

T H O M A S
C O O P E R

IUMI General Average Webinar II General Average: Procedure, Security and Defences

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When can G.A. be declared?

- The right to claim G.A. arises when a G.A. sacrifice is made or a G.A. expense is incurred:

Hain SS. Co Ltd v. Tate & Lyle [1934]

Morrison SS Co v. Greystoke Castle [1947]

- The right to G.A. security arises on termination of the adventure: Potoi Chau [1983]

Frustration or Abandonment of the Adventure

Davis Contractors v. Fareham UDC [1956]

Frustration arises when, “without default of either party, a contractual obligation has become incapable of being performed because the circumstances... would render it a thing radically different from that which was undertaken by the contract.”

- Shipowner is bound to repair the ship and carry the cargo to destination if, when repaired, the ship's value would exceed the cost of repairs/recovery: *Ass. Generali v. Bessie Morris* [1892]
- If temporary repairs would enable the voyage to be completed then only temporary repair costs are considered: *Kulukundis v. Norwich Union* [1937]
- A voyage could be abandoned due to cargo's condition: *The Savona* [1900]

Transshipment and Non-Separation Agreements (“NSA”)

- Rule G (3) and (4) YAR 1994 and 2004
- NSAs allow owners to recover the cost of transshipping cargo to destination in another ship. But cargo’s proportion cannot exceed the cost which would have been payable if cargo had been forwarded at its own expense
- Can cargo interests collect cargo short of destination against shipowners’ will: The City of Colombo [1986]?
- ABT Rasha [2000] – Hull insurers are liable for the cargo’s portion of G.A. contributions unrecoverable due to a Bigham Clause

Is a declaration of G.A. necessary?

- Question for the law of the state where the adventure ends
- Under English law no formal G.A. declaration is required
- The main reason to declare G.A. is to collect security
- In some other jurisdictions G.A. must be declared before a notary public for any G.A. claim to be made

Who Pays G.A.?

Parties to the Common Maritime Adventure

a) Shipowner/Bareboat Charter  Hull Insurer

But if G.A. exceeds ship's insured value  P&I insurer

b) Cargo (including B/L freight)/cargo insurer

Theoretically the owner of the cargo when the G.A. sacrifice/expense was made/incurred. In practice the cargo receiver (or his insurer) has to pay to lift the G.A. lien: The Potoi Chau [1983]

But if cargo declines to contribute due to a breach of contract by carrier  P&I insurer

c) Time Charterer's bunkers  Charterer's liability insurers

Can G.A. be claimed if the ship is in ballast?

- In principle if there is only one party interested in the adventure there should be no possibility of a G.A. declaration
- Ballast G.A.'s are possible if vessel is chartered or the hull policy so provides (either expressly or as sue and labour)
- AAA's Rule of Practice B26 and ITC Hulls 1.10.83 or IHC 2003 cl 8.3

What is an Average Adjuster?

- An Adjuster is the servant of whoever appoints him
- “If he [the Owner] engages the services of an average stater, it is merely as a matter of business convenience on his part. The average stater is not engaged, nor does he act on behalf of any of the other parties concerned, nor does his statement bind them”

Wavertree Sailing Ship Co v. Love [1897] per Herschell LJ

- The Adjuster has considerable powers and discretion over what to allow
 - low value cargo (YAR 2016)
 - Whether to re-adjust salvage in G.A. under YAR 2016
 - Rule E – provision of information
 - cash deposits

G.A. Security

- Possessory lien arises when a G.A. sacrifice is made or expense incurred but cargo have no obligation to contribute or give security until the termination of the adventure/voyage
- Hull insurers – usually give no security
- Cargo insurers usually give a G.A. Guarantee to pay sums “properly” due
- Cargo receivers usually give a G.A. Bond (and valuation form)
- Payment on account clauses (“and which is payable” means “legally due” – Jute Express [1991])
- Cash deposits (YAR Rule XXII)

Preparation of the Adjustment

- Burden of proof is on claiming party
- Parties obliged to cooperate with the Adjuster (Rule E)
- Parties must supply particulars of values asap
- Parties must give notice of claims in G.A.
- If a party fails to supply values or notice of claims within 12 months of the loss/payment the Adjuster may estimate it (YAR 2016 Rule E3)
- G.A. Guidelines

Jurisdiction and Enforcement

The Armar [1980]

Mora Shipping v Axa [2005]

Cargo's Defences to G.A. Claims (1)

Time Bar

- UK: Limitation Act 1980 s. 5 - 6 years for contracts
Greece: 1 year after end of year in which claim accrues
- Potoi Chau [1983]: time runs from issue of adjustment under G.A. securities
- Under YAR 2004 and 2016 Rule XXIII: G.A. claims are barred unless suit is brought:
 - a. within 1 year after the issue of the Adjustment; or in any event
 - b. within 6 years after termination of the common maritime adventure

Cargo's Defences to G.A. Claims (2)

- Local laws
- Tort – bailment on terms
- Wrong person suing/sued

Cargo's Defences to G.A. Claims (3) – Unseaworthiness The Hague/Hague-Visby Rules

- **Article III Rule 1:**

1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:

(a) Make the ship seaworthy;

(b) Properly man, equip and supply the ship;

(c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

Cargo's Defences to G.A. Claims (3) – Unseaworthiness The Hague/Hague-Visby Rules

- **Article IV Rule 1:**

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy.... Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.

Cargo's Defences to G.A. Claims (3) – Unseaworthiness The Hague/Hague-Visby Rules

- **Article IV Rule 2:**

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.

(b) Fire, unless caused by the actual fault or privity of the carrier.

...

Elements: Duty to Provide a Seaworthy Ship

General

- Common law: Absolute duty
- Article III Rule 1: due diligence “*before and at the beginning of the voyage*”
- Overriding obligation
- Not an absolute concept

Elements: Duty to Provide a Seaworthy Ship Definition

- *“The ship must have that degree of fitness that an ordinary careful owner would require his vessel to have at the commencement of her voyage having regard to all the probable consequences of it. Would a prudent owner have required that it (that is, the defect) be made good before sending his ship to sea, had he known of it?”*

Lord Justice Scrutton in *F.C. Bradley & Sons Ltd v Federal Steam Navigation Co.* [1926] 24 Ll. Rep 446 approving statement from Carver on Carriage by Sea

Elements: Duty to Provide a Seaworthy Ship

Components

- Vessel seaworthy

in a suitable condition and suitably manned and equipped to deal with the ordinary perils likely to be encountered on the voyage

- Physical condition of vessel and equipment
- Competence/efficiency of Master and crew
- Adequacy of bunkers, stores and documentation

- Vessel cargoworthy

Fit to receive the specified cargo

Elements: Duty to Provide a Seaworthy Ship

Physical condition of Vessel and Equipment

- Structure and Hull
- Machinery
- Hold Preparation (e.g. *The “FIONA”* [1994] 2 LI. Rep. 506)
- Hatches and Vents
- Engines and Generators (e.g. *The “KRITI REX”* [1996] 12 LI. Rep. 171)
- Pumps, pipes and lines (e.g. *The “SUBRO VALOUR* [1995] 2 LI. Rep. 509)
- Stowage (e.g. *Smith, Hogg and Company Limited v Black Sea and Baltic General Insurance Company Limited* [1940] A.C. 997)

Elements: Duty to Provide a Seaworthy Ship Manning

- Question of Fact
- Incompetence or inefficiency may constitute a “disabling want of skill” or a “disabling want of knowledge” (*Standard Oil v Clan Line* [1924] A.C. 100)
- Incompetence may even be demonstrated from one incident (*The “STAR SEA”* [1997] 1 Ll. Rep. 360).
- Incompetence is different to negligence e.g. lack of ability or training.
- **“Would a reasonably prudent owner, knowing the relevant facts, have allowed this vessel to put to sea with this Master and Crew with their state of knowledge, training and instruction?”**

Salmon J in *Hong Kong Fir Shipping v Kawasaki* [1962] 2 Q.B. 26 at 34

Elements: Duty to Provide a Seaworthy Ship Bunkers, Stores and Documentation

- Equipped or provisioned so as to be “reasonably fit to meet and undergo the perils which are likely to be encountered and to keep the cargo in sound condition” (e.g. *The “MAORI KING”* [1895] 2 Q.B. 550 or *Queensland National Bank Ltd v ENO* [1898] 1 Q.B. 567)
- Sufficient bunkers and stores
- Food and drinking water
- Charts, pilot books and navigational aids
- Documents of Compliance and Safety Management Certificate (*The “MADELEINE”* [1967] 2 Ll. Rep. 224)

Elements: Causation

“...unseaworthiness is **a** cause, or if it is preferred, **a real**, or **effective** or **actual** cause...”

Lord Wright in *Smith, Hogg and Co Ltd v Black Sea and Baltic General Insurance Co Ltd* [1940] at 1005

Elements: Causation

- *“In truth, unseaworthiness ... can never be the sole cause of the loss. ... It must, I think, always be only one of several co-operating causes. ... I can draw no distinction between cases where the negligent conduct of the master is a cause and cases in which any other cause, such as perils of the seas, or fire, is a co-operating cause. A negligent act is as much a co-operating cause, if it is a cause at all, as an act which is not negligent. The question is the same in either case, it is, **would the disaster not have happened if the ship had fulfilled the obligation of seaworthiness, even though the disaster could not have happened if there had not also been the specific peril or action.**”*

Lord Wright in *Smith, Hogg and Co Ltd v Black Sea and Baltic General Insurance Co Ltd* [1940] at 1005

Elements: Due Diligence

- The duty to supply a seaworthy ship is personal to the carrier and is non-delegable
- The Carrier is responsible for agents/third parties to whom he delegates the exercise of due diligence
- Carrier must delegate to skilled and competent persons.

The “Muncaster Castle” [1961] A.C. 807

Consequences of Causative Unseaworthiness

- Shipper/Cargo Interest right to:
 - Recover damages from Carrier subject to
 - Time Bar (Article III Rule 6/6bis: Notice as soon as possible or if not immediately apparent within three days of delivery, AND suit within one year of delivery of the cargo)
 - Limitation of Liability (Articles IV and IX Hague Rules): amount per unit/package/kg OR ship's tonnage OR ship's value)
 - Defence to G.A. contributions claim

Conclusion for G.A. Contributors

- Check G.A. security wordings are “safe” to sign
- Investigate the cause of the G.A. incident asap
- Co-operate with the Adjuster by providing information/documents
- Be pro-active in obtaining information and documentation from the assured (including, if necessary, authority to pursue claims in his name)
- What will currency of Adjustment be? Should insurers hedge?
- Before paying ensure the Adjustment has been properly drawn up and no defences are available

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