



Marine Masters Maritime Law consultancy

GENERAL AVERAGE

In the aftermath of the EVER GIVEN we want to use the opportunity to clarify the principle of General Average. The concept of General Average exists since the times when Phoenician traders were roaming the seas, and it has been relied upon ever since.

General Average is nothing more than a form of mutual insurance, agreed between those who are 'committed' in a maritime adventure: (1) The owner of the ship and (2) the cargo Owners on that ship¹. The insurance of General Average is necessary for sacrifices or expenditures made to safeguard the continuation of the maritime adventure as a whole. On such occasions, all participants will contribute to such expenditure in the proportion of value they were initially part of that adventure.

York Antwerp Rules

Modern GA is largely set out in the York Antwerp Rules. The Y/A rules do not have the status of a treaty or a convention; this set of rules/procedures apply because they are agreed between the parties to a Bill of Lading or a Charter Party.

GA is also a part of English Common Law² and many other jurisdictions around the world. 'User demand' for unity on the application of GA resulted in that as early as the mid-1800s the first set of York Antwerp rules were born. These rules are mentioned in almost any shipping contract, sometimes by one short and simple sentence like 'Y/A 94 to apply'.

The York-Antwerp rules give a good insight on what are the necessary components for a General Average³:

1. There must be an extraordinary sacrifice or expenditure;

2. The expenditure must have been made voluntarily/intentionally;
3. The expenditure must have been made reasonably;
4. The sacrifice must be made for the common safety to preserve the property involved in a common maritime adventure...
5. ...incurred in a Time of Peril.

Some components overlap with Salvage: GA and Salvage have an overlap and Salvage expenses can be part of GA.

How does a general average work?

In a GA a loss is prorated between ALL parties on board the ship it occurred on. How this equates to fairness is best illustrated by an example:

A ship carries a cargo of 2 cargo owners. One of the cargoes, cargo B, needed to be thrown overboard to avoid the ship from sinking. The ship is worth 10 MIO dollars, cargo A is worth 5 MIO dollars and cargo B is also worth 5 MIO dollars. In this case, the total value of the adventure is 20 MIO dollars of which 1/2 part is of the shipowner, and each cargo owner has 1/4 part. In case cargo B was jettisoned the loss is 5 MIO dollars.

1/2 of the loss is contributed by the shipowner (2.5 MIO dollars) and the cargo owners both contribute 1.25 MIO dollars each.

If, alternatively, the loss would have been divided between the shipowner and cargo owner A, the cargo owner of the jettisoned

¹ and on some occasions also the charterers of that ship.

² Birkley v. Presgrave(1801), but it misses a 'voluntary' and a 'reasonable' component other sources of General average has...

³ see Rule A of for example Y/A94 or Y/A04

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cargo B would not (need to-) contribute. In that case, the owner of the jettisoned cargo would have no loss at all even though he was part of the same maritime venture.

Average Adjuster

The above example is a simplified GA Adjustment. Adjusting is the work of an Average Adjuster and this task is usually much more complex than the mentioned example. It is important to remember that the provided adjustment is nothing but an 'advise only'⁴. The actual agreement on the contribution is between the carrier and the cargo interest(s).

However, if a party to the adjustment signs the average bond or the presented Guarantee forms, this could represent a contractual agreement. Recent case law⁵ focuses on the exact wording used during the adjustment process on the GA Security and the initial average guarantee forms used. It is therefore important not to sign any documents presented without a thorough check on the used wording(s), even if security is provided Cash.

The declaration of General Average also allows the carrier to exercise a possessory lien (i.e. he can 'sit on the cargo'), until the cargo owner has provided security in the form of an average bond, or with cash security. Usually, the cargo insurance will take care of supplying an average bond.

Recent developments on General Average

The GA process intends to keep all questions of any fault to the event outside the GA adjustment⁶. It is necessary to apportion any adjustment and to establish the shares in the total maritime adventure. It is up to the individual parties to accept or reject liability to the claim.

Since the mid-2010's⁷ there seems to be a trend of more discussions surrounding general average cases. These discussions focus on defence (i.e.: no contribution to the GA), from

the cargo interests that the actual GA act was, a result from an *Actionable fault of the carrier*, which is under Hague Visby rules article III rule 1: '*failure to exercise due diligence to make the ship seaworthy before and at the commencement of the voyage*'.

Such due diligence is not an absolute concept. This makes it difficult to give 'hard boundaries on what makes a ship seaworthy or not. The general rule of thumb for a shipowner is to be careful on keeping a degree of fitness on the ship for the intended purpose of that ship.

A recent case, the MSC MCA LIBRA⁸, where the matter of (un-)seaworthiness in a GA is invoked as an actionable fault involved a containership that grounded as a result of defects in the passage plan for leaving the port of Xiamen/China. The owners claimed the cost for re-floating and repairs as General Average. This is disputed by the cargo interests. The case will be looked at by the UK Supreme Court later this year. The UK SC now needs to establish whether a 'defective passage plan' could be considered the ship unseaworthy. Is such a defective passage plan an 'attribute of the ship' or is a passage plan is only a recording of a 'navigational decision' on board.

The latter would protect the shipowner under Hague Visby Rules Art IV rule 2(a) then the cargo interests will have no 'actionable fault' defence against the General Average contribution claimed by the ship owners for the costs of the salvage and the repairs.

Getting involved in a General Average, beware!

The EVER GIVEN aftermath, is potentially interesting in view of the developments of General Average in recent years.

Firstly, because of the recent discussions between the Suez Port authority and the shipowners/insurers whether ships this size

⁴ In *Castle v Hong Kong Shipping*[1984], Lord Diplock stated : (sic) '*the average statement has no other legal effect than as an expression of opinion by a professional man*'

⁵ see *BSLE Sunrise* [2019] EWHC 2860 (Comm) and *Maersk Neuchatel* (St Maximus Shipping Co.Ltd v A.P. Moller-Maersk A/S1 [2014]

⁶ see for example Rule D Y/A 94 rules

⁷ see, amongst others, *BSLE SUNRISE* [2019] EWHC 2860(comm) and *St Maximus Shipping Co Ltd v. AP Moller-Maersk AS* (Maersk Neuchatel) [2014] EWHC 1643 (Comm)

⁸ *Alize 1954 v Allianz Elementar Versicherungs AG* (The "CMA CGM LIBRA") - confirmed in the court of appeal in 2020, appeal to UK SC pending 2h 2021.

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would necessitate tugboats while passing the Suez Canal. Where does that leave seaworthiness when she left her last port of loading if she cannot pass the Suez Canal by herself, with as a result the Casualty?

Secondly, the York Antwerp rules (and applicable caselaw) require that a General Average sacrifice must be made in a Time of Peril. What Peril, or what Dangers, apply for a ship resting comfortably wedged between 2 sand Suez Canal banks? Caselaw in THE MAKIS case however includes 'future potential' perils and not just actual present danger for declaring General Average,... how soon would the ship be in peril in this case in the middle of a Canal and how 'potential' is the future peril? Or is what happened a 'whoopsie' that needs to be solved by the Shipowner...

Thirdly, a changing climate implies increasing perils as wind forces on average seem to increase. So where lies the boundary when it is 'assumed' a ship can pass a certain area with or without tugboats without some form of negligence can be established? Again there is not a hard set of rules to substantiate this.

Blocking a 'highway of the world'⁹

We realize that '*peril*' during the blockage extended to, possibly, something way larger than the ship EVER GIVEN itself and that obstruction of the Suez Canal have had consequences beyond the industries' imagination. A lot of money has been lost, by a lot of people who were not always directly involved in the casualty itself. A lot of losses will therefore not be retrievable. It is however safe to say that the claimed sum will have a severe impact on the shipping and insurance industry as a whole and that the ship owner of the EVER GIVEN and the cargo owners, will not be the only one 'paying' in the end.

It remains, however, a question of what the outcome will be from a legal perspective: is it really a General Average?

In the case of the above adjustment example sacrificing 1 of 2 cargoes on board the vessel did the job, but with the amount of 'interests'

on a ship the scale of the EVER GIVEN there is a whole new level playing field.

From a cargo-owners perspective, given the recent buildup on case law and pending the Supreme Court's decision on the MSC MCA LIBRA case, we predict it will be worthwhile not to give in without a fight once proposals for the EVER GIVEN GA adjustment start to appear....

If you have any comments or questions with regards to General Average or to how this is, or should be -, part of your (cargo-) insurance policy, please do not hesitate to contact us for assistance.

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Best regards,
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⁹ We assume that any discussion on whether the Suez Canal, '*a highway of the world where ships of all nations can go protected by the law of nations*', will be considered 'high seas' on the basis of what Vaughan Williams LJ mentioned in *Republic of Bolivia v Indemnity Mutual Marine Assurance Co Ltd* ([1909] 1 KB 785.