DR. ARUN KASI
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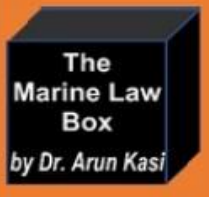
GENERAL AVERAGE
A Handbook

(Cases Summary 2012-2021 included)

The Marine Law Box



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Preface

This handbook presents the law, rules and practice relating to general average. Numerous cases on the subject are included. The first two chapters include an introduction and a brief analysis of s 66 of the UK Marine Insurance Act 1906. The subsequent chapters address specific subjects of general average that have often come into question, namely costs of repairs and other costs incurred at a port of refuge; substituted expenses and piracy; exception where the general average incident was caused by the actionable fault of a party; and time limit. They discuss these specific subjects both from the perspective of the common law/the Act and York Antwerp Rules. The chapter before the last contains an outline of the York Antwerp Rules 2016, rule by rule, in a summary form. The last chapter is an appendix of summary of general average cases decided by the English courts in the last decade from 2012 to 2021.

Commentary is included where appropriate. Worked examples are added to help the readers gain a clear understanding of the working of general average. The book will be a guide for novices as well as shipowners, charterers, importers, exporters, FD&D managers, arbitration counsel, arbitrators and lawyers. I trust that the industry and legal fraternity involved in this subject will find this book useful and as a must-have manual on general average and quick reference material.

This handbook is based on English law. It is up to date with materials available as of November 2021.

Dr. Arun Kasi
December, 2021

Acknowledgement

I am thankful to Ms. Karthika Arunachalam for assisting me to complete the task of writing this handbook. In particular, she undertook the work of summarising the York Antwerp Rules 2016 and diligently writing an outline of each of the rules, included in the chapter before the last.

Dr. Arun Kasi
December, 2021

About the Author

Dr. Arun Kasi is a barrister specialising in practice of maritime law. He undertakes the full range of maritime court matters as well as work as arbitrator and arbitration counsel under the terms of the London Maritime Arbitrators Association (LMAA) and Singapore Chamber of Maritime Arbitration (SCMA). He holds a doctorate in maritime law. He graduated with his law degree when he was 19 years old and has been working in the field since then. To date, over three decades, he has authored seven books and about 50 articles. See https://arunkasico.com

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1 Introduction

Every sea voyage is a maritime adventure. All parties interested in the adventure share certain risks. For instance, if a laden vessel grounds, and the shipowner incurs the expense of refloating her and bears the damage to her hull and propeller in the course of refloating, the shipowner will be entitled to contribution from the cargo interest representing the value of the cargo saved by the exercise against the value of the vessel saved by the exercise.[1] The refloating exercise is a general average incident, the loss suffered by the shipowner by the refloating exercise is a general average loss and the contribution that the cargo pays the shipowner is called a general average contribution. The refloating cost covered here includes the failed attempts to refloat before a successful attempt is made.[2] Similarly, ransom paid to pirates to have the ship and the cargo is recoverable in general average in the applicable proportion.[3] The same is true where the engine breaks down and the cost of towing the laden vessel to a place of safety is incurred.[4] However, an exception is that if an incident like breakdown or grounding happened because of an actionable fault of the shipowner, it will not be entitled to claim a general average contribution for the costs consequent upon the breakdown or grounding. For example, if the carriage was subject to the Hague-Visby Rules, which imposes the duty on the shipowner to exercise due diligence to ensure the vessel is seaworthy at the beginning of the voyage,[5] and the vessel was not seaworthy by want of due diligence on the shipowner's part, then the shipowner will not be entitled to the contribution.[6] Similarly, where some cargo is jettisoned to lighten the vessel to save the rest of the cargo and the vessel, the owners of the jettisoned cargo will be entitled to a general average contribution from the other cargo and the vessel.[7] The following example will show a basic and simple computation of how the parties to the common maritime adventure share the general average loss. Ship sails with cargo belong to 2 cargo interests. The values involved are as follows:

[1] *The CMA CGM Libra* [2020] EWCA Civ 293. In this case, the vessel grounded because of the insufficiency of charts which was held to be an instance of unseaworthiness at the beginning of the voyage for want of due diligence on shipowner's part.
[2] *The Maersk Neuchatel* [2014] All ER (D) 29 (Jun).
[3] *The Longchamp* [2018] 1 All ER 545.
[4] *The Cape Bonny* [2017] EWHC 3036.
[5] Art. III(1).
[6] *The Cape Bonny* [2017] EWHC 3036.
[7] *The Potoi Chau* [1983] 2 Lloyd's Rep 376.

Value of Ship	USD 1 million
Value of Cargo 1	USD 0.5 million
Value of Cargo 2	USD 0.5 million
Total Value in the Common Maritime Adventure	USD 2 million

Cargo 1 is jettisoned to save the ship and other cargo. The general average contributions for loss of Cargo 1 will be as follows:

Ship	USD 250,000
Cargo 1	USD 125,000
Cargo 2	USD 125,000
Total Loss	USD 500,000

The result is that the owner of Cargo 1 will receive USD 375,000 in general average contributions from the shipowner and the owner of Cargo 1, and bear the remaining loss of USD125,000 himself.

A general average act arises where a party to a maritime adventure makes an extraordinary expenditure or sacrifice in time of peril to preserve the property in peril in the common adventure. General average is a millenniums-old concept of mutual insurance in common maritime adventures which has survived the subsequently emerged concepts of commercial insurance. In the era of commercial insurances, the general average contribution payable by the cargo interest will be paid by the cargo insurers, while the general average contribution to be made by the shipowner will be met by the hull and machinery (H&M) insurers. Having said that it must not be overlooked that it is not uncommon for importers to underestimate the importance of insurance and have their cargoes transported without an insurance cover.

A distinction must be made between the loss which is a general average loss and one which is the cause of the general average incident. The latter is not claimable in general average while the former is. For example, a fire breaks out. The crew douses water and thereby damages some of the cargo and the vessel's equipment. The damage caused by the fire is not a general average sacrifice, but the damage by the water doused is a general average sacrifice. In the case of damage by smoke, the practice is not to allow it in general average as it is not practical to distinguish between the damage caused by the smoke and the damage caused by the fire and water doused.[8] When a vessel grounds, the damage suffered by the vessel by the grounding incident is not a general average loss. The cost of refloating, damage to hull machinery and

[8] This is expressly stated in Rule III of York Antwerp Rules.

propellers sustained in the course of refloating, and putting the vessel to a port of refuge (where necessary for safety) are all general average losses.[9] When the costs of repair are claimed in general average, the allowable costs (eg. repair to the damage caused by the refloating exercise) and the non-allowable costs (eg. repair to the damage caused by the grounding) must be separated.[10]

A golden rule of general average is that 'no recovery, no liability to contribute'. Hence, if the vessel incurs general average expenses at a port of refuge, that will not be claimable if the vessel subsequently sinks with a total loss of the cargo.[11] A general average claim and contribution will only arise among parties to a common maritime adventure. The common maritime adventure can be different for different groups involved in a voyage. This example will help understand the working of the golden rule as well as the common maritime adventure. A vessel carries cargoes belonging to 3 cargo interests and the following incidents happen in sequence during the voyage:

i) First incident. The master lightens the vessel, in danger of foundering, by jettison of the entire cargo of the cargo interest no. 1. This is a general average sacrifice by the cargo 1. The vessel continues with the voyage.

ii) Second incident. The vessel grounds and the master refloats her by straining the propellers resulting in damage to the hull and machinery. This is a general average sacrifice by the vessel. The vessel continues with the voyage.

iii) Third incident. The vessel catches a fire that burns down the entire cargo of the cargo interest no. 2 (total loss) before the fire is extinguished. This is not a general sacrifice of cargo 2.

The vessel reaches the destination port with the cargo belonging to the cargo interest no. 3 only. Now, the general average contributors for the loss to the cargo interest no. 1 (the jettisoned cargo) are:

i) the ship,

ii) the cargo interest no. 3 (the safely arrived cargo), and

iii) the cargo interest no. 1.

[9] *The Maersk Neuchatel* [2014] All ER (D) 29 (Jun).
[10] *The Maersk Neuchatel* [2014] All ER (D) 29 (Jun).
[11] *Chellew v Royal Commission* [1922] 1 KB 12.

The general average contributors for the damage to the vessel caused by the measures taken to refloat after the second incident (the grounding) are:

i) the ship, and

ii) the cargo interest no. 3.

It must be noted that cargo interest no. 1 is excluded from the list of contributors because after the first incident (jettison), it is no longer part of the 'common' maritime adventure. It must also be noted that cargo interest no. 2 is excluded from the list of contributors in relation to both instances, as it received no cargo at the end.

When a general average sacrifice has been made by the shipowner, it will declare 'general average'. The shipowner is entitled to lien over the cargo for general average contribution due from the cargo interest. In practice, the shipowner will forgo the lien and release the cargo in return for a general average bond (often in the form of Lloyd's Average Bond) from the cargo interest to pay the due general average contribution. The bond must be fortified by a cash deposit (where the cargo is uninsured) or a general average guarantee from the cargo insurers (where the cargo is insured).[12] If the bond and guarantee or cash deposit are not furnished, the shipowner may retain the goods in the exercise of the lien and claim the costs of storage.[13] The shipowner will appoint the general average adjusters (frequently from the Association of Average Adjusters, London) to ascertain the contribution due from cargo interests, which a cargo interest and its insurer may challenge by a court or arbitral proceedings, whichever is applicable.[14] Usually, the bond and guarantee will have the choice of law, jurisdiction and dispute resolution clauses. The average adjuster will send out to the cargo interest a valuation form that the cargo interest must return with the purchase invoice and details of any damage found at the destination. The average adjuster will also send out the bond and guarantee forms for the respective interests to sign and return to have the cargo released.

For general average adjustment, the vessel and the cargo must be valued at the termination of the common maritime adventure, which will be the port of discharge or the place of abandonment of the voyage such as the point of transshipment or a port of refuge if the cargo is delivered there. If the vessel calls at ports during the voyage other than the port of discharge of the concerned cargo, then the vessel will be valued at the final destination, while the cargo will be valued at the port of discharge or the place of transshipment or delivery of the cargo.

[12] *The Lehmann Timber* [2013] All ER (D) 59 (Jun).
[13] *The Lehmann Timber* [2013] All ER (D) 59 (Jun).
[14] *The BSLE Sunrise* [2019] EWHC 2860 (Comm).

The sources of law or rules of general average are threefold. First, common law. Secondly, statute, namely s 66 of the Marine Insurance Act 1906 in the UK. Thirdly and very popularly, York Antwerp Rules, a set of standard terms often contractually incorporated into bills of ladings and charterparties. The Rules has been in place since 1890 and had gone through various revisions[15] and the latest one is the 2016 version. It must be noted that the Rules is not a convention and it is not part of the law, hence has no force unless contractually incorporated in shipping contracts. The circumstances in which the general average allowed under the statute is slightly wider than that under the common law. The incidents of the general average allowed by the York Antwerp Rules is wider than those allowed by the common law or the statute. The scope under the statute and York Antwerp Rules are discussed in the following chapters.

In this work, references to York Antwerp Rules, without a specific year, refers in common to the versions of the Rules since 1974 till 2016.

[15] 1890, 1924, 1950, 1974, 1990, 1994, 2004, 2016.

2 Marine Insurance Act 1906, s 66

The Marine Insurance Act 1906, s 66, defines 'general average' as follows:

> **66. General average loss.**
>
> (1) A general average loss is a loss caused by or directly consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice.
>
> (2) There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure.
>
> (3) Where there is a general average loss, the party on whom it falls is entitled, subject to the conditions imposed by maritime law, to a rateable contribution from the other parties interested, and such contribution is called a general average contribution.

The common law definition of general average is largely similar to that in s 66 save that the requirement that the sacrifice or expenditure must be *reasonably* made is not there.[16] In that sense, the common law definition of general average is wider than that of s 66. It must be borne in mind that that Act came in to codify the common law, as declared in the preamble to the Act as "An Act to codify the Law relating to Marine Insurance". To understand the statutory and common law perspective of general average, it will be helpful to analyse the various elements of the s 66 definition by reference to cases, which follows.

2.1 'Extraordinary' sacrifice or expenditure

The sacrifice or expenditure must be extraordinary to qualify as a general average loss. In *Robinson v Price,*[17] during a voyage, a leakage happened, which allowed water to ingress. To remain afloat, the vessel had to continuously pump out incoming water. By this exercise, the vessel finished fast all her coal and had to burn her parts and cargo for fuel to continue pumping out. It was held that the parts of the vessel and the cargo thereby lost are general average sacrifices as this was extraordinary. In *Societe Nouvelle d' Armement v Spillers & Baker*,[18] in time of the First World War, a French vessel engaged a tug to tow her from Ireland to England

[16] *The Alpha* [1991] 2 Lloyd's Rep 515.
[17] *Robinson v Price* (1877) 2 QBD 295.
[18] *Societe Nouvelle d' Armement v Spillers & Baker Ltd* [1917] 1 KB 865.

to avoid attack by undersea boats. It was held that the cost of towing was not a general average expenditure because it was not extraordinary in times of war.

2.2 'Sacrifice'

The sacrifice may be made by any interest involved in the maritime adventure. The concerned interest may be the cargo interest, ship interest or even freight interest. In *Anglo-Argentine Live Stock Agency v Temperly SS Co,*[19] a livestock carrier, bound for England, got into difficulty during the voyage and had to call at a Brazilian port for repair. This call would prohibit the livestock from being allowed later into England. Hence, the livestock had to be landed and sold at Antwerp for a lower price than that they would fetch in England. It was held that the loss of price was a general average sacrifice by the livestock owner. In *Robinson v Prince*, discussed above, the vessel's part and cargo burnt for fuel to support continuous pumping out of ingressed water ingress were held to be general average sacrifices by the vessel and cargo interest respectively. In *Papayanni and Jeronica v Grampian,*[20] damage caused to the vessel by scuttling her in an attempt to extinguish a fire was held to be a general average sacrifice by the shipowner. In *The Bona*,[21] a vessel suffered damage by straining her engines to refloat. It was held that this was a general average sacrifice by the shipowner. In *Austin Friars SS Co v Spillars & Baker,*[22] a vessel encountered a strong ebb. The pilot attempted a risky manoeuvre to get in between two piers. The vessel collided with the piers and was strictly liable for the damage irrespective of any negligence. It was held that the liability to the port authority was a general average sacrifice by the shipowner.

A sacrifice will be made by the freight interest where there is a general average loss of cargo if the freight (in full or partly) is payable upon the right and true delivery. In such as case, the freight interest will lose the freight. The interest suffering a general average loss of freight can be a shipowner or charterer.

2.3 'Expenditure'

The general average loss can be in the form of an expenditure made in the time of peril to perverse the imperilled property in the common maritime adventure. An example of such

[19] *Anglo-Argentine Live Stock Agency v Temperley SS Co* [1899] 2 QB 403.
[20] *Papayanni and Jeronica v Grampian SS Co Ltd* (1896) 1 Com Cas 448.
[21] *The Bona* [1895] P 125.
[22] *Austin Friars SS Co v Spillers & Baker Ltd* [1915] 3 KB 586.

'expenditure' is tug and some port of refuge costs incurred by a shipowner after the vessel has grounded or the engine has broken down, while the damage sustained by the vessel's hull during the refloating exercise is a 'sacrifice'. Controversy exists as to the expenditure spent by a shipowner in a port of refuge, which is discussed later in this chapter.

2.4 'Voluntarily' made or incurred

Equally, the sacrifice or expenditure must be made voluntarily. In *Athel Line v London & Liverpool WRA*,[23] delay was caused by the master complying with the orders of convoy commander during the Second World War. It was held that the loss consequent upon the delay was not a general average loss because the compliance was not a voluntary act of the master. However, as long as the general average act was intended, the loss need not be foreseen but must not be too remote.[24] In *McCall v Houlder Bros*,[25] in a port of refuge, the master set the ship head down to facilitate repairs. Water entered into the holds and damaged perishable cargo. It was held under the common law that the damage to cargo was a general average loss.

2.5 'Reasonably' made or incurred

In order for a sacrifice or expenditure to be a qualified general average loss, it must be reasonably made or incurred under s 66, though such a requirement is not present in the common law. In *The Alpha*,[26] the court allowed a claim in general average under the common law although the master's response to the peril, causing damage to the engine, was unreasonable.

The requirement of 'reasonableness' has been quite leniently construed taking into account that a shipowner or master may decide in a time of emergency. In *The Cape Bonny*,[27] when the engine broke down, the vessel ordered a tow tug at the hire of USD55,000 per day, while seemingly another tug was available for about USD40,000. The court found that the decision of the vessel to order the tug at the rate of USD55,000 was reasonable in the circumstances. The case is discussed in more detail in the last chapter.

[23] *Athel Line v London & Liverpool WRA* [1944] KB 87.
[24] Obiter of Lord Denning in *Australian Coastal Shipping Commission v Green* [1971] 1 QB 456.
[25] *McCall v Houlder Bros* (1897) 66 LJQB 408.
[26] *The Alpha* [1991] 2 Lloyd's Rep 515.
[27] *The Cape Bonny* [2017] EWHC 3036 (Comm).

2.6 Sacrifice or expenditure 'in time of peril' to 'preserve the property imperilled'

The sacrifice must be made in the time of peril. The 'peril' here refers to an 'actual' peril and merely an assumed one even if reasonably assumed. In *Watson (Joseph) v Fireman's Fund Insurance*,[28] the master thought there was a cloud of smoke, but indeed it was only a vapour. The master responded to the assumed peril by putting steam into the cargo holds, which action damaged the cargo. It was held that there was no general average here as there was no actual peril. However, while the peril must be actual, it need not be immediate. In *The Makis*,[29] the vessel was put into a port of refuge to repair damage to her propeller in a time of potential, but not immediate, danger. It was held that the port of refuge expenses were a general average expenditure.

[28] *Watson (Joseph) & Sons Ltd v Fireman's Fund Insurance Co* [1922] 2 KB 355.
[29] *Vlassopoulos v British and Foreign MI (The Makis)* [1929] 1 KB 187.

3 Repairs and Costs at Port of Refuge and Transshipment

3.1 Temporary repairs to general average and non-general average damage

Permanent repairs carried out to put right a general average sacrifice, such as the damage sustained during the refloating exercise, are of course claimable in general average. However, temporary repairs, whether to the general average damage (eg. refloating) or non-general average damage (eg. grounding), carried out at a port of refuge, are not allowable in general average under the common law and s 66, if the cargo and the vessel are safe at the port of refuge and the temporary repairs are carried out merely to allow the vessel to continue with and complete the voyage rather than saving any property in peril. In *Wilson v Bank of Victoria*,[30] the court refused, under the common law, to allow the costs of temporary repairs in general average holding that the shipowner carried out temporary repairs as part of its contractual undertaking to prosecute the voyage with the utmost dispatch.

Temporary repairs may represent a loss to the shipowner because it will not make a saving, or saving to the full extent, when permanent repairs are later performed. They may represent a benefit to the cargo and freight interests because the voyage is not delayed by effecting permanent repairs immediately. Hence, York Antwerp Rules, where it applies, as is often the case, allows by Rule XIV the cost of temporary repairs effected to enable the shipowner to complete the voyage rather than for the safety of the vessel and the cargo. This covers both the temporary repairs to the general average damage and accidental damage (i.e. which is not general average damage).

3.2 Port of refuge costs: entry, exit, discharge and reloading

Under the common law and s 66, controversy exists as to the costs allowed in connection with port of refuge. While the costs of entry into the port of refuge and discharge of cargo there are allowed, cases are divided on whether the cost of exit is allowable. In *Atwood v Sellar*,[31] the costs of entry, exit, discharge of cargo and reloading of the cargo were allowed under common law. Shortly after that, in *Svendsen v Wallace*,[32] only the costs of entry and discharge of cargo were allowed in common law, but not the costs of exit and reloading, as they were not done in

[30] *Wilson v Bank of Victoria* (1867) LR 2 QB 203.
[31] *Atwood v Sellar* (1880) 5 QBD 286.
[32] *Svendsen v Wallace* (1885) 10 App Cas 404.

the time of peril. However, under Rule X of York Antwerp Rules, where it applies as is often the case, the costs of entry, exit, discharge and reloading are all allowed. Additionally, Rule XI allows the costs of crew maintenance, fuel and stores consumed during the stay at the port or place of refuse are allowed, while Rule XII allows the costs of temporary repairs at a port of loading, call or refuge, for common safety without any deduction for "new for old". In *The Bijela*,[33] the vessel grounded shortly after sailing. She was then put to Jamestown anchorage. She had the choice of having temporary repairs done there for USD282,000 or permanent repairs in New York for USD535,000. The shipowner chose the former option. Under the common law and s 66, permanent repairs for grounding damage, if effected, would not be a general average expenditure. The House of Lords held, under Rule XIV, the temporary repairs qualified as a general average expenditure as they were necessary for the 'safe prosecution of the voyage'. In *The Trade Green*,[34] the port of refuge asked the vessel to be towed away after she caught fire. It was held that the cost of engaging the tug was not allowed in general average, because it was not incurred for the safety of the interests involved in the common maritime adventure or continuation of the voyage, but it was incurred for the safety of the port.

3.3 Transshipment and non-separation agreement

Transshipments may be made in the time of peril, eg. by ship-to-ship transfer (STS), or merely to reach the cargo to the destination port, eg. when the cargo is safe at a port of refuge. The cost of a transshipment made in the time of peril is a general average expenditure but not a transshipment made at a safe port of refuge.

Once transshipment is done, the transshipped cargo is no longer liable for any subsequent general average sacrifice or expenditure under the common law and s 66, as the cargo is then no longer part of a common maritime adventure. In *Royal Mail Steam Packet v English Bank of Rio de Janeiro*,[35] a valuable lightweight cargo was moved into a lighter when the vessel was grounded to preserve the cargo. It was held that the cargo interest was not liable for general average contribution in respect of subsequent refloating costs. This was because at the time the refloating costs were incurred, the cargo was no longer part of the common maritime advance. This common law position is modified by Rule G ('non-separation agreement') of York Antwerp Rules where it applies. A non-separation agreement means the

[33] *The Bijela* [1994] 1 WLR 615.
[34] *The Trade Green* [2000] 2 Lloyd's Rep 451.
[35] *Royal Mail Steam Packet v English Bank of Rio de Janeiro* (1887) 19 QBD 362.

cargo will be liable to contribute for general average incidents subsequent to the transshipment subject to a limit of the transshipment cost. However, Rule G does not entitle the shipowner to claim in general average the transshipment cost. Hence, if the cargo is transshipped at a port of refuge and subsequently the port of refuge costs are incurred, the cargo will be liable for the port of refuge costs to the limit of the transshipment cost.

4 Substituted Expenses, Piracy and K&R Insurance as 'Complete Code'

4.1 Piracy: Rule F and Rule C

Payment made to pirates to have the vessel and the cargo released is a general average expenditure under the common law and s 66. Rule F of York Antwerp Rules, where it applies as is often the case, allows expenses incurred in place of a general average expense to be recoverable in general average subject to a limit of the general average expense that has been saved. Rule F reads as follows:

> Any additional 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.

However, Rule C(3) excludes any loss by delay in general average contributions. Rule C(3) reads as follows:

> Demurrage, loss of market, and any loss or damage sustained or expense incurred by reason of delay, whether on the voyage or subsequently, and any indirect loss whatsoever, shall not be allowed as general average.

Rule F and its apparent conflict with Rule C(3) came to a test before the UK Supreme Court in *The Longchamp*[36] in the context of piracy. In this case, the vessel was hijacked by pirates, who demanded USD6 million for release of the vessel and the cargo. By a negotiation that was prolonged for 50 days, the shipowner brought down the ransom demand to USD1.85 million, which was paid and the vessel was released. The prolonged negotiation cost the shipowner an extra maintenance cost of USD160,000. While it was not doubted that the cargo interest was liable to contribute in general average for the ransom paid, they refused to contribute for the USD160,000 maintenance cost. The UK Supreme Court held that the USD160,000 maintenance cost was allowable in general average under Rule F and that the same was not barred by Rule C(3), hence resolving the apparent conflict in favour of Rule F.

[36] *The Longchamp* [2018] 1 All ER 545.

4.2 K&R Insurance as 'Complete Code'

Agreement between the parties as to payment of K&R Insurance may have an impact on general average claim in connection with piracy. *The Polar*[37] demonstrates this. The Polar was carrying 70,000 mt of fuel oil under a voyage charterparty. Under the charterparty, the charterers were to pay for the kidnap and ransom (K&R) insurance and War Risks policy. The charterparty incorporated York Antwerp Rules. Bills of lading were issued, as often happens, incorporating the charterparty. The vessel was kidnapped while transiting Gulf of Aden. A ransom was paid to the pirates to have the vessel and the cargo released. The owners brought a claim for general average contribution against the cargo owners under the bills pursuant to the York Antwerp Rules for the ransom payment.

Sir Nigel Teare held that as between the owners and the charterers the insurance provision created a "complete code" - whereby the charterers will pay the premium and the owners' only resort was to the insurance fund - thus the charterers are relieved from the obligation to pay a general average contribution when the insured risk materializes.

However, on the question of whether the exception from the liability to contribute in general average extended to the holders of the bills of lading, his Lordship answered in the negative. His Lordship held that the exception in favor of the charterers in the charterparty was not incorporated into the bills of lading by a general incorporation clause. This was because the liability to pay the premium was not on the holders of the bills. Hence, the holder of the bills cannot take the benefit of the exception. Accordingly, the cargo interest was liable to contribute in general average.

[37] *The Polar* [2020] EWHC 3318 (Comm).

5 General Average Loss by Actionable Fault of a Party

A general average incident is independent of the cause underlying the general average. However, if the general average incident happened by the actionable fault of a party to the maritime adventure, that party will be liable to compensate the other parties contributing in general average for their loss by the general average contribution. This is recognised in Rule D of York Antwerp Rules, the net effect of which is that a party at actionable fault in relation to a general average incident is will not secure a general average contribution in connection with the incident due to equal crossclaim by the party liable to contribute in general average.[38] Rule D reads as follows:

> Rights to contribution in general average shall not be affected, though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the common maritime adventure, but this shall not prejudice any remedies or defences which may be open against or to that party in respect of such fault.

The classical example of this is where the engine breaks down because the vessel was not seaworthy at the beginning of the voyage due to lack of due diligence on the shipowner's part in breach of Art III(1) of the Hague-Visby Rules.[39] In such as case, the shipowner will not be entitled to claim in general average. For this, the fault must be 'actionable'. If the party at fault is exempted from liability, then there is no actionable fault and the party may claim in general average contribution. For example, if a chief engineer barratrously sets fire to the ship, resulting in the vessel being immobilised and towage costs incurred, the shipowner will be entitled to general average contribution, because the shipowner is exempted from liability for the fire under Art IV(2)(b) of the Hague-Visby Rules since the fire happened without the actual fault or privity of the shipowner.[40] These two examples will help understand the working of Rule D.

> *Example 1.*
> A ship is unseaworthy at the outset of the voyage by fault of the shipowner.
> This is a breach of the shipowner's duty for which the shipowner is liable.
> Due to the unseaworthiness, the ship catches fire during the voyage.
> Crew extinguishing the fire, damages the cargo with water.

[38] *Goulandris Brothers Ltd v B Goldman & Sons Ltd* [1957] 3 WLR 596.
[39] *The CMA CGM Libra* [2020] EWCA Civ 293.
[40] *The Lady M* [2019] 2 All ER (Comm) 731.

The damage to the cargo is a general average loss despite that it was caused by the fault of one of the interests in the common maritime adventure.
But the shipowner, effectively, will not have a claim for general average contribution from the cargo interests, because the cargo interests have an equal cross-claim against the shipowner for breach of the seaworthiness-obligation that resulted in the general average loss.

Example 2.
A ship catches fire by leakage of chemicals from an ISO tank container.
The leakage is attributable to the fault of the cargo owner.
The fire incident necessitates salvage operations.
Few other cargoes are damaged by the fire – this is not a general average loss.
Few other cargoes are damaged by water used to extinguish the fire – this is a general average loss.
The associated salvage cost is a general average loss.
Salvage is contracted for – this is a general average loss.
The owner at fault will be liable to contribute in general average but not claim in general average.

6 Time Limit

The time limit to bring a general average claim, whether under the common law or statute or under contractual provision like a bill of lading that incorporates York Antwerp Rules (of a version before 2004), is six years from the date the general average expenditure was incurred or the sacrifice was made.[41] However, where the cargo interest has executed a bond (in the popular Lloyd's Average Bond form) and/or the insurer has executed a guarantee to have the cargo released, the time limit is six years from the date of publication of the general average adjustment.[42] In the absence of a bond and/or guarantee in cases to which York Antwerp Rules of 2004 or later version applies, the time limit is fixed by Rule XXIII to one year after the general average adjustment is issued subject to a long stop of six years from the date of termination of the common maritime adventure. The common maritime adventure will be terminated when the vessel and the cargo reaches the port of discharge or the cargo is delivered prior to that in a port of refuge cargo or otherwise is transshipped or the voyage is abandoned.

In *Potoi Chai*,[43] the vessel grounded off Somalia in 1972. A part of the cargo was jettisoned, while some other destined for other ports were discharged at Aden. Some cargo was transshipped and some other was delivered at the port of destination. The cargoes were delivered upon a bond in the Lloyd's Avergea Bond form secured either by a cash deposit or an insurer's guarantee. After all the discharge by early 1973, the vessel was declared a constructive total loss apart from the salvage cost incurred by the shipowners. The general average adjusters published their statement in 1977 under which a substantial contribution was payable by the saved cargo to the shipowners. The ship managers instituted action against the cargo interest in 1978. Subsequently, they applied to add the shipowners as a plaintiff. The application was contested by cargo interests on grounds that by 1979, the action was already time-barred. The Privy Council allowed the application, holding that the time limit to bring an action under the bond and/or guarantee was six years from the date the general average statement was published. The board noted that in the absence of the bond and/or the guarantee, the time limit would be six years from the date of the general average sacrifice or expenditure, whether under the common law or York Antwerp Rules incorporated into the bills of lading. Notably, the board was dealing with a version of the York Antwerp Rules prior to 2004. The

[41] *The Potoi Chau* [1983] 2 Lloyd's Rep 376.
[42] *The Potoi Chau* [1983] 2 Lloyd's Rep 376.
[43] *The Potoi Chau* [1983] 2 Lloyd's Rep 376.

Rules were amended since the 2004 version, by the addition of Rule XXIII, to provide a shorter time limit, namely one year from the issuance of the general average adjustment with a long stop of six years from the termination of the common maritime adventure. Rule XXIII reads as follows:

Rule XXIII – Time Bar for Contributing to General Average

(a) Subject always to any mandatory rule on time limitation contained in any applicable law:

(i) Any rights to general average contribution including any rights to claim under general average bonds and guarantees, shall be extinguished unless an action is brought by the party claiming such contribution within a period of one year after the date upon which the general average adjustment is issued. However, in no case shall such an action be brought after six years from the date of termination of the common maritime adventure.

(ii) These periods may be extended if the parties so agree after the termination of the common maritime adventure.

(b) This rule shall not apply as between the parties to the general average and their respective insurers.

7 York Antwerp Rules

The definition of general average in the York Antwerp Rules 2016 is as follows:

> **Rule A**
>
> 1. There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure.

The incidents of general average covered by the York Antwerp Rules are wider than those covered by s 66 or the common law. For example, the costs of temporary repairs in a port of refuge may be covered by the Rules but not by the common law or s 66. Various costs incurred at a port of refuge may be covered by the Rules, while the position under the common law or s 66 can be controversial. Limited liability of the cargo to contribute after transshipment is provided for in the Rules, while there is no longer such liability in the common law and s 66. Rule III expressly excludes smoke damage from the scope of general average as it is not practical to distinguish the damage caused by smoke from the damage by fire and the water dousing.

The York Antwerp Rules 2016 contains one Rule of Interpretation and one Rule Paramount, followed by seven lettered Rules from A to G (general principles), 23 roman-numbered Rules from I to XXIII (specific application). By the Rule of Interpretation, in case of inconsistency between the law or practice and the Rules, the Rules prevail. In case of inconsistency between the lettered Rules and the numbered Rules, the numbered Rules prevail. By the Rule Paramount, no general average allowance is available unless the sacrifice or expenditure was reasonably made or incurred. The Rule of Interpretation and the Rule Paramount read as follows:

> **Rule of Interpretation**
>
> In the adjustment of general average the following Rules shall apply to the exclusion of any law and practice inconsistent therewith.
>
> Except as provided by the Rule Paramount and the numbered Rules, general average shall be adjusted according to the lettered Rules.

Rule Paramount

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

The requirement of 'reasonableness' has been quite leniently construed taking into account that a shipowner or master may decide in a time of emergency. In *The Cape Bonny*,[44] when the engine broke down, the vessel ordered a tow tug at the hire of USD55,000 per day, while seemingly another tug was available for about USD40,000. The court found that the decision of the vessel to order the tug at the rate of USD55,000 was reasonable in the circumstances. The case is discussed in more detail in the last chapter.

7.1 York Antwerp Rules 2016

A summary of the York Antwerp Rules 2016, rule by rule, in a summary form but not exhaustively, follows.

7.1.1 Rule of Interpretation

The Rules prevails over any other inconsistent law and practice. Numbered rules prevail over lettered rules in case of inconsistency.

7.1.2 Rule Paramount

General average act must be reasonable.

7.1.3 Rule A – Exclusive interpretation of general average

There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure.

[44] *The Cape Bonny* [2017] EWHC 3036 (Comm).

7.1.4 Rule B – Tugs and tows

Tugs and tows (otherwise than in salvage operation) are considered to be part of the common maritime adventure.

7.1.5 Rule C – Indirect losses, etc

Indirect losses, loss by delay and loss by pollution are not allowed.

7.1.6 Rule D – Fault of a party

The fault of a party to the common maritime adventure that caused the general average loss does not prevent the operation of general average. But rights and liabilities of parties in relation to the fault are unaffected.

7.1.7 Rule E – Burden and procedure

Some rules as to the burden of proof and the procedure are provided by this Rule.

7.1.8 Rule F – Substituted expenses

Substituted expenses are allowed to the limit of the general average loss avoided.

7.1.9 Rule G – Valuation and Transshipment

The valuation must be made at end of the maritime adventure. General average contribution subsequent to transshipment is limited to the cost of transshipment, called ‘non-separation agreement’.

7.1.10 Rule I – Jettison is general average only if cargo carried in accordance with custom

Jettison is a general average sacrifice only if the cargo was carried in accordance with a recognised custom of trade. This means in the case of jettison of deck cargo, it will be a general average contribution only if deck carriage was allowed by a custom. A mere agreement between the carrier and the cargo interest allowing deck carriage is not sufficient.

7.1.11 Rule II – Loss or damage by sacrifice for the common safety is general average

Damage by water that goes down a ship's hatches opened to jettison cargo is a general average sacrifice.

7.1.12 Rule III – Extinguishing fire

Damage to ship or cargo by beaching or scuttling to extinguish a fire is a general average loss. Damage by smoke is not a general average loss.

7.1.13 Rule IV – Cutting away wreck damaged in accident is not a general average sacrifice

Loss or damage sustained by cutting away wreck or parts of the ship which have been previously carried away or are effectively lost by accident shall not be allowed as general average.

7.1.14 Rule V – Intentional grounding

Intentional grounding for common safety and consequent damage to property are general average sacrifices.

7.1.15 Rule VI – Salvage

Salvage is a general average in limited circumstances. Art 13 of the Salvage Convention 1989 (Enhanced Award) may be included in general average, but not Art 14 of the Salvage Convention 1989 (Special Compensation).

7.1.16 Rule VII – Damage to machinery and boilers in attempt to refloat

Damage to machinery and boilers when ashore in time of peril is covered in general average, if it was to refloat her for the common safety. But no such damage is allowed when the vessel is afloat.

7.1.17 Rule VIII – Lightening when ashore

Cost of lightening, lighter hire, and consequent damage to property in the common maritime adventure are general average loss.

7.1.18 Rule IX – Cargo and ship parts burnt as fuel (less estimated cost of fuel) is a general average sacrifice

The rule in *Robinson v Price,*[45] is maintained subject to a clarification that the estimated cost of the fuel that would otherwise have been used for the prosecution of the voyage must be deducted from the general average claim.

7.1.19 Rule X – Expenses at port or place of refuge

Various expenses in connection with the port or place of refuge are allowed. Conditions for allowing are:

i) The vessel enters the port or place of refuge or returns to the port of loading.
ii) This happens following an accident, sacrifice or other extraordinary circumstances.
iii) The circumstances render it necessary for common safety.

[45] *Robinson v Price* (1877) 2 QBD 295.

The costs allowed in general average are:

i) Entry, exit, discharge, reloading.
ii) Removal to another port or place for repairs.

If the vessel is condemned or voyage is abandoned, storage expenses are allowed in general average only up to:

i) the point stated above, or
ii) discharge (if that happens later than the condemnation or abandonment).

This rule is extended to any other port or place to which the vessel is necessarily moved from a port or place of refuge because repairs cannot be carried out in the port or place of refuge.

7.1.20 Rule XI – At port of refuge – maintenance cost, crew wages, stores, fuels

These expenses are allowed in general average where Rule X conditions are satisfied.

7.1.21 Rule XII – At port of refuge – damage to/loss of cargo, stores and fuel when discharging/reloading

These loss are allowed in general average where Rule X conditions are satisfied.

7.1.22 Rule XIII – Deductions from cost of repair

For vessels aged up to 15 years, no 'new for old' deduction is made for repairs to general average damage. For vessels aged more than 15 years, 'new for old' deduction is one-third. For parts of the vessel like lifeboats, age is counted on the concerned part. No deduction is made for provisions, stores, anchors and cable lines.

Costs of cleaning, painting and coating of the bottom are allowed:

i) if the last painting or coating was done within 2 years, then, ½ allowed, or
ii) if last painting or coating more than 2 years ago, no general average.

7.1.23 Rule XIV – Temporary repairs

Temporary repairs necessitated by a general average sacrifice are allowed in general average. Temporary repairs of accidental damages, if necessary to complete the common maritime adventure, are allowed in general average. No 'new for old' deduction on temporary repairs.

7.1.24 Rule XV – Loss of freight by general average sacrifice allowed in general average

This is subject to deductions of the cost that the freight earner would have incurred to earn the freight had the general average sacrifice not been made.

7.1.25 Rule XVI – Valuation of loss of or damage to cargo

Valuation of loss or damage to cargo must be done on the following bases:

i) The valuation must be done at the place and time of discharge.
ii) The value must be ascertained by the commercial invoice held by the receiver, which can be different from the shipped value, after passing through many hands.
iii) Insurance must be included.
iv) Freight must be included in the valuation of the cargo only where it is payable despite the general average incident, eg. cargo jettisoned where the freight is payable only upon the right and true delivery (hence not payable when jettisoned).

7.1.26 Rule XVII – Valuation of contributory values

Valuation of contributory values must be made on the following bases:

i) At the termination of the common maritime adventure, which will be at the port of discharge unless the voyage is abandoned or the cargo is earlier transshipped.
ii) Costs of insurance and freight are included, but freight will be excluded if it is not payable following the general average incident.
iii) The vessel is valued without taking into account demise or time charters.
iv) Where cargo is sold short of destination, the value to be taken is the actual net proceeds of the sale.

No general average contribution is available from:

i) Mails.
ii) Passenger luggage.
iii) Accompanied personal effects.
iv) Accompanied private motor vehicles.

7.1.27 Rule XVIII – Damage to ship

Damage to ship and her parts is valued on the following bases:

i) When repaired or replaced, the actual cost (subject to Rule XIII 'new for old' deduction).
ii) When not repaired or replaced, the reasonable depreciation arising from the damage subject to a limit of the estimated cost of repair or replacement.
iii) If the cost of repair would exceed the value of the ship when repaired, then the difference between the estimated sound value of the ship without the damage and the estimated value of the ship in the damaged condition.

7.1.28 Rule XIX – Wilfully misdescribed cargo and undervalue declared cargo

Where the cargo is wilfully misdescribed at the time of shipment:

i) No general average claim by that cargo interest.
ii) But that cargo interest must contribute in general average.

Where the value of the cargo is underdeclared at the time of shipment:

i) That cargo must contribute in general average based on the real value.
ii) But that cargo will receive in general average based on the declared low value only.

7.1.29 Rule XX – Capital loss and cost of insuring general average

Capital loss incurred by owners of goods sold to raise funds to meet general average expenses is allowed in general average. The cost of insuring general average is also allowed in general average.

7.1.30 Rule XXI – Interest on losses allowed in general average.

Interest is allowed up to three months after the general average adjustment is issued. Interest must be awarded at the rate of 12 months LIBOR + 4% for the currency in which the general average is adjusted. If no LIBOR for that currency, then 12 months LIBOR + 5% for USD currency.

7.1.31 Rule XXII – Collection of Contributions

The general average contributions must be collected by the average adjuster into a special client account. They must be deposited into an interest earning account for benefit of:

i) Parties entitled to general average contribution.
ii) Salvors.
iii) Special charges payable.

7.1.32 Rule XXIII – Time limit

The time limit to bring a general average claim is one year after a general average adjustment is issued. This is subject to a long stop of six years after the termination of the common maritime adventure. Parties may extend the time limit by mutual agreement. This rule does not affect as between parties and their insurers.

It must be noted that this does not affect the time limit applicable to a general average bond or insurance guarantee, which is usually six years after the general average adjustment is published.

8 Cases Summary 2012-2021

8.1 *The Free Goddess* [2021] EWHC 226 (Comm)

***Griffin Underwriting Ltd v Verouxakis (The Free Goddess)* [2021] EWHC 226 (Comm) – High Court – Calver J**

Griffin insured The Free Goddess against kidnap and ransom. The vessel was kidnapped in laden condition en route from Egypt to Thailand and taken to Somalia in February 2021. Griffin paid the ramson of USD6.5 million and got her released in October 2021. Then Griffin entered into a settlement agreement with the owners of the vessel on terms that (i) vessel will proceed to the destination port and discharge the cargo pursuant to bills of lading issued; (ii) all the rights of the owners to claim general average contribution will be subrogated to Griffin; (iii) the owners will account for any general average contribution that they receive. In breach of the agreement, the owners did not proceed to the destination port, instead sold the cargo in Oman. Thereby, Griffin's potential claim against the cargo interest for general average contribution was practically lost. In addition to that, the owners received USD800,000 which they did not account to Griffin. Griffin sued the owners' controlling person for inducing breach of the contract and claimed the USD800,000 plus the loss of general average contribution that it would have received from the cargo owners but for the sale of the cargo at Oman. Calver J ordered payment of the USD800,000 and the damages for the loss of general average contribution to be assessed.

Prior to this, A Beltrami QC sitting as the judge of the QBD was satisfied that the service was done pursuant to CPR 6.40 (*Griffin Underwriting Ltd v ION G Varouxakis* [2019] EWHC 2757 (Comm)). Even if that were not to be so, he was satisfied that the owners have notice of the proceedings and the circumstances warranted dispensation with the service. He further noted that as the owners have given an address for service, it is their responsibility to ensure any documents served at the address is passed to the owners.

8.2 The Polar [2020] EWHC 3318 (Comm)

***Herculito Maritime Ltd and others v Gunvor International BV and others (The Polar)* [2020] EWHC 3318 (Comm) – High Court – Sir Nigel Teare**

The Polar was carrying 70,000 mt of fuel oil under six bills of lading while under a voyage charterparty. Under the charterparty, the charterers were to pay for the K&R insurance and

additional War Risks coverage to transit through Gulf of Aden. The bills incorporated the voyage charterparty by a wide incorporation clause as well as York Antwerp Rules. The vessel was kidnapped while transiting the Gulf of Aden en route from St Petersburg to Singapore. A ransom was paid to the pirates to have the vessel and the cargo released. The owners brought a general average contribution claim against the cargo interests under bond and cargo insurers under guarantee. Sir Nigel Teare held that as between the owners and the charterers the insurance provision created a complete code, whereby the charterers would pay the premium and the owners' only resort was to the insurance fund, thus the charterers are relieved from the obligation to pay general average contribution when the insured risk materialises. His lordship noted that in *The Ocean Victory*,[46] which concerned safe port warranty, the insurance was taken in the joint names of the owners and charterers. In *The Evia No. 2*,[47] also a case concerning safe port warranty, the insurance was not in the joint names. In both these cases, the respective courts held that the insurance provision created a complete code for the owners to recover their losses from the insurer, thus relieving the charterers. Coming to the liability of the holders of the bills to contribute in general average for the ransom payment, his lordship held that despite that the incorporation clause was wide enough to bring in the insurance provision into the bills, the words cannot be manipulated to put the holders of the bills in liability to pay the insurance premiums. It followed that the exception from the general average contribution was not available to the holders of the bills, who were not liable to pay the premium.

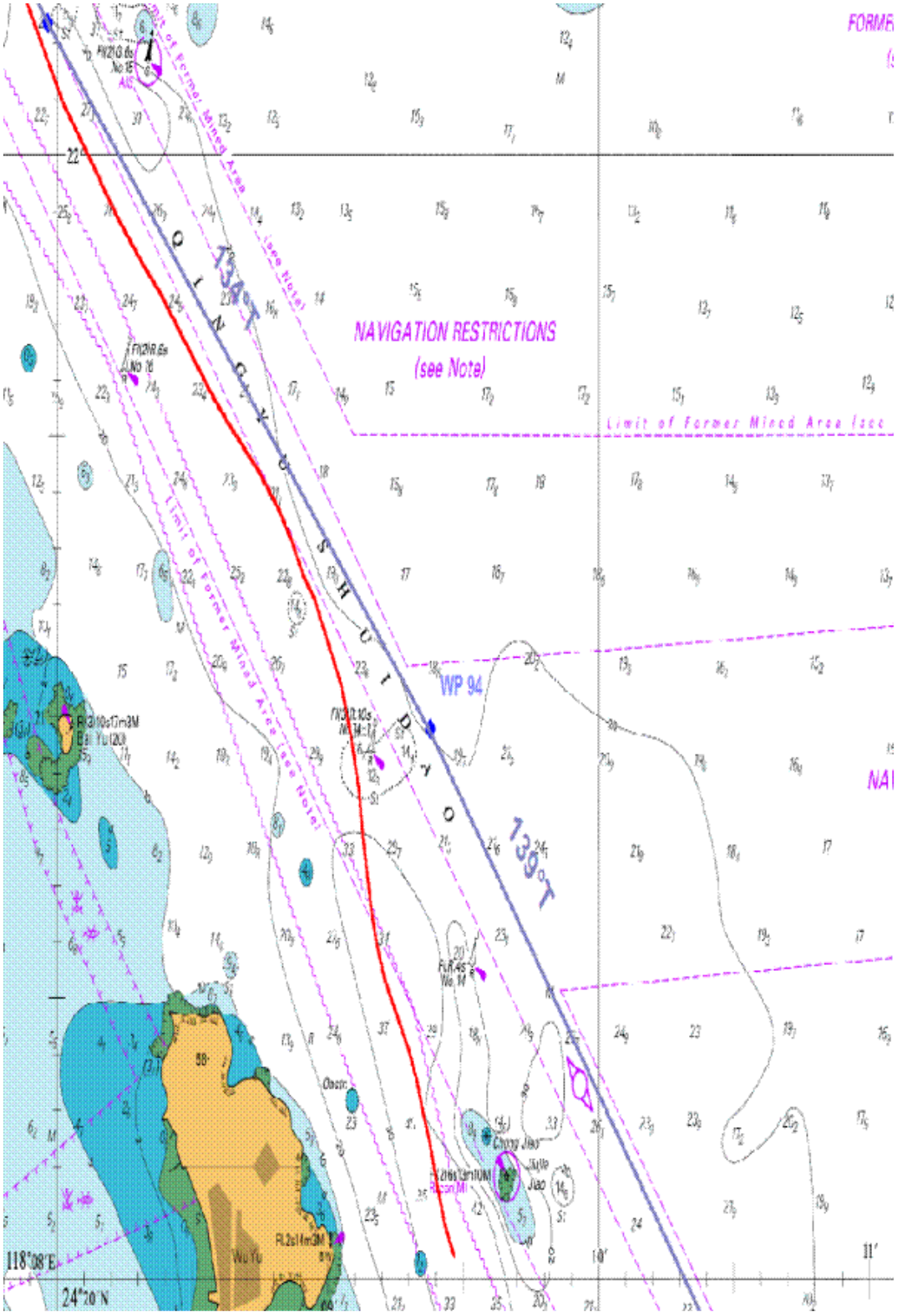
8.3 The CMA CGM Libra [2020] EWCA Civ 293

***Alize 1954 and another v Allianz Elementar Versicherungs AG and others (The CMA CGM Libra)* [2020] EWCA Civ 293 – Court of Appeal – Flaux LJ, with whom Males LJ and Haddon-Cave LJ agreed**

The CMA CGM Libra loaded cargo at Xiamen. The working chart was defective in that it did not contain a warning of the danger that the depths shown in the chart outside the fairway was not reliable and can be shallower than that shown in the chart. A Notice to Mariners was issued to this effect. The second officer prepared a passage plan that, following the defective chart, did not note the danger. The vessel, seemingly for some reason, was navigated outside the fairway. This resulted in the vessel ending up in shallow waters and grounding. The owners incurred salvage expenditure and had the vessel refloated, and claimed a general average

[46] *The Ocean Victory* [2017] 1 WLR 1793.
[47] *Evia No. 2* [1983] AC 736.

contribution from the cargo interests for this pursuant to York-Antwerp Rules in the sum of about USD13 million. While more than 90% of the cargo interest paid the contribution, a small portion of the cargo interests refused to pay. Hence, the owners' action against the small portion of the cargo interests. The Rule D of the York-Antwerp Rules, while providing that a party will be entitled to the general average contribution for the relevant sacrifices/expenditures made by it even if the sacrifices/expenditures were necessitated by the fault of the party, does not prejudice any remedy available to the party against whom a general average contribution claim has been made against the party fault for that fault. In effect, this excludes general average contribution claim by a party at actionable fault. The arguments of the owners that updating charts and preparing passage plan, though done prior to commencement of the voyage, are matters of navigation, performed by the members of the crew quo navigator rather than the carrier, one-off matters as opposed to systematic failure and not attributes of the vessel were rejected after considering numerous authorities presented on both sides. The court reiterated that the navigation exception in Art IV(2) of the Hague-Visby Rules is not available where the breach is of the Art III(1) obligation to exercise due diligence to ensure seaworthiness up the commencement of the voyage. Flaux LJ, with whom Males LJ and Haddon-Cave LJ agreed, held that the vessel was unseaworthy as a result of carrying a defective chart and passage plan. It followed that the owners were not entitled to the general average contribution from the cargo interests, upholding the judgment of Teare J. An extract from the chart used follows:


NAVIGATION RESTRICTIONS
(see Note)
Limit of Former Mined Area (see Note)
WP 94
134°T
139°T
118°08'E
24°20'N

8.4 The BSLE Sunrise [2019] EWHC 2860 (Comm)

***Navalmar UK Ltd v Ergo Versicherung AG and another company (The BSLE Sunrise)* [2019] EWHC 2860 (Comm) – High Court – Judge Pelling QC**

The BSLE Sunrise carried a cargo of pipes from Jebel Ali to Antwerp under three bills of lading, which incorporated YAR 1974. En route, the vessel grounded off Valencia on 28 September 2012. The owners had the vessel refloated and temporary repairs effected to continue with the voyage to Antwerp. On 5 October 2012, the owners declared 'general average'.

Insofar as two of the three bills were concerned, on the same day, 5 October 2012, the cargo insurers furnished a general average guarantee on the following terms:

> In consideration of the delivery in due course of the goods specified below to the consignees thereof without collection of a deposit, we the undersigned insurers, hereby undertake to pay to the ship owners … on behalf of the various parties to the adventure as their interest may appear any contributions to General Average … which may hereafter be ascertained to be properly due in respect of the said goods.

These are wordings approved by the Association of Average Adjusters and the Institute of London Underwriters.

Thereafter on 8 October 2012, the cargo interests furnished a general average bond in Lloyd's form as follows:

> In consideration of the delivery to us or our order, on payment of the freight due, of the goods noted above we agree to pay the proper proportion of any … general average … which may hereafter be ascertained to be properly and legally due from the goods or the shippers or owners thereof …"

There was no express reference in the guarantee to the bond. The guarantee was issued before the bond was issued.

Insofar as the other bill was concerned, the bond was issued on 11 October 2012 and the guarantee was issued on 15 October 2012 and there as an express reference in the guarantee to the bond.

The vessel arrived at Antwerp on 26 November 2012 and all the cargo was discharged. The general average adjusters issued general average adjustment whereby the cargo interests

were to pay a general average contribution to the owners. The adjusted amount not having been paid, the owners instituted action against both the insurers.

It was the position of the insurers that no general average contribution was payable, by Rule D of the YAR, because the grounding happened as a result of an actionable fault of the owners, namely the failure of the owners to exercise due diligence to ensure the vessel's seaworthiness at the commencement (i.e. breach of the Hague-Visby Rules Art III(1) obligation). It was the case of the owners that the insurers liable under the guarantee was not entitled to Rule D defence in the event of an actionable fault on the part of the owners, although the cargo interests would be entitled to the defence. Judge Pelling QC rejected the argument of the owners and decided as a preliminary issue that the insurers were entitled to Rule D defence as much as the cargo interest would be entitled. This is so despite, in the case of two of the bills, that the guarantee was issued even before the bond and that no express reference was made in the guarantee to the bond. The judge noted that the guarantee is issued in conjunction with the bond, as it has been done in the past 200 years. The guarantee is for payment of the due general average, while no general average may be due when Rule D is triggered. The guarantee merely replaces the requirement of a cash deposit. In the event a deposit is lodged, the question of liability is always preserved. By the guarantee, the insurers have no commercial interest to confer on the owner any greater benefit than that conferred by the bond.

8.5 The Lady M [2019] 2 All ER (Comm) 731

***Glencore Energy UK Ltd and another company v Freeport Holdings Ltd (The Lady M)* [2019] 2 All ER (Comm) 731 – *Court of Appeal* – Simon LJ, with whom Coulson LJ and Sir Geoffrey Vos C agreed**

The Lady M was on a voyage carrying 62,250 mt of oil from Taman, Russia to Houston, the USA under four bills of lading which were subject to the Hague-Visby Rules. On 14 May 2015, the chief engineer deliberately set fire in the engine room. The fire was put out within 36 minutes, however, the main electrical switchboard was damaged beyond repair and the vessel was immobilised. This resulted in the owners ordering a salvage tug on LOF on 14 May 2015. On 16 May 2015, the salvage tug Tsavliris Hellas commenced towing the vessel to Las Palmas. The savage tug and the vessel arrived at Las Palmas on the evening of 31 May 2015. The salvors instituted arbitration against "The Owners of M.V. Lady M, Her Cargo, Freight and Bunkers".

The shipowners and cargo owners settled the salvor's claim separately. The cargo owners paid about USD3.8 million to the salvors and incurred an expense of about GBP46,000 in investigation and defence. The cargo owners brought the claim to recover the monies paid and spend in connection with salvage and for a declaration that they are not liable for general average contribution. In return, the owners brought a counterclaim for about USD560,000 for the general average contribution.

At the High Court, two preliminary issues were ordered to be determined, namely whether the chief engineer's conduct amounted to barratry and whether if so Art IV(2)(b) of the Hague-Visby Rules exempted liability of the owner for that. On the first issue, Popplewell J held that the conduct of the chief engineer may or may not be barratry depending on his mental state at that time. On the second issue, his lordship held that Art IV(2)(b) was capable of exempting the owner from liability for fire barratrously or deliberately caused. (See *Glencore Energy UK Ltd and another v Freeport Holdings Ltd (Lady M)* [2017] EWHC 3348 (Comm) – High Court – Popplewell J)

On appeal, Simon LJ, with whom Coulson LJ and Sir Geoffrey Vos C agreed, upheld that that Art IV(2)(b) covers fire even if caused deliberately or barratrously as long as that happened without the actual fault or privity of the carrier. However, on the first question, his lordship found that the fire was deliberately and barratrously caused by the chief engineer. The result was that the owners were exempted from liability to the cargo owners on the latter's claim.

8.6 The Longchamp [2018] 1 All ER 545

Mitsui and Co Ltd and others v Beteiligungsgesellschaft LPG Tankerflotte MBH and Co KG and another (The Longchamp) **[2018] 1 All ER 545 – Supreme Court – Lord Neuberger, with whom Lord Sumption, Lord Clarke and Lord Hodge agreed, but Lord Mance DP dissented**

The Longchamp was boarded and hijacked by pirates on the Gulf of Aden while carrying cargo under a bill of lading subject to the York Antwerp Rules 1974. The pirates asked for USD6 million ransom to disembark and release the vessel. The owner negotiated over 51 days and reduced the ransom to USD1.85 million, which was paid, and the vessel was released. The cost of operating expenses incurred by the owners during the 51 days was USD160,000, which the owners claimed in general average contribution from the cargo interest together with the

ransom paid. A dispute arose as to whether the USD160,000 operating expenses are allowable in general average. Lord Neuberger, with whom the majority agreed, held that it was allowable in general average under Rule F, which provides:

> 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.

His lordship construed Rule F objectively and in the natural context. and rejected the argument of the cargo interests. His lordship rejected the cargo interests' argument that the general average contributions in the circumstances are excluded by Rule C, holding that even if the expenditure fell within Rule C, it did not prejudice its allowability under Rule F. Rule C provides:

> Only such losses, damages or expenses which are the direct consequence of the general average act shall be allowed as general average. Loss or damage sustained by the ship or cargo through delay, whether on the voyage or subsequently, such as demurrage, and any indirect loss whatsoever, such as loss of market, shall not be admitted as general average.

8.7 The NV Jia Li Hai [2017] EWHC 2509 (Comm)

***Cosco Bulk Carrier Co Ltd v Tianjin General Nice Coke (The NV Jia Li Hai)* [2017] EWHC 2509 (Comm) – High Court – Knowles J**

Following a collision and the consequent expenditure spent by the owners in saving the vessel and the cargo, the owners declared 'general average'. The cargo insurers gave the general average guarantee to pay any due general average contribution payable by the cargo interests. Subsequently, the cargo insurers did not pay, and the owners sued the insurers. The insurers defended with an allegation that there was a breach by the owners of the obligation to exercise due diligence to ensure the seaworthiness of the vessel at the commencement of the voyage. This was based on the insurer's position that the Bessel had no adequate systems in place in relation to passage planning and/or bridge management, resulting in the collision and the following expenditure. Seemingly, if this was true it would be a breach of Hague-Visby Rules Art III(1) obligation, which breach will disentitle the owners to any general contribution under Rule D of the York Antwerp Rules. The insurers produced a report from the Chinese authorities

saying there was negligence in the lookout, failure to proceed at a safe speed and negligence in taking precautions required in special circumstances. An expert, namely a captain, giving an expert opinion for the insurers said that it was difficult to see how the collision would have happened if the systems were properly implemented and followed. However, the insurers were not able to answer the owners' question of what systems ought to have been maintained. While seemingly the collision here did not happen shortly after the vessel left the port, Knowles J drew attention to the following passage from Scrutton:

> The burden of proving unseaworthiness rests upon the party who asserts it and the party intending to rely upon unseaworthiness must plead it with sufficient particularity. But where a ship, shortly after leaving port and without any apparent reason sinks or leaks, the mere facts afford prima facie evidence of unseaworthiness, which must be rebutted.

Knowles J concluded that insurers failed to show some foundation for the allegations of unseaworthiness it made supported by a statement of truth. Hence, his lordship gave a summary judgment for the owners.

8.8 The Cape Bonny [2017] EWHC 3036 (Comm)

MT "Cape Bonny" Tankschiffahrts GMBH & Co KG v Ping and Property and Casualty Insurance Company of China Ltd, Beijing Branch (The Cape Bonny) **[2017] EWHC 3036 (Comm) – High Court – Teare J**

The Cape Bonny, a tanker, was carrying oil from Argentina to China. The bill of lading incorporated the Hague-Visby Rules and the York Antwerp Rules. On this voyage, the engine broke down and the vessel was immobilised and adrift at sea on 14 July 2011. At this time, she was seeking to avoid the tropical storm or typhoon MA-ON. The vessel ordered a tug to tow the vessel through a towage and salvage broker. There were three choices of tugs to order, namely Salvage Challenger at the hire of USD40,000 per day, De Da at USD55,000 per day and Koyo Maru at USD56,656 (or possibly USD57,656) per day. The vessel chose Koyo Maru, seemingly because Koyo Maru could reach faster than the other two, among others. An attempt to put the vessel in a Japanese port of refuge failed as the port authorities were reluctant to allow a laden disabled vessel to enter. A Chinese port authority, namely Tianjin, allowed the vessel to berth, but the receivers of the cargo refused to receive the cargo at that port. Time was not in favour of the owners to attempt by a court order forcing the receivers to receive the cargo at the Chinese berth. Accordingly, the vessel was towed to Yosu in South Kora and arrived

there on 1 August 2021 to transfer the cargo onto another vessel The Cape Bata by STS operation to deliver the cargo at the destination port. Here, the vessel was towed by four harbour tugs to the outer anchorage for the STS operation, which was undertaken on 2 and 3 August 2011. After the STS operation, the South Korean authorities were reluctant to allow the vessel to enter the port, hence the vessel was towed by Koyo Maru out to sea in view of the approach of another typhoon MUIFA. After the intervention of the local Pilotage Association, the vessel, now in ballast, was allowed to enter the port. The vessel accordingly was towed back to the outer anchorage by Koyo Maru on 9 August 2011, when Koyo Maru was dismissed. Then the vessel was assisted by four harbour tugs to a layby berth to have the repairs done.

In the meantime, on 28 July 2011, the owners declared general average and the cargo insurers furnished a general average guarantee to facilitate the cargo to be delivered to the cargo interests without a cash deposit. On 13 March 2013, the average adjusters assessed the cargo's contribution to be about USD2.5 million, which was later amended to about USD2.1 million. The insurers refused to pay. The owners sued the insurers. The defence of the insurers was that the vessel was unseaworthy at the commencement of the voyage and the owners failed to exercise due diligence to ensure seaworthiness, hence a breach of Art III(1) obligation. If this was true, that will relieve the cargo interests, and thus the insurers, from the liability to pay general average contributions, by Rule D of the York Antwerp Rules.

Teare J was satisfied that (i) the vessel was unseaworthy at the commencement of the voyage, (ii) the owners failed to exercise due diligence and (iii) that was the cause of the breakdown. Accordingly, his lordship held that Rule D was triggered, and the insurers were relieved from the liability to pay general average contributions. The basis of this decision was that the cause of the breakdown was the damage to the main bearing no. 1 caused by foreign particles in the lubricating oil, which should have been removed but not removed. A crankweb deflection reading taken in May 2011 (prior to the current voyage), compared with a reading taken in Nov 2010, showed too large a difference. This would alert a prudent engineer of abnormal wear of the main bearing no. 1 to undertake necessary remedial action. But this was not done, hence the owners failed in their duty to exercise due diligence to ensure seaworthiness at the commencement of the voyage.

If the general average contribution contributions were payable, which was not the case here, there was a dispute as to the quantum. As a matter of academic interest, Teare J dealt with the question of quantum. His lordship found that, by Rule Paramount, Rule A and Rule E of the York Antwerp Rules, the legal burden of proving that the expenditure was reasonable is on the owners. In the circumstances of the case, his lordship found that it was reasonable for the

owners to choose Koyo Maru although it was the most expensive option. His lordship considered that mere immobilisation by engine breakdown, even if the weather is fine, is a danger that needs to be dealt with without delay. More, in this case, the danger was plain due to the risk of MA-ON typhoon. It was found that it was reasonable for the owners to retain the tug, as they did, until the South Korean authorities gave permission to enter the port and the vessel was towed to the outer anchorage on 9 August 2011. It was found equally reasonable for the owners to divert to Yosu to perform STS operation given that the Japanese authorities have refused entry and the receivers have refused the Chinese berth.

8.9 The Maersk Neuchatel [2014] All ER (D) 29 (Jun)

St Maximus Shipping Co Ltd v AP Moller-Maersk A/S (The Maersk Neuchatel) **[2014] All ER (D) 29 (Jun) – High Court – Hamblen J**

A demise charterer let in 2004 the container vessel The Maersk Neuchatel to a time charterer in liner trade by a charterparty in an amended BIMCO BOXTIME form. The charterparty required the demise charterers to give temporary security in the event of a general average or salvage, to cover all goods and containers, which may subsequently be replaced with full security from the interested party. On 20 July 2007, whilst on a laden voyage from South East Asia to various South and West African ports, the vessel grounded off the port of Tema, Ghana. Eight attempts were made to refloat her between 20 July 2007 and 31 August 2007. On 31 August 2007, upon lightering, the vessel was refloated by the salvors. In the course of the attempts to refloat and refloating, the vessel's bottom suffered serious damage and resulting in numerous attempts to refloat and serious damage to her bottom. On 25 July 2007, general average was declared. Upon this incident, the parties negotiated the terms of the letter of undertaking (LOU) by way of the security to be given by the time charterers to the demise charterers, assisted by their respective solicitors and the general average adjusters. The terms were finalised, and the LOU was issued in September 2007. The relevant terms were that the demise charterer would:

> pay the proper proportion of any General Average and/or Special Charges which may hereafter be ascertained to be due from the Cargo … under an Adjustment prepared by the appointed Average Adjusters in accordance with the Charterparty …
>
> make one or more payment(s) on -account of such sum or sum(s) as will be certified by the General Average Adjusters to be due from Cargo …

The LOU included a non-separation agreement. Upon the LOU, the remaining containers were discharged at Tema and the vessel was then put to Gdansk for repairs. The demise charterers, time charterers and the general average adjusters all surveyed/inspected the vessel. In December 2010, the adjusters gave a draft adjustment to the time charterers, whereby about 80% of the bottom damage and 100% of the propeller damage were classified as general average sacrifice resulting from the refloating exercise. The adjusters published the final adjustment in January 2012, whereby about 82% of the bottom damage was classified as a general average sacrifice. The total sum ascertained to be due from the cargo interests was about USD6.3 million (including liability under the non-separation agreement). The time charterer contended that the right amount of contribution was only about USD3.5 million. The time charterers, having earlier paid USD2.5 million on a without prejudice basis, made a further payment of about USD1 million as per the time charterer's account. Hamblen J construed the construction, in strict terms, to mean that the time charterers had agreed to pay the proper portion of whatever sum is ascertained by the adjusters to be due from the Cargo, although the Cargo is not bound by the ascertainment. His lordship treated this as an on-demand guarantee dependent on certification. This was because the usual words like "payable in respect of the goods by the Cargo" was missing. His Lordship distinguished *The Jute Express* [1961] 2 Lloyd's Rep 55, where such words appeared in the average bond and Sheen J held that the undertaker only agreed to pay what is legally and properly due and payable. His lordship disagreed with the time charterer's argument that the mere words "pay proper portion of any General Average" had the effect of usual words like "payable by the Cargo".

It appears that there was a consensus that if the liability of the Cargo is subsequently established in a lesser amount than that ascertained by the adjudicators and paid by the time charterers, then the excess amount can be recovered. But if the ascertained amount turns out to be lesser than that subsequently held due from the Cargo, the demise charterers will have no recourse to the time charterers for the excess amount but have to claim the same from the Cargo. Attempts by the time charterers to have the LOU rectified failed.

It is observed that in *Navalmar UK Ltd v Ergo Versicherung AG and another company (The BSLE Sunrise)* [2019] EWHC 2860 (Comm), Judge Pelling QC held that the insurers guaranteeing the payment by the cargo interest under a bond was entitled to all defences available to the cargo interests and was in the same position as the cargo interests to challenge the general average adjustment.

8.10 The Lehmann Timber [2013] All ER (D) 59 (Jun)

Metall Market OOO v Vitorio Shipping Co Ltd (The Lehmann Timber) **[2013] All ER (D) 59 (Jun) – Court of Appeal – Sir Bernard Rix, with whom Arden LJ and Patten LJ agreed**

A cargo of steel coils was carried under four bills of lading by The Lehmann Timber. The vessel was first detained by pirates and released by payment of ransom by the owners. Subsequently, the vessel suffered an engine breakdown, which put the owners to the cost of towing. Finally, the vessel arrived at the destination port of St Petersburg. The owners declared 'general average' and appointed the general average adjusters.

The cargo carried under one of the bills were insured, while the other three were uninsured. The general average adjusters, on behalf of the owners, demanded the usual general average bond secured by an insurer's general average guarantee or cash deposit. The cargo receiver refused to give the bond in respect of any of the bills, while the insurer gave its guarantee in respect of the one bill covered by insurance. The owners exercised the lien over all the cargoes for general average contribution and discharged all the cargo in a nearby warehouse. The owners subsequently claimed the general average contribution as well as the cost of storage.

The dispute was first arbitrated. The arbitral tribunal allowed the owner's claim. On appeal, Popplewell J held that the owners were entitled to exercise the lien in respect of all the cargoes including the one in respect of which the insurers had given the guarantee as no bond was given by the cargo receiver. However, his lordship held that the owners were not entitled to the storage costs, following the decision of the House of Lords in *Somes v British Empire Shipping Co* (1860) 8 HL Cas 338 where it was held that an artificer was not entitled to the storage cost when exercising his lien. On further appeal by both parties, Sir Bernard Rix delivering the judgment of the Court of Appeal held that the owners were entitled to exercise the lien in respect of all the cargoes as the guarantee without the bond was insufficient or at least it was reasonable for the owners to require a bond in addition to the guarantee. His lordship also held that *Somes* principle was not applicable outside the context of an artificer and that, in any event, it was not applicable in the current context of a lien for general average. Accordingly, his lordship reversed the decision of Popplewell J on this point and held that the owners were entitled to the storage cost, after finding that the conduct of the owners in incurring the storage costs in the circumstances was reasonable.

Sir Bernard Rix observed the significance and benefits of a bond to the owners, which will possibly include a limitation period running from the date of the bond, law and jurisdiction clause and an undertaking to make payment on an interim certificate on account.

It is observed that a guarantee in essence guarantees the discharge of the cargo interests' obligation under a bond. In *Navalmar UK Ltd v Ergo Versicherung AG and another company (The BSLE Sunrise)* [2019] EWHC 2860 (Comm), Judge Pelling QC tied up the guarantee with the bond although the guarantee was issued before the bond was issued.

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