceed to destination under steam requiring coal purchased at Rio and Fayal
- Ship-owners claimed cost of coal purchased as substituted expenses in lieu of expenses otherwise incurred had PR been effected at Rio

Held: Claim disallowed – use of auxiliary engine to bring vessel home and consequent expenditure on coal, was merely performance of a service by Ship-owners to Cargo carried - therefore not a subject of contribution.

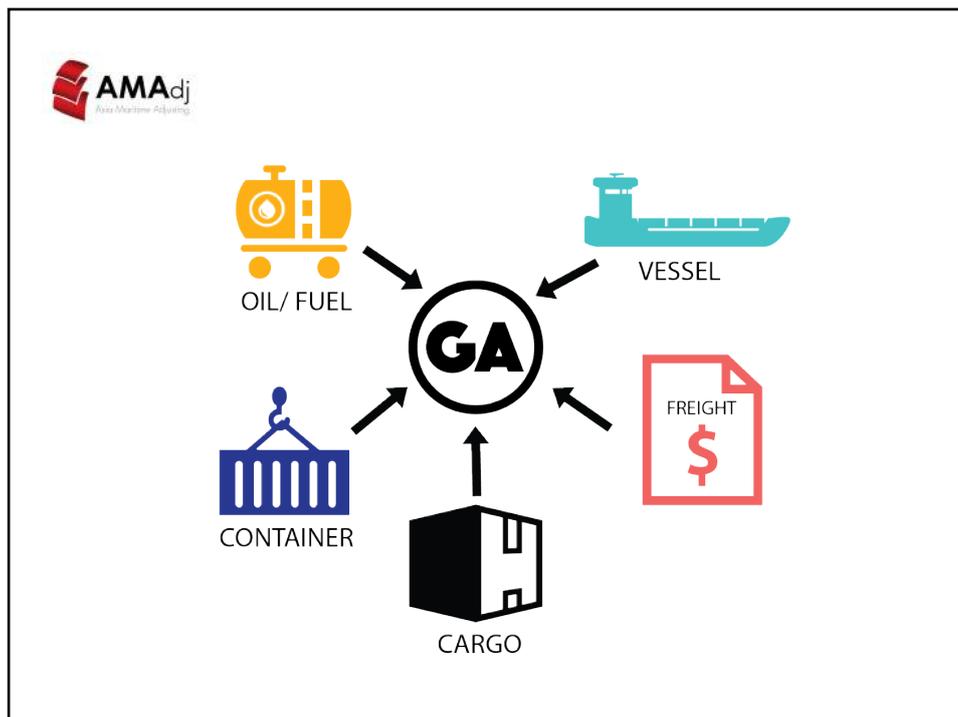


APPORTIONMENT OF GA

The loss would be adjusted as follows:

			❌	✅
Ship	200	pays	67	50
Merchant A.....	100	pays	33	25
Merchant C.....	<u>300</u>	pays	100	75
	600			
Merchant B (jettisoned and made good)	<u>200</u>	pays	--	<u>50</u>
	<u>800</u>	pays	<u>200</u>	<u>200</u>

Everyone whose property had been at risk sustained the same degree of loss, i.e. 25%.



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What is General Average?

- A system of making good maritime losses based on equity, **equity** being the key word.
- Extraordinary sacrifice or expenditure voluntarily and reasonably made or incurred in time of peril to preserve property imperiled in the common adventure.
- Object of GA Act must be the preservation of the whole adventure.
- Adventure or some part thereof must be saved.

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THE YORK-ANTWERP RULES

The internationally accepted code of rules setting out

- what losses and expenses are admissible in general average, and
- how they are to be apportioned between ship and cargo interests etc.

York Rules 1864
York/Antwerp Rules 1877
YAR 1890
YAR 1924
YAR 1950
YAR 1974
YAR 1974 as amended 1990
YAR 1994
YAR 2004
YAR 2016

CMI – Comite Maritime International 國際海事委員會 the custodians
YAR not a Convention
Incorporation by reference in Contract of Carriage




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Rule F of York-Antwerp Rules

Rule F - Any extra expense incurred in place of another expense which would have been allowable as general average shall be deemed to be general average and so allowed *without regard to the saving, if any, to other interests*, but only up to the amount of the general average expense avoided.

N.B. "extra" replaced by "additional" since 1994




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Rule F – Philosophy & Principle (pre “Longchamp”)

“For this rule to have any application there must have been ***an alternative course*** which, if adopted would have involved expenditure which could properly be charged to general average.”

F.29 14th Edition of Lowndes & Rudolf

“Although Rule F is phrased in terms which refer to the incurring of the expense, its application in practice presupposes a ***choice between*** two (and some more) ***different courses*** of action.”

11.35 4th Edition of Hudson & Harvey




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Requirements (generally accepted)

- It deals with “*expense*” – not “*loss*”
- *Only expenses that are “extra” (i.e. additional and not extraordinary) qualify – but excluding any ordinary voyage expense saved*
- *There must have been an alternative course of action, that if adopted, would have resulted in expense which could properly be allowable in GA*
- *Extra/additional expenses must have been incurred in place of the alternative course of action*
 - Also, need to satisfy the requirements laid out in the YAR as a whole, e.g.
 - Rule A – reasonable (nature and quantum)
 - Rule C – excludes indirect liabilities, delay, etc.



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Examples

- Working overtime on repairs
- Dry-docking with cargo on board
- Towage to destination
- Forward cargo to destination
- Temporary repairs – Rule XIV

To identify the “hypothetical alternatives” in each case.

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Practice -v- Law

“..., the law cannot be decided by what is understood among writers and practitioners in the relevant field ... Experience shows that in many areas of practical and professional endeavour generally accepted points of principle and practice, when tested in court, sometimes turn out to be unsustainable. I accept that it may be right for a court to have regard to practices which have developed and principles which have been adopted by practitioners, but they cannot determine the outcome when the issue is ultimately one of Law.”

Lord Neuberger in “The Longchamp” [2017]

“... In the absence of a comprehensive body of case law (general average rarely reaches the courts), adjusters have 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.”

Lord Sumption in “The Longchamp” [2017]

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The “Makis” (1929)

Vlassopoulos v. British & Foreign

- Vessel’s foremast collapsed at loading port
- Derrick fell into hold
- Repairs necessary for safe prosecution of voyage
- Allowance for expenses per Rules 10 & 11 (intention)
- But vessel and cargo not in peril whilst at port
- **Held:** Lettered Rules constitute the general principles which are to be applied, to which the numbered Rules were subservient.

➤ The “Makis” Agreement (British Ship-owners & Underwriters)

“Except as provided in the Numbered Rules 1 to23 inclusive, the Adjustment shall be drawn up in accordance with the Lettered Rules A to G inclusive.”

- Leading to introduction of a **Rule of Interpretation** included in the 1950 YAR

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The “Alpha” (1991)

Corfu Navigation v. Mobil Shipping

- Vessel grounded at sank bank in the River Zaire
- Vessel and cargo in peril
- Master used engine in effort to refloat causing substantial damages – unskilful and negligent
- Damages allowed per Rule VII
- Cargo contended allowance unreasonably made
- **Held:** Claim under Rule VII is not subject to requirement of reasonableness in Rule A

- Leading to introduction of **Rule Paramount** included in the 1994 YAR

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The "Bijela" (1994)

Marida Ltd. v. Oswal Steel



Providence of Rhode Island

New York

Jamestown



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The "Bijela" (1994)

Marida Ltd. v. Oswal Steel

- Bulker loaded cargo at Providence, Rhode Island for India
- Vessel grounded shortly after sailing from Providence
- Sustained substantial bottom damage
- Put into Jamestown where no dry dock available
- Vessel could have discharged cargo, proceeded to New York, dry-docked and permanently repaired, then returned to reload cargo and resume voyage – estimated GA \$535,000
- Temporary Repairs effected at Jamestown - \$282,606
- Adjuster W disallowed TR view no alternative at Jamestown – [practice of many adjusters](#)
- Ship-owner referred case to Adjuster M who allowed TR as GA in terms of Rule 14, YAR 1974

➤ Commercial Court disallowed on ground that PR at New York would not have been necessary for the safe prosecution of voyage – TR served that purposes



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The "Bijela" (1994)

Pending appeal, AAA Uniformity Resolution supported by market Underwriters:

Application of Rule XIV

That in practice, in considering the saving in expense referred to in the second paragraph of Rule XIV of York-Antwerp Rules 1974, the determination as to whether permanent repairs would have been necessary for the safe prosecution of the voyage shall not be affected by the fact that temporary repairs were practicable.

- Court of Appeal upheld the decision to disallow
- House of Lords upheld the Ship-owners' claim
 - Q. The 2nd para of Rule XIV obliges us to suppose that the TR had not been effected at Jamestown. **What then would have happened?**
 - *"It is not necessary to assume that the vessel could not have been repaired at Jamestown in order to give effect to the two rules [rules X and XIV]. It is only necessary to assume that she was not so repaired, as r. XIV requires."*

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THE "LONGCHAMP" - CASUALTY

VESSEL	MV Longchamp
VOYAGE	Transiting the Gulf of Aden on a voyage from Rafnes, Norway, to Go Sau, Vietnam
CARGO	2,728.732 Metric tons of Vinyl Chloride Monomer in Bulk

Under bill of lading dated 6th January 2009 which stated that "General Average, if any, shall be settled in accordance with York Antwerp Rules 1974".



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THE CASUALTY

DATE OF CASUALTY 29TH January 2009

SUMMARY At 6:40, seven heavily armed pirates boarded the vessel and commanded the master to alter course towards the bay of Ely, Somalia

31st January 2009 – Vessel arrived and dropped anchor

RANSOM 30th January 2009 - negotiators for pirates boarded the vessel and demanded a ransom of US\$6 million

Negotiation period of 51 days

22nd March 2009 – ransom agreed at US\$1.85m

27th March 2009 – Ransom delivered

28th March 2009 – Pirates disembarked

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NORMAL GA ALLOWANCES

- **Cost of searching Ship**
- **Ransom money itself**
- **Fees and expenses of negotiating team**
- **Associated lawyers cost**
- **Cost of delivering the ransom cash**
- **Insurance Premium on the ransom cash**
- **Associated bank charges**

(Detention expenses and loss of hire not recoverable)

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THE ADJUSTMENT 31 August 2011

- Total c.v. US\$5,452,278
- Cargo – US\$787,186 (14.4377%)
- Total GA. US\$3,298,365.49
- Cargo pays US\$476,209.60
 - POA+interest 573,538.26
 - Refund US\$ 97,328.66

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THE ADJUSTMENT

It was noted that the adjusters had allowed in general average under Rule F the following expenses incurred during the negotiation period, in view of that “an amount of US\$4.15m was saved in the common interest of all property owners concerned, which would have been recoverable in GA per Rule A of the York-Antwerp Rules 1974.”:

i) Media response service	US\$20,639.30
ii) Crew wages	75,724.80
iii) High-risk area bonus	70,058.70
iv) Crew maintenance	3,315.00
v) Bunkers	11,115.45
vi) Telephone re negotiations	751.00
	<u>US\$181,604.25</u>

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THE ADJUSTMENT

- Cargo Interests disagreed
 - Cargo's proportion US\$26,220!
- **Sought opinion of AAA Advisory Committee – (4:1) expenses claimed did not come within Rule F.]**
- **Dispute found its way to the Court.**

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THE COMMERCIAL COURT DECISION

Commercial Court	<p>The Court found that:</p> <ul style="list-style-type: none"> a) Hypothetical alternative course of action must meet requirement that it was “reasonably ... incurred” within meaning of r.A b) Expenses ii) – v) allowable in GA under r. F as “substituted expenses” in lieu of saving \$4.15m c) Expenses i) and vi) allowable in GA under r.A d) Payment of the original demand US\$6m without negotiation would not have been unreasonably incurred. <p>Construction</p> <p>“extra” – ordinary and natural meaning, which is “additional” and not “extraordinary”</p> <p>“expense” (in the context of bunkers) – consumption of bunkers included.</p> <p>“extra” expenses – all that is required: the substituted expense resulted in additional financial outlay which would not ordinarily have been incurred</p>
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THE COURT OF APPEAL DECISION

Commercial Court

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Court of Appeal

The cargo appealed challenging to the judgment on expenses i) – v) and the Court agreed that:

- Payment of the original ransom demand of US\$6m without negotiation would have been reasonable;
- The media response costs, i) are allowable in general average under Rule A;
- Consumption of bunkers is treated as an expense for the purpose of Rule F;

BUT, the Court held that

- Expenses ii) – v) not allowable under Rule F – not “an alternative course of action”, there being only one road open to the ship-owners, namely negotiation and that road led to wherever the negotiation ended.**

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SUPREME COURT DECISION

Commercial Court

↓

Court of Appeal

↓

Supreme Court

The owners appealed to the Supreme Court submitting that the negotiation period expenses, ii) – v) amounting to US\$160,213.95, fell within the expression “expense incurred” by them within Rule F and those expenses were incurred “in place of another expense”, i.e. the saving of US\$4.15m resulting from the negotiations. Since the negotiation period expenses were less than the “general average expense avoided”, they were accordingly allowable in general average under Rule F.

The Supreme Court (by a majority of 4 to 1) reversed the Court of Appeal decision, allowing the negotiation period expenses, ii) – v), in general average under Rule F

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SUPREME COURT DECISION

Commercial Court

↓

Court of Appeal

↓

Supreme Court

a) the language of Rule F did not require that the expenses were incurred following an alternative course; incurring the negotiation period expenses was an alternative to paying a higher ransom; “the former involved incurring *vessel-operating expenses* whereas the latter involved *paying a ransom*”

b) it was not necessary to consider whether the initial ransom demand was reasonable under Rule A; the words in Rule F “another expense which would have been allowable as general average” were a reference to an expense of a nature/type which would have been allowable (rather than its’ quantum) under Rule A, under which a ransom would be allowable in general average.

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SUPREME COURT DECISION

Commercial Court

↓

Court of Appeal

↓

Supreme Court

c) Rule C only applies to loss consequential on a GA act defined by Rule A. It does not apply to expenses covered by Rule F, which is concerned with sums expended in avoiding expense otherwise allowable as general average.

d) The Court saw no reason for restrictively interpreting the word “extra” so as to require an expense to be of a nature which would not normally have been incurred in response to the peril threatening the adventure. The Court was of the opinion that the natural contextual meaning of “extra expense” was “simply an expense which would not otherwise have been incurred (but for the saving of the “other expense”)”.

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The decision - Construction

- YAR being an international rule should be interpreted by its wording instead of by practice.
- “Given that the Rules represent an international arrangement, it is particularly *inappropriate* to adopt an approach to their interpretation which involved *reading in any words or qualification*. as a matter of ordinary language, Rule F applies to the negotiation period expenses... To imply some qualification such as the requirement that those expenses must have been incurred so as to achieve an “alternative course of action” appears to me to be very dangerous.”
- The Court favoured interpretation of Rule F: “whenever an expense is incurred to avoid a sum of a type which would be allowable, that expense would be allowable, but only to the extent that it does not exceed the sum avoided.”
(Accordingly, the negotiation period expenses in the amount of US\$160,213.95 fell under Rule F as they were incurred to avoid paying US\$6m, resulting in a saving of US\$4.15m.)




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The decision - Construction

- “*Any extra expense*” - Any additional expense “which simply would not otherwise have been incurred but for the saving of the “other expense””.
- Rule C of York-Antwerp Rules exclusions has no application to Rule F – “...it does not follow that such indirect liabilities should be irrecoverable if they are expended in order to mitigate what would otherwise be a larger GA claim”.
- “*in place of another expense*” – “must be assessed objectively ... it is clear ... that negotiations were ... needed if the ransom was to be reduced, that such negotiations took ... time, and that the passage of time resulted in the negotiation period expenses ... being incurred.” As a result of those negotiations resulting in the ransom reduced, such expenses were incurred *in place of* the alternative of paying the extra.



The decision - Approach

Suggested questions to be asked (as set by AAA Advisory Committee):

1. *Is the expense avoided of a nature (not quantum) that would have been allowable?*
2. *Has the substituted expenses been incurred to avoid or minimize a GA expense of a type that would be allowable?*
(Mitigation of loss is offered as the principle underlying Rule F.)
3. *Does the substituted expense incurred exceed the sum avoided?*

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Effect of Rule Paramount - Reasonableness

The Rule requires the substituted expense to have been reasonably incurred ; no such requirement of reasonableness applies to the hypothetical alternative course.

Speaker's view apparently shared by former Editor of Lowndes & Rudolf – 12th Edition

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AAA ADVISORY COMMITTEE

(Reference is requested to the Report dated 25th January 2018)

- **“Longchamp” decision departs from**
 - views of main YAR stakeholders – IUMI BIMCO/ICS
 - General international understanding
- **Future (English, also Hong Kong) GA adjustments**
 - Negotiating ransom
 - Negotiating award with (cash) salvors
 - Also impact of following in wide range of cases involving Rule F:
 - Discarding of the “reasonableness” test in favour of requiring only that the hypothetical alternative is of “a nature” that might be allowable
 - Broadening understanding of what constitutes an “extra expense” in Rule F to include any expense including “indirect liabilities” such as demurrage that has mitigated a GA expense
 - Rule C has no application to Rule F
- **Looking forward to** comments from all quarters




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Speaker’s notes

- **Effect of Rule Paramount - Reasonableness**
The Rule requires the substituted expense to have been reasonably incurred ; no such requirement of reasonableness applies to the hypothetical alternative course.
Apparently shared by former Editor of Lowndes & Rudolf – 12th Edition
- **Equity**
Equity is the aim of GA; it is however the market which remains being the ultimate decider.
- **Role of Average Adjusters**
AAA: It is not for the Average Adjusters to determine what should come within GA, which is a matter solely for the stakeholders themselves. The role of adjusters is to explain the implications of any developments in the law as best they can, and then await the response of the markets they serve.





AMA_{dj}
Asia Maritime Adjusting



Raymond Wong
ASIA MARITIME ADJUSTING (HONG KONG)
Office B, 9/F., Sai Wan Ho Plaza,
68 Shau Kei Wan Road, Hong Kong

T. +852 3590 5653 / 3996 9876
E. ama@averageadj.com

thank you!

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