Neutral Citation Number: [2023] EWHC 2784 (Comm)

Case No: CL-2022-000447

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 10/11/2023

Before :

THE HON MR JUSTICE BUTCHER

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Between :

STAR AXE I LLC **Claimant**

- and –

ROYAL AND SUN ALLIANCE LUXEMBOURG S.A. – Belgian Branch
(2) The following insurers represented by underwriting agent JEAN VERHEYEN, member of AXA Group
(a) XL INSURANCE COMPANY SE
(b) AXA BELGIUM SA
(c) ALLIANZ ESA EUROSHIP GMBH
(d) HELVETIA SWISS INS CO LIECHTENSTEIN AG
(e) SIAT SOCIETÁ ITALIANA ASSICURAZIONI
(3) HDI GLOBAL SE
(4) BALOISE BELGIUM NV
(5) The following insurers represented by underwriting agent AMICA
(a) AXA VERSICHERUNG AG
(6) CNA INSURANCE CO
(7) ALLIANZ BENELUX NV
(8) The following insurers represented by underwriting agent WE SPECIALITY
(a) SIAT SOCIETÁ ITALIANA ASSICURAZIONI **Defendants**

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Chirag Karia KC (instructed by **Shoreside Law**) for the **Claimant**
Richard Sarll (instructed by **Birketts LLP**) for the **Defendants**

Hearing date: 31 October 2023

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Approved Judgment

This judgment was handed down remotely at 10.00am on Friday 10 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives
(see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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MR JUSTICE BUTCHER

The Hon Mr Justice Butcher:

1. The present is a Part 8 Claim. It raises the issue of which version of the York-Antwerp Rules ('YAR') is applicable pursuant to clause (3) of the standard Congenbill 1994 form, which provides:

   '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'.

2. The Claimant contends that it is the York-Antwerp Rules 1994 ('the YAR 1994'). The Defendants contend that it is the York-Antwerp Rules 2016 ('the YAR 2016').

3. Mr Sarll for the Defendants said that this was an old chestnut, which has been debated for years, and that the present case provided 'at long last' the opportunity for clarity.

The Facts

4. The facts as to the transaction giving rise to the issue which are relevant for present purposes are very limited.

5. The Claimant carrier issued 7 bills of lading, on the Congenbill 1994 form, acknowledging shipment on its vessel, the M/V 'Star Antares', of cargoes of ferro chrome. Three of these bills were dated 18 September 2021, and were issued in Maputo, Mozambique. The others, one dated 30 September 2021, one dated 1 October 2021 and two dated 4 October 2021, were issued in Richards Bay, South Africa. Together, I will refer to these bills as 'the Bills of Lading'.

6. As the vessel was proceeding to her second discharge port, Luoyan in China, on 3 November 2021, she allegedly struck an unknown submerged object, sustaining damage. General Average was declared on 19 November 2021 by Independent Average Adjusters Ltd.

7. The Defendants are cargo insurers. They issued Average Guarantees dated 26 November 2021 to the Claimant, undertaking to pay the Claimant or the Claimant's average adjusters any contribution to general average and/or salvage and/or special charges which might be legally and properly due and payable in respect of the goods covered by the Bills of Lading.

8. A dispute has arisen as to whether their respective rights and obligations are governed by YAR 1994 or YAR 2016.

The Parties' Arguments

9. For the Claimant, Mr Karia KC argued that, when considered against the relevant background matrix of fact, the words '[YAR 1994], or any subsequent modification thereof' did not embrace either the York-Antwerp Rules 2004 ('YAR 2004') or YAR 2016. Those, he submitted, are new sets of Rules and not 'modifications' of YAR 1994.

10. In support of this case, Mr Karia relied on a number of materials, which he submitted formed part of the relevant 'matrix' or context against which the nine critical words of the Bills of Lading fell to be construed.

11. The principal matters he referred to were as follows:

(1) The YAR are drafted and promulgated by the Comité Maritime International ('CMI'). The YAR 1994 were followed by the YAR 2004. In the *Commentary on the York-Antwerp Rules 2004*, published by the Association of Average Adjusters and prepared by Mr Richard Cornah (who, the Introduction states, 'played a prominent role in the deliberations at the Vancouver Conference'), appears the following:

'It was agreed at the Vancouver conference, 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 these 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 Rule 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.'

(2) The introductory paragraphs to a summary of YAR 2004 produced by the CMI refer to the Rules as being 'a new text', 'these new rules' and 'the new rules'. Similarly, in its resolution adopting YAR 2016, the CMI Assembly described the task leading to those Rules as being 'to draft a new set of Rules'.

(3) In a Special Circular No. 1 of July 2007, BIMCO [viz the Baltic and International Maritime Council, a shipowner association which is the custodian of forms including Gencon and Congenbill] said that it: 'considers the YAR 2004 to be a new set of Rules and not in anyway a modification or amendment of the 1994 Rules (a view shared by the authors of the new Rules)'.

(4) In an Insight Article to the Members of the Gard P&I Club on 'Fake Congenbills' of 1 August 2007 it was said:

'A supplementary point which may be of interest relates to whether the 2004 version of the Rules can be considered as an amendment to the 1994 Rules. This point arises because charterparties and bills of lading often incorporate the term "1994 Rules or any subsequent amendments". It was agreed at the CMI Conference in Vancouver in 2004, at which the 2004 version of the Rules were finalised, that this version of the Rules was 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 refers to "the York-Antwerp Rules 1994 or any subsequent modification thereof" the 1994 Rules still will apply.'

(5) In the textbook, *Lowndes & Rudolf: The Law of General Average and the York-Antwerp Rules* (15th ed) (2018), appears the following:

'[30.30] Clauses which provide that the adjustment shall be governed by the York-Antwerp Rules do not in practice appear to have given rise to disputes. This is perhaps surprising, since some forms of clause provide for the incorporation of a particular version of the York-Antwerp Rules as amended, or with subsequent modifications or the like. Such provisions might be thought ambiguous, the possible meanings being that they are to incorporate only such modifications as are, strictly speaking, amendments to the specified version of the Rules, or else that they

are intended to incorporate the current version of the Rules. The only example of an amendment of the Rules in the narrow sense is the 1990 amendment of the York-Antwerp Rules 1974. By contrast, although in substance they may be regarded as amendments of the previous version, the CMI resolutions whereby successive versions of the Rules have been promulgated, record the agreement that the new rules are to be given their own name (eg York-Antwerp Rules 2004), which of itself tends to indicate that they are not to be treated as an amendment of the previous version, but as an entirely new set of rules. *So widespread is the view among 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 (sic)") 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.

In view of the difficulties of construction of provisions of this nature it would be best to avoid them, and to use language which makes it clear whether the intention is to incorporate the current version of the Rules, or only "amendments" in the strict sense.'

Mr Karia relied in particular on the italicised words.

(6) In the text book *Voyage Charters* (4th ed) (2014) – which was the edition current at the time the Bills of Lading were issued – appears the following:

'[39.1] Clause 12 of Gencon 1994 differs from the corresponding general average clause of Gencon 1976 in several respects. First, it provides that general average shall be adjusted according to "*York-Antwerp Rules 1994 and any subsequent modification thereof*". This wording raises the question of whether the York-Antwerp Rules 2004 are to be regarded as a subsequent modification of the 1994 Rules. Whilst the 2004 Rules might be regarded as a subsequent modification of the 1994 Rules, [fn] they are, technically, a new set of rules, and on balance it seems probable that the 1994 Rules continue to apply.'

The footnote read 'Just as the Hague-Visby Rules have been held to be an amendment of the Hague Rules for the purpose of a similar provision…'

(7) In *General Average: Law and Practice* by Professor Rose, 3rd ed (2017), at [1.26] there is the following:

'The York-Antwerp Rules do not have inherent binding force but their wide acceptance is shown by their frequent incorporation in standard form clauses, into charterparties, bills of lading and marine insurance policies… The Rules have been regularly revised, most recently in 2016. [fn]'

The footnote, which is what Mr Karia relies on, is in these terms:

'… 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).'

(8) The new version of the Congenbill, issued in 2016 provides, in paragraph (3):

'(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.'

12. Mr Karia submitted that, given that material, there can be no doubt as to what clause (3) of the Congenbill 1994 form would have been understood to mean in the relevant trade at the time of the agreement: it would have been understood as applying YAR 1994. If the parties had intended to incorporate YAR 2016, rather than YAR 1994, they would either have used the Congenbill 2016 form, or have amended clause (3) of the Congenbill 1994 form to incorporate YAR 2016 instead. As neither was done, the parties' agreement was that YAR 1994 were applicable.

13. For the Defendants, Mr Sarll submitted that the incorporating formula had a clear and unambiguous meaning. It was intended to function as an inbuilt updating mechanism; and made the most recent version of the YAR applicable.

14. Mr Sarll submitted that the relevant factual matrix included the following, none of which was disputed by the Claimant:

(1) That shipowners and charterers are in the habit of using contract wordings for many years, even after newer wordings have been published. There could have been no assurance, when drafting a wording such as Congenbill 1994, that the market would only use it until such time as an updated wording became available.

(2) The YAR constitute a code for regulating the adjustment of general average. The first version of the Rules appeared in 1877, their aim being to harmonize the treatment of general average by the principal seafaring nations.

(3) The YAR have been periodically revised, with further versions being published in 1890, 1924, 1950, 1974, 1994, 2004 and 2016. At least since 1950, the revisions have been overseen by CMI. Following a consultation process, the new version will be approved at a CMI meeting and published in the CMI yearbook.

(4) In addition to these further versions, an amended version of the 1974 Rules was issued in 1990, on order to take account of the Salvage Convention 1989.

(5) Apart from that specific instance, the periodic updating of the YAR is, in general terms, to be explained by a desire for the adjustment of general average to march in step with developments in shipborne commerce and to suit the changing expectations of ship and cargo interests.

15. Mr Sarll argued that, construed against that matrix, the disputed words of the Congenbill 1994 clearly had the meaning for which the Defendants contended. When the Congenbill 1994 was drafted, it would reasonably have been anticipated that there would have been a further version of the YAR before the Congenbill was updated or fell out of use. The drafters would have considered it desirable for the wording to

incorporate the latest version of the YAR, not one that was outdated, for otherwise developments in shipborne commerce would not be properly reflected.

16. 'Modification' is a word of wide import. It is defined in the *OED* as 'the action or an act of making changes to something without altering its essential nature or character' or 'the result of such alteration'. Mr Sarll submitted that it was a wider word than 'amendment', which is found in other incorporating provisions of this nature. He submitted that it was amply wide enough to embrace new iterations of the YAR; and the fact that the CMI may have made a reference to YAR 2016 being a 'new set of rules' made no difference. As shown by the terminology used by Lord Neuberger in Mitsui & Co Ltd v Beteiligungsgesellschaft LPG Tankerflotte (The 'Longchamp') [2017] UKSC 68 at [3], it is natural to refer to there having been a number of 'versions' of the YAR of which the latest 'version' is YAR 2016. A new 'version' was within the meaning of a 'modification'.

17. Mr Sarll submitted that, when drafted, there was no real doubt as to what Clause (3) of Congenbill 1994 meant and was understood to mean. He referred to *Lowndes and Rudolf* (12th ed)(1997), which had simply said that 'clauses which provide that the adjustment shall be governed by the York-Antwerp Rules … do not appear to have given rise to disputes.' He also referred to *Voyage Charters* (3rd ed)(2007), which had said in relation to an equivalent provision to that at issue here:

'[39.1] First, it provides that general average shall be adjusted according to "York-Antwerp Rules 1994 or any subsequent modification thereof". It is submitted that the effect of this is to incorporate the [YAR 2004] in relation to any casualty which arose after the latter Rules were adopted.'

18. This interpretation, he submitted, was entirely in line with the approach of the courts to clauses incorporating the Hague Rules (or legislation giving effect thereto) 'and any amendment thereto' or 'as amended'. Such clauses had been considered effective to incorporate the Hague-Visby Rules. Mr Sarll referred to McCarren & Co. Ltd v Humber International Transport Ltd (The 'Vechscroon') [1982] 1 Lloyd's Rep 301 and Noranda Inc v Barton (Time Charter) Ltd (The 'Marinor') [1996] 1 Lloyd's Rep 301. In the latter, Colman J said (at 304 RHC):

'The words "as amended" in Rider A are, in my view, intended to provide for legislative changes which may subsequently be made in respect of the subject matter of the existing Act identified in the clause paramount [viz the Canadian Carriage of Goods by Water Act, rs cc-15]. Whether those changes were effected by a subsequent Act which introduced amendments into the Act specified or by a subsequent Act which repealed the specified Act and replaced it with an Act containing amended provision in respect of the same subject-matter would be wholly irrelevant to the owners and charterers of *Marinor*. The obvious purpose of incorporating the rider is to make sure that throughout the period of the time charter the current Canadian Carriage of Good by Sea legislation is contractually incorporated.'

19. Mr Sarll submitted that what had happened in relation to the YAR was that, after the YAR 2004 were promulgated an opinion emerged in the market that the YAR 2004 were to be treated as a new set of rules not referentially incorporated by formulae such as clause (3) of Congenbill 1994. This, as explained in Browne 'The treatment of salvage in general average' (2016) 22 JIML 469 at 477, was because:

(1) The YAR 2004 were controversial. In particular they were not favoured by the shipowning community. Rules VI, XI and XIV of the YAR 2004 were especially controversial.

(2) After YAR 2004 were adopted, the Documentary Committee of BIMCO decided not to incorporate YAR 2004 into any of their standard contracts of carriage.

(3) While, to quote Browne, 'many lawyers' took the view that YAR 2004 would apply to many of BIMCO's standard contracts anyway, 'most adjusters' took the view that the words 'and any subsequent modification' or 'any subsequent amendment' thereof did not incorporate YAR 2004 because those rules were not 'modifications' or 'amendments' to YAR 1994.

20. It was for this reason that there came to be a number of statements from various sources suggesting that such words did not incorporate versions of the YAR subsequent to YAR 1994. This, Mr Sarll said, was unfortunate, both because it represented a failure to give the words used their correct meaning, and because it has tended to lead to parties not accepting that the YAR 2016, which enjoy a consensus between ship and cargo interests, are incorporated. This, Mr Sarll submitted 'has become a hindrance for the YAR project'.

21. Mr Sarll submitted that as there was no expert evidence, the Claimant could not establish a market practice. Insofar as the Claimant referred to written materials from various sources, they were either not part of the relevant 'matrix' or provided no assistance. The text books indicated that there was doubt as to the meaning of the clause. Insofar as views were expressed that the wording was not effective to incorporate later versions of the YAR, they were wrong. There was no evidence of any universal understanding of the relevant clause.

Principles of Construction

22. There was little dispute as to the relevant principles. I was referred to what was said in Investors Compensation Scheme v West Bromwich BS [1998] WLR 896 at 912-913 by Lord Hoffmann; and to the summary of the approach to be adopted given in Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (The 'Ocean Neptune') [2018] EWHC 163 at [8] by Popplewell J.

23. A material issue in this case is what material forms part of the background knowledge which was reasonably available to the parties in the situation they were in at the time of the contract. In this regard, there is a helpful discussion in Lewison, *The Interpretation of Contracts* (7th ed) at para. 3.157, as follows:

'Lord Hoffmann's proposition [in ICS] was that background included what "should have been reasonably available to the parties". That formulation does not restrict background to what the parties actually knew; and raises questions about how to judge what would have been "reasonably available". To take the second point first, it has been pointed out in Australia that in the age of the internet the range of material "reasonably available" is almost limitless; and that a fact that is reasonably available to the parties should only be used as an aid to interpretation if it can be inferred that the parties actually knew it. This limitation has been held to be equally applicable in English law. In SAS Institute Inc v World Programming Ltd, Lewison LJ said:

> "Almost anything is available on the internet these days, and simply because something is available on the internet does not mean that it is relevant background."'

24. Also of assistance is the following summary of the most relevant principles in Challinor v Juliet Bellis & Co [2013] EWHC 347 (Ch) at [279] per Hildyard J:

> '(1) At least where there is no direct evidence as to what the parties knew and did not know, and as a corollary of the objective approach to the interpretation of contracts, the question of what knowledge a reasonable observer would have expected and believed both contracting parties to have had, and each to have assumed the other to have had, at the time of their contract…
>
> (2) that includes specialist or unusual knowledge which only parties entering into a contractual engagement of the sort in question might reasonably be assumed to have; and it also includes knowledge which it is to be inferred, from the nature of the actions they have in fact undertaken, that they had or must have had;
>
> (3) however, it does not include information that a reasonable observer would think that the parties merely might have known: that would open the gate too far to subjective or idiosyncratic speculation…'

Discussion

25. It is convenient to start with the words of the clause. I agree with the Defendants' submission that the word 'modification' ordinarily signifies a change which does not alter the essential nature or character of the thing modified. When used in the context of a written instrument or set of Rules I think it ordinarily has, if anything, a rather wider connotation than 'amendment', extending to changes in approach, and being less focused than is the word 'amendment' on textual change.

26. In addition, the clause here contains the words '*any* subsequent modification'. The use of 'any' emphasises that it is all 'modifications' to the YAR 1994 which are to be incorporated.

27. If one then asks how these words are reasonably to be understood judged against what may be called the uncontroversial factual matrix, namely that which I have summarised in paragraph [14] above, I think that the answer is clear. The words are reasonably to be understood as capable of applying to a new version of the Rules. I do not consider that a reasonable person possessed of that background knowledge, and without regard to the materials relied on by the Claimant to which I will return, would understand the parties to have meant only amendments to the 1994 version of the Rules which were identified as such, rather than a new version of the Rules which included some changed provisions. A reasonable person would not, in my view, have understood the parties to have been drawing that somewhat technical distinction, without its being expressly articulated. On the contrary, had the narrower effect been intended the parties would not have used the words 'any … modification'.

28. There is no difficulty, in my view, as a matter of the ordinary use of language, in describing YAR 2004 or YAR 2016 as 'modifications' of YAR 1994. Each was

produced by the same body, was directed to the same end, and contained many of the same provisions, but introduced some changes.

29. I regard the above conclusion as consistent with the way in which courts have construed clauses incorporating the Brussels International Convention of 1924 'and any subsequent amendment thereto' (McCarren & Co Ltd v Humber International Ltd (The 'Vechscroon') [1982] 1 Lloyd's Rep 301, or national legislation enacting the Hague Rules 'as amended' (Noranda Inc v Barton (Time Charter) Ltd (The 'Marinor') [1996] 1 Lloyd's Rep 301. In each the conclusion was that the Hague-Visby Rules applied. It is true that in the first of those cases the point was common ground: nevertheless Lloyd J clearly regarded that common ground as correct. In the second, Colman J rejected a submission that the incorporating clause was only effective to incorporate a legislative act which contained amending provisions, and was not apt to cover a case in which an act had been repealed and replaced with an act which contained amended .provisions. Colman J considered that such a distinction would be 'wholly irrelevant to the owners and charterers of the *Marinor*'.

30. Furthermore, such an interpretation accords with the most obvious purpose of including a reference to subsequent modifications of the specified YAR, namely to ensure that the adjustment of general average should be in step with major developments in shipborne commerce such as would be expected to be considered and taken into account by the CMI.

31. The emphasis of the Claimant's argument was not on what the words might be taken to mean on their own, or as judged against what I have called the 'uncontentious' components of the factual matrix. It was rather that, given the specific materials on which it relied, the words could only reasonably be understood as having the narrower incorporating meaning for which it contended. It is therefore necessary to consider those materials in some detail, both as to whether they were reasonably available to the parties, and as to whether they would have affected the way in which the language of the document would have been understood by a reasonable person and if so how.

32. It was not in dispute that evidence can be adduced which shows what words would have been understood to mean in the relevant trade at the time of the agreement, even if it does not amount to evidence of a trade usage or custom. I also accept Mr Karia's submission that such evidence can, in an appropriate case, be in the form of published materials, and does not necessarily have to be adduced by way of expert evidence. Such material was considered of assistance in Lloyds TSB Bank plc v Clarke [2002] 2 All ER (Comm) at [15]. However, such materials have to be looked at carefully, to see whether they do indeed reveal a background usage which would have influenced how a reasonable person would have understood the contractual language or whether they represent only one view as to what particular words mean.

33. I start with the Claimant's reliance on the *Commentary on the York-Antwerp Rules 2004* produced by the Association of Average Adjusters. I have set out the passage in the document on which the Claimant relies. As to that part which says that it was agreed at the Vancouver conference that the Rules should be given the title of YAR 2004 'to make it clear that these were not simply an amendment to or modification of the 1994 Rules', this is not a reference to any travaux préparatoires produced by the CMI, and no material, such as an official record of the proceedings, has been adduced to show any such agreement. It is not easy to square with the CMI's summary of the YAR 2004,

which refers to the 'amendments' made to YAR 1994, or the CMI's resolution which itself refers to the 'amendments which have been made to the [YAR 1994]'. I do not consider that it can be inferred that both parties actually knew of this *Commentary* or that it is something that a reasonable person would have expected and believed both parties to the Bills of Lading to have had. Further, if, contrary to that, a reasonable person would have expected the parties to have known of this *Commentary*, then that could only be on the basis that the parties are assumed to have a fairly high degree of specialist knowledge. On that basis, however, there seems no good reason why the parties should not also be assumed to have known that this statement of what was agreed finds no counterpart in the article by Browne, 'The treatment of salvage in general average', cited above, which also deals, especially at 477, with what transpired at the Vancouver conference.

34. The part of the *Commentary* which states that 'where contracts of affreightment such as Congenbill 1994 refer to "[YAR 1994] or subsequent modification thereof…" the 1994 Rules will remain applicable', appears to be simply the opinion of Mr Cornah, and possibly of the Association of Average Adjusters. If, contrary to my view, this was material which both parties are to be treated as having known, it would, in my view, have been reasonably expected that they would consider such a statement of opinion as being neither necessarily correct nor a sure guide to how a court would construe the relevant words.

35. As to the BIMCO Special Circular No. 1, there was no evidence presented even that this was, or is, publicly available on the internet. I do not consider that a reasonable person would have expected both parties, including cargo interests such as the Defendants, to have known of it. In any event, the statement which it contains to the effect that YAR 2004 was 'not in anyway a modification or amendment of the 1994 Rules' is a statement of BIMCO's opinion or position. Furthermore, the document itself states (in bold): 'BIMCO strongly recommends that its members remove references to "any subsequent amendments thereto" (or similar wording) after "[YAR 1994]" in any charter parties they conclude'. That was clearly because it was recognised that those words might indeed be construed as having the effect of incorporating the YAR 2004.

36. The Insight Article of Gard is, in my view, quite clearly not material which a reasonable person would have expected both the parties to have known. It is a circular to Gard's members, and one which is primarily (and in its title) directed to a different subject. Merely because it is capable of being found on the internet does not make it part of the relevant matrix of fact. In any event, the text relied on by the Claimant appears to be derived from the *Commentary* and not to be independent of it, and likewise represents an expression of a view.

37. As to the Claimant's reliance on text books, and in particular *Lowndes & Rudolf, General Average: Law and Practice* and *Voyage Charters*, it will be a rare case in which the expressions of view in a legal text book as to the meaning or effect of certain words or of particular provisions will form a material part of the relevant 'matrix of fact'. This is precisely because they are statements of opinion, and, even if assumed to be known to both parties, would have been understood as such.

38. Here, furthermore, I consider that the text books referred to by Mr Karia themselves indicate that a clause such as the one with which this case is concerned is, at best from

the Claimant's point of view, capable of two interpretations. The thirteenth (2007) and fourteenth (2013) editions of *Lowndes & Rudolf* stated that clauses incorporating a particular version of the YAR '*as amended* or *with subsequent modifications* or the like' were 'ambiguous', and that it would be advisable to avoid 'the difficulties of construction of provisions of this nature' by using language 'which makes it clear whether the intention is to incorporate the current version of the Rules, or only "amendments" in the strict sense.' The fifteenth edition of *Lowndes & Rudolf* added some text, including that which I have italicised in the quotation given above. To say, however, that 'it is possible to contend that there is a binding practice in London' is not to say that there is a binding practice; and no binding practice has, in fact, been argued for in this case. The remainder of the text continues to indicate that such clauses 'might be thought ambiguous' and to refer to 'difficulties of construction'.

39. *Voyage Charters* in its 3rd edition (2007) had 'submitted' that a clause applying the YAR 1994 'or any subsequent modification thereof' had the effect of incorporating YAR 2004 in relation to any casualty which arose after the latter Rules were adopted. In the 4th edition, which I have quoted above, the opposite view was expressed 'on balance' and 'whilst the 2004 Rules might be regarded as a subsequent modification of the 1994 Rules'. This seems to me to indicate very clearly the fact that what were being expressed were opinions, which the authors themselves recognised to be open to debate.

40. The footnote from *General Average: Law and Practice* relied upon by the Claimant does not, in my view, provide any support for its position. What the author is apparently referring to in that footnote is the incorporation of a specific set of rules, and is not considering language incorporating a set of rules 'and any subsequent modification' thereof or the like.

41. In my view, even assuming that one should regard this text book material as being known to the parties at the time of contracting, it does not point to the conclusion that the relevant words would have been reasonably understood to have the meaning for which the Claimant contends. The reasonable person considering what the parties meant, would have regarded these expressions of opinion as just that; and would rather have understood the parties to have meant what the words, taken in the context of what I have called the 'uncontroversial' factual matrix, conveyed.

42. In my judgment, that meaning is the one for which the Defendants contend. The relevant words would have incorporated into a putative contract comparable to the contract(s) at issue here the YAR 2004 after their adoption and before the adoption of the YAR 2016. Those words are effective to have incorporated the YAR 2016 into the contract(s) with which the present case is concerned.

43. As will be apparent from the foregoing, I do not draw a distinction between the effect of the relevant words on the incorporation of the YAR 2004 and YAR 2016. But, as Mr Sarll submitted, the incorporation of the YAR 2016 is, if anything, the stronger case, as those Rules command a broader consensus, BIMCO has not made about them statements similar to those which it made about YAR 2004 which I have referred to above, and the arguments that they are not at least a 'modification' of the YAR 1994 are weaker.

44. I should finally refer to Mr Karia's argument that had the parties intended to incorporate the YAR 2016, they would have used the Congenbill 2016 form. This point appeared

to me to be answered by Mr Sarll's submission that, had the parties actually wanted to ensure that it was the YAR 1994 which were incorporated, they could have used the Congenbill 2007, which provides for YAR 1994 *simpliciter*. As it was, they did not do that, but instead used a form which specifically provided for the incorporation of subsequent modifications of the YAR 1994.

Conclusion

45. For the reasons I have given, I hold that it was agreed that the relevant general average adjustment was to be conducted under YAR 2016.