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BEEIDIGTE DISPACHEURE – SWORN AVERAGE ADJUSTERS

GENERAL AVERAGE – just (and) still modern

A pleading delivered at VHT Seminar on general average,
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Do we like accidental damage to our property?

No, we don't. That's why many people insure their property against such incidental damage. But certainly not all do – in our daily practice we experience considerable quantities of cargo travelling around the world which are not insured at all.

Even worse, however, is damage to our property that is the result of somebody else's voluntary act, or arbitrary decision. In such a case we dislike the result and we dislike the person so deciding.

This apparently is a very basic human feeling. Already 3000 years ago the Phoenicians felt it to be unjust to leave e.g. a cargo owner standing with empty hands and pockets after the loss of his goods which had been jettisoned following the decision of the ship's master – whereby the ship and all the other merchants' property had been saved from being lost in the sea. Over centuries and millenia this has not changed.

A case of general average (G/A) that was recently heard before the English High Court (the "Longchamp") obviously led the judge (Mr Stephen Hofmeyr QC) into thorough studies of quite a number of older cases. A couple of these are cited in his judgement, and I take the liberty to make use of his groundwork:

"The liability to contribute in no sense results from the contract of carriage, but exists wholly independently of the contract of carriage, by virtue of the equitable doctrine of the Rhodian law, which as part of the law maritime has been incorporated in the municipal law of England."

(Milburn v Jamaica Fruit importing Co [1900] 2 QB 540 at 550; see Longchamp p. 4)

Short before that, four Lords sitting on the Privy Council went even further in saying:

"... in any aspect of it, the rule of contribution has its foundation in the plainest equity."

(Strang, Steel & Co v A Scott & Co [1899] 14 App Cas 601; see Longchamp p. 3)

And a last one from 1881:

"It is a law founded upon justice, public policy, and convenience and rests ... upon reasons which are so obvious that it is not surprising to find that it is older than any other law or rule in force..."

(Pirie v Middle Dock Co [1881] 4 Asp. Mar. Law Cas. 388 at 390; see Longchamp p. 4)

I am not sure that I would want to see justice, plain equity or public policy as the only legal basis for general average, and I admit that "convenience" may not be what most people spontaneously associate with G/A. But it is obvious that the principle has a very strong foundation and is firmly anchored in the heads and hearts of maritime people.

Traditions have their charms, but a long history is, in itself, certainly no argument for hindering change. Looking at somewhat more recent times, however, we see there is indeed change and development in the matter of general average:

While the Phoenicians and Romans kept the system very basic, it became more complex in the later parts of the second millenium after Christ. With the invention of steamships, shipping and trading changed its face as it got faster and truly international. Hence, then modern practitioners decided to unify the system of general average to adapt it to a smaller world. In 1860 they started to draft the wording of what became the York Rules four years later and should become the York-Antwerp Rules in 1877.

One general decision from that times still particularly contributes to the discussions there have been ever since then: the decision to leave the strict cage of "common safety" as the only guiding light in a situation of peril for all property involved in the adventure, but to acknowledge the reason for which the adventure had been started, i.e. the aim to complete the voyage to the intended and agreed destination. This meant the incorporation of certain aspects of "common benefit" allowances. The concept had been well established in a number of continental national laws but not in the UK, and it some of our English friends still seem to be unhappy that they were out-voted 150 years ago...

In fact, the worldwide unification of general average by means of the York-Antwerp Rules (YAR) was a big success. So was the international trade, and while in ancient times a handful of merchants had travelled with their goods on board a ship, around the beginning of the 20th century there were already steamers with about 3000 Bs/L! And general average was declared and adjusted on these when there were not only no computers, but not even calculating machines!

The most popular objections against general average

Different sorts of criticism have been repeatedly raised again and again, and a number of them have been presented to us this afternoon. I think we should have a closer look at some of these:

1. G/A offers possibilities of fraud and abuse
2. There exists no similar system for inland transportation
3. G/A is too complicated
4. G/A causes delay
5. G/A causes additional costs
6. Modern means of communication have made G/A unnecessary
7. G/A is unnecessary as insurance is a simpler and cheaper option

1. The possibility of fraud and abuse (?)

The simple possibility of abuse does not make a system bad. Leaving money in a bank account will give the bank the theoretical opportunity to make fraudulent use of it – but does that mean all banks should be closed down?

I believe the use of qualified, independent average adjusters in reasonable jurisdictions should be the best means to counter that danger. And in the end there is still Rule D of the YAR – and cargo lawyers are regularly making full use of it, requesting dozens of documents in the hope to find whatever small a hint to unseaworthiness of the vessel and actionable fault on the shipowner's part... is that unreasonable? Or fraudulent? Should Rule D better be dismissed?

No, certainly not. The concept of the YAR, including Rule D, is well-trying and fair, and the mere possibility of abuse does not make it unfair.

2. There is no similar system for land transportation (?)

That is correct. It is difficult to counter this argument because it is no argument. The conclusion to be drawn from this statement could as well be that such system must be created, or the YAR be made applicable for land transport as well.

The truth is that transport by road or rail is, in many ways, not the same as maritime transport. For a truck with an engine breakdown on the Autobahn either assistance or replacement will be rather readily available in almost no time. For a vessel out at sea with a huge amount of cargo quick help is not that easy to arrange.

3. G/A is too complicated (?)

It should be safe to assume that close to 100% of the people owning and driving a motor car are unable to dismantle its engine to single parts and put it back together again. In fact even opening its locks by pressing a button on a tiny remote control key

will be close to magic for most of them. Would we therefore conclude that none of these people should use a car any more because it is too complicated for them?

Or look at a charter party, concluded on a NYPE 1946 time charter form with 28 clauses, but now this contract is meant for one voyage only and includes rider clauses No. 29 - 99. Amongst the clauses are ones like NAABSA or AAAA, SSHINC, UIIWCHTAUTC, or FDEDNRCAOSLONL. Thus a once somewhat simple form has grown into a rather complex system, and probably most readers will agree that such a contract is not something readily understandable to anybody who is not involved in the daily business of chartering and broking. But: If it is too complicated to grasp all its details, all the rights and obligations at a quick glance, do we then have to conclude that charter contracts of this kind should not be made any more?

Bill of Lading conditions or insurance policies might serve as further examples. And: All these contractual conditions are not worldwide unified as the YAR are, but different from carrier to carrier, broker to broker, from country to country and even within a single jurisdiction.

But general average is too complicated?

Frankly this is ridiculous. We are living in a specialised world, and the legal field is not only no exemption but a perfect example. No serious lawyer would say he knows all aspects of the law, nor even all aspects of maritime law. G/A may be complicated, but there are specialists to handle it and apply the rules.

4. G/A causes delay (?)

Time is money, and the world around us is not slowing down, but rather speeding up. In the days of just-in-time deliveries delay is a most unwanted thing. Transport people know this and usually do their utmost to avoid problems, but casualties can still happen. As mentioned earlier, solutions are not always quick and easy for a cargo vessel in distress far from the next port.

But is it general average that causes the delay? First of all it is the casualty itself, and that is just bad luck. If a vessel has to put into a port of refuge to fix a propulsion problem there is delay – whether G/A is declared or not. Associated with the G/A procedure, in my experience there are often two additional factors:

a) The first is the decision making process on the side of the ship's owners and underwriters. As G/A has a somewhat bad reputation, many people seem to try to avoid it and apparently have to overcome their inhibitions before declaring G/A and instructing an adjuster.

b) Secondly, cargo owners and underwriters are reluctant to surrender G/A security. There can be different causes for such hesitation – no knowledge of the procedure,

mistrust in the average adjuster, a feeling that the shipowner may be liable for the casualty and the consequent cost and damage.

From my perspective as a publically appointed average adjuster, observed by the Chamber of Commerce, obliged to keep strictly independent and impartial, I can say: It is only security! All rights are reserved to have the adjustment and its allowances challenged, or to rely on unseaworthiness arguments to avoid payment of the contribution in the end. Putting up security quickly is key for avoiding delays!

c) Finally I have to confess that there can be delay in the release process on the side of adjusters, at least in cases with large amounts of consignments, such as typically on container vessels. I can report, however, that modern technology assists in solving this problem as well. First of all, electronic submission of cargo manifests prevents us from having to type all the B/L and container numbers – importing the data to a dedicated database is quickly done and avoids mistakes.

In addition, of course also the further handling is simplified by the sensible use of computers. If I say sensible I do not mean sending out "word" format security forms for people to insert cargo and address details which in the best case are returned in a legible form but then still have to be typed into the database by the adjuster.

With some pride I can report that our firm has developed a database solution (named "Casco") which makes use of work done by cargo interests in any event to reduce the workload at our end, thereby allowing a much more efficient and thus quicker service in checking the security papers and releasing secured consignments. As it is an internet based solution, it allows us to work together with co-operated partners in real big cases. And there are further advantages to it; e.g. a liner agent in a port can be granted access to the database to review the "real time" release status for the most urgent shipments rather than waiting for updated lists from the adjuster. Of course, such modern systems also speed up the run-off of a G/A case by streamlining information and communication.

To sum it up: I believe that most of the delay would not occur if everybody was ready to accept the system of G/A, put a little trust in the qualified average adjusters, and just go along the lines of the usual procedures.

5. G/A is too expensive (?)

It must be clear that the allowable losses and expenses – towage or salvage, sacrifice damage, port of refuge expenses, etc. – are incurred anyway. So what are the additional cost factors in G/A? These are usually found towards the end of an adjustment's cost chapter:

a) G/A interest

In my eyes it is fair to allow interest for someone who has been out of pocket for a potentially long time for somebody else. Is it right to reimburse an assured only after a two year quarrel over a claim and then without any compensation for his capital

loss? The Nordic Plan provides for interest to be paid on an insurance claim as well. And, on the other hand, very often underwriters are the ones who earn most of the G/A interest after having refunded the assured's expenses by way of payments on account.

b) Advancing commission

... may be seen as a superfluous relict but this will most probably be done away with in the YAR 2016.

c) Adjusting fees

Of course specialists like average adjusters are not cheap. But if you choose a qualified adjuster you will get good value for the money: an efficient, experienced professional with in-depth knowledge of a niche area and with trained problem-solving and mediation skills.

(On a side note: Lawyers are usually more expensive – both by hour and in terms of the total bill. In our experience practically all container vessel salvage cases end up with solicitor's fees at least three times as high as the average adjusters' charges!)

And claims handling under insurance policies is not for free either. In fact where we as independent average adjusters are instructed to adjust particular average claims under Hull & Machinery or Loss of Hire covers I assume our fees are in the same range as those incurred for the same work at other desks where such claims are handled.

But insurers are striving for profit. Hence, additional, in particular external costs are not welcome: they cut the profits.

6. Modern means of communication have made G/A unnecessary (?)

In the days of sailing ships or the first steamers, the master of a vessel in distress at some faraway place simply had no possibility to communicate with the owner of the ship or the cargo merchants. He had to make decisions more or less on his own, had to find ways to raise money for necessary assistance or repairs to the ship, and had to ensure that the contracts of affreightment could be fulfilled and the voyage to destination completed. Some of the older Rules refer to this specific difficulty (see YAR XX, para 2).

But the very basis of G/A is not dependent on this peculiarity. If ship and cargo are in danger of getting totally lost measures must be taken to prevent this. It will be helpful for the master that nowadays he can easily communicate with the shipowner, and access to assistance by external experts is more or less permanently available – hence the burden of choosing the most efficient and reasonable measures is no longer resting with the master alone. But nevertheless something must be done, cost must be incurred or sacrifice made. There will be financial damage or loss, and while the improved means of communication may assist in properly reducing such losses,

I cannot see why this should give any reason to do away with an established system to distribute the losses in the aftermath.

7. "Losses should lie where they fall – insurance will pick them up." (?)

This, I admit, sounds very comfortable. But I fear that a closer look reveals some drawbacks with this concept as well.

a) If losses lie where they fall then everybody will avoid to incur any loss from the beginning. In situations where some wilful sacrifice might avoid/stop severe danger for very valuable property this can be a dangerous reluctance.

b) Insurance is not a charity event. Insurance is offered because (well at least in the long run) the premiums are higher than the damages paid, leaving a profit for underwriters. Allegedly insurance is the better, simpler, quicker and cheaper system – but well, it is still expensive enough to enable insurers to earn their money with it. This is why high claims on a policy will usually bring up the premium in the next prolongation.

c) Because insurance costs money not everybody does take cover. There are large companies consciously adhering to the concept of "self-insurance", and there are very small enterprises who simply want to save the premium. Whatever the reason, we do see a significant amount of cargo being shipped without insurance.

d) "Let losses lie where they fall" is not at all accepted in other fields of the law, e.g. land transport, where usually insurers do try to recover from other parties as much as possible – and that is after (usually) negligent causation but even the more in cases of wilful damage to the insured property.

(By the way, also without specific rules on general average, legal concepts such as agency of necessity, unjustified enrichment, or compensation amongst joint and several debtors may open ways for similar purposes.)

e) Ship's crews would be in danger of being held liable for "wrong" choice of means. (But that might offer a new field for the insurance industry then...)

One should keep in mind that inventing something new does not necessarily make existing models superfluous. An airplane is a fascinating means of transportation, but has it made ships, trains and cars unnecessary? In the same manner, insurance does not replace general average. Over the last 150 years, again and again there have been voices from the insurance industry complaining about G/A being too complicated and too expensive. We are all working in a world where economical activities are subject to and shaped by competition. If insurers wish to reduce or eliminate G/A they have possibilities to widen the scope of cover they offer to the various market players. Some of these have been taken (e.g. G/A absorption clauses), while others

may still be waiting. Large container ships present particular challenges and are therefore in the focus of such discussions and developments (e.g. the "Swiss Re / P. Townsend" model of a per container/per voyage cover for G/A and salvage only).

For the time being, however, we are close to an agreement on certain improvements / cutbacks in the prospected 2016 version of the YAR – an agreement on changes, not on deletion or complete abolition of general average.

So, why should we keep general average alive?

Because it is good, and that is for a couple of reasons:

1. Knowing that there is an established system for a fair and proper distribution of sacrifices and financial losses afterwards makes quick and reasonable decisions easy in the moment of peril.

2. The average adjuster as an independent intermediary serves as a natural communication interface. More or less automatically we get in contact with all parties involved and can exchange information on a certain basis of trust. We hear about needs of different parties and can assist in finding convenient solutions.

3. For the shipowner and his underwriters this can be an enormous advantage because we are buffering enormous amounts of communication, particularly in multi-B/L cases. This allows the parties tasked with acute problems such as salvage operations etc. to concentrate on efficient solutions to the practical problems.

4. In addition, as we are an independent party rather than a department of the ship's managers, other stakeholders more prepared to accept advice from us.

As an example, looking at a containership with fire in the cargo which is extinguished by water – and we saw these rather frequently over the last months – many of the cargo interests with water damaged consignments do finally rely on our advice that they will be reimbursed from the G/A and do not approach the shipowner or the P&I Club for damages. If these claims were brought against the shipowner, usually the Club and/or lawyers would have to counter these – with at least the same costs running up for the insurance industry.

In view of these good reasons to keep the system of general average there is no need to elaborate on the practical difficulties that the project of abolishing G/A would bring about! And all that is left for me at this point is to quote the conclusion I arrived at in my presentation at a VHT seminar three years ago:

"I have heard the argument that from a global economic view it is senseless and unproductive to redistribute losses in G/A. After one underwriter has borne a loss in the first instance there is no need to charge a proportion of that loss to another insurer, and even with a top-up of adjusters' fees!

I confess I fully agree that this is a valid argument – or, well, at least it will be, as soon as:

- either no loss records or statistics are kept any more, and losses paid do no longer influence the fate of insurance contracts and the fixing of premiums,
- or any loss you may think of will be covered by the the one and only existing global insurance company's compulsory cover."

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