REPORT OF THE WORKING GROUP
ON THE
RULE PARAMOUNT
IN THE YORK ANTWERP RULES 1994

The working group was established at the General Assembly of the Association in Rhodes in 1995.

The following were members of the working group:-

Stefano Cavallo
Leo Walsh
Jaap Gerritzen
Carlo Mongrandi
Hans-Juergen Zeyse
Michel Lureau
Abed Tahiri
Charles Hebditch (Chairman)

The Rule reads as follows:-

"In no case shall there be any allowance for sacrifice or expenditure unless reasonably made or incurred."

On 19/4/96 the Chairman circulated a questionnaire to all members of the working group. He later circulated a definition of "paramount" provided by Leo Walsh, that had been requested by the Council at its meeting in Antwerp in 1996. Later, extracts from the proofs of the relevant sections of the new edition of Lowndes, which were kindly provided by the editor, John Wilson, were circulated to the members and, finally, extracts from the address of Howard Myerson to the USAAA, when he was Chairman, were also circulated.

Replies were obtained from all members except two.

The questions and a synopsis of the answers received are as follows:-

Question 1. In your national jurisdiction is there such a legal concept as a "Rule Paramount"? If so, please advise in what context it appears and what meaning it has.

Replies. In none of the countries from which a reply was obtained is there such a concept, although there are some laws which cannot be contracted out of.

Question 2. Are you aware of the term being used in any other international code? If so, which one and what meaning does it have?

Replies. No member replying could point to the term being used in an international code, although in common law jurisdictions the term "Clause Paramount" is used in contractual documents concerning the carriage of goods by sea; in civil law jurisdictions the concept of contracting parties having to act as a good father of a family was referred to.

Question 3. The introduction of this Rule Paramount was stimulated by the English case of the "ALPHA" (1991 2 Ll. Rep. 515). Do you consider that the courts of your country would have reached a similar decision on the facts of the case or do you think that they would have been more likely to have held that there was, under the 1974 Rules, an overriding requirement for general average actions to be reasonable? If they probably would have so held, then it is arguable that the Rule is unnecessary, or only necessary in England.

Replies. Members from three countries felt unable to advise on this question. Two from civil law countries felt that their judges would have decided in the opposite way to the English judge. The question was of course irrelevant so far as the English member was concerned.

Question 4. In the "ALPHA" case it was the general average act which was unreasonable, the sacrifice of the ship in refloating. The Rule of course also requires "expenditure" to be "reasonably made or incurred". Do you consider that the wording means that the act of incurring the expenditure has to be reasonable or that the amount of the expenditure has to be reasonable? For instance if a ship has broken down at sea and there is a choice between being towed to a port of refuge or being towed to destination, does the average adjuster have to consider the reasonableness of the action taken compared with the action not taken, irrespective of the relative costs involved? Or does he merely have to consider whether the cost of the action taken is reasonable?

Replies. The replies to this question were somewhat varied. The majority of the members felt that both the act and the costs have to be reasonable, although some put more emphasis on one than the other. The French member stated that the reasonableness was to be tested with reference to the degree of peril with which the ship and cargo were threatened.

Question 5. What significance does the Rule have in the interpretation of Rule F? I think most adjusters have, under the earlier Rules, taken the view that the action not taken, for which the action taken was substituted, is almost by definition less reasonable; if not, the proviso protects the position. Do you think this has now changed? Is it now necessary to judge not only the reasonableness of the action taken, but the action not taken?

Replies. There was general agreement that both the action taken and the action for which it was substituted should be reasonable, although it was appreciated that the action not taken might well on occasion be less reasonable than that taken.

Question 6. What significance does the Rule have in the interpretation of Rule VI? Will it be possible for a party to the general average to argue that a fixed price contractual salvage should have been made by the Master or Shipowner rather than a Lloyd's form salvage? Or of course vice versa.

Replies. The general feeling was that the Master should always have the benefit of the doubt and that the test of reasonableness does not solely depend on the financial outcome; there was also a worry that lawyers might try to be wise after the event on this question, and others, using the Rule Paramount as a weapon to attack allowances in General Average.

Question 7. Although Rule E, first paragraph, presumably places the onus of proving "reasonableness" on the party claiming in General Average, in practice and in the first instance it will be the average adjuster who will have to take a view on whether any act is in fact

"reasonable". How will he do this? Will he just use his experience or will he be expected to submit each case where there might be any shadow of doubt to, for instance, a distinguished master mariner and ask him whether he would have done what was done or something else. If the reply is something else, then at what cost? If the action is considered to be "unreasonable" but the cost of the "reasonable" alternative greater, what then?

Replies. The majority of members considered that it was for the adjuster to make a judgement on the question of reasonability of any action, but that in certain, probably rare, circumstances he may have to take expert advice. The French member considers this an irrelevant question, given that reasonability is to be tested by the degree of danger involved.

The above are a very brief synopsis of the detailed and most thoughtful replies that the Chairman of the working group has received.

Leo Walsh provided the following helpful definition of "paramount":-

"We view the word paramount in the sense of having the highest rank or authority in application of the rules. This rule was not to be superseded by any provision contained in another rule, whether lettered or numbered, or by an omission in a rule. I believe as applied to the 1994 Rules, the foregoing comments still apply."

John Wilson in the new edition of Lowndes, of which he is the joint editor, quotes Lord Denning M.R. in Nea Agrex v. Baltic Shipping (1976) who described a "Clause Paramount" incorporating the Hague Rules into a contract of carriage, as follows "*it* overrides any express exemption or condition which is inconsistent with it."

The Chairman extracted the following definitions from the Shorter Oxford English Dictionary, although of course each different legal system will have its own definitions:-

PARAMOUNT

1. **a.** Above in a scale of rank or authority; superior
   b. Above all others in rank ,order or jurisdiction; supreme.
2. Superior to all others in influence, power etc.;pre-eminent.

REASONABLE

1. Endowed with reason.
2. **a.** Having sound judgement; sensible, sane. Also not asking for too much.
   b. Requiring the use of reason.
3. Agreeable to reason; not irrational, absurd or ridiculous.
4. **a.** Not going beyond the limit assigned by reason; not extravagant or excessive; moderate.
   b. Moderate in price; inexpensive.
5. **a.** Of such an amount, size, number etc., as is judged to be appropriate or suitable to the circumstances or purpose.
   b. Of a fair, average, or considerable amount, size etc.

CONCLUSION

The replies have demonstrated very clearly the difference of approach between the civil and common law systems. Underlying the civil law is the concept of the good father of the family and therefore the Rule Paramount is felt to be unnecessary as the concept of reasonableness has always applied to all acts and allowances under all sets of the York Antwerp Rules. The Rule is therefore really only of importance to those working in common law jurisdictions.

There is however a general worry that lawyers working in such jurisdictions may use the Rule as a weapon to attack adjustments and to be wise after the event. However perhaps the wise words of Mr Justice Clifford in "The Star of Hope" (1869), quoted by Howard Myerson in his Chairman's address last year, will be borne in mind by modern judges if challenges of this kind are made; they are:-

"Standing upon the deck of the vessel, with a full knowledge of her strength and condition, and of the state of the elements which threaten a common destruction, he can best decide in the emergency what the necessities of the moment require to save the lives of those on board and the property entrusted to his care, and if he is a competent master, if an emergency actually existed calling for a decision whether such sacrifice was required, and if he appears to have arrived at his conclusion with due deliberation, by a fair exercise at his own skill and judgement, with no unreasonable timidity, and with an honest intent to do his duty, it must be presumed, in the absence of proof to the contrary, that his decision was wisely and properly made."

C.S.Hebditch 27 July 1997