

## GENERAL AVERAGE AND SALVAGE

### **Introduction**

The owner of the cargo ship Dali, which lost power and struck the Baltimore Bridge on 26 March 2024, causing six deaths and significant disruption, has declared "general average". This declaration means cargo owners will face additional costs due to their share of general average expenses. Despite the incident being the fault of the Dali, cargo owners are still required to contribute under the contract's New Jason Clause. While US law typically exempts cargo owners from such contributions if the fault lies with the shipowner or their agents, the New Jason Clause alters this default rule.

This article explores the law and practice of general average and salvage.

### **General Average**

General average is a principle of maritime law where all parties in a sea voyage share the costs of a voluntary sacrifice or extraordinary expense incurred to save the vessel and cargo from a common peril. The 1801 case of *Birkley v Presgrave* 1 East 220 illustrates that the concept of general average was enforced by common law principles:

*"...All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo comes within general average and must be borne proportionably by all who are interested."*

For general average to apply, a formal declaration must be made. This involves the shipowner or their representative declaring that general average has occurred, and a general average adjustment is typically prepared by a specialist adjuster. The result of such a declaration is an entitlement to a general average contribution by the person whose property has been sacrificed or the expenditure incurred, against the other interests that are saved.[1]

General average is governed by various international conventions, including the York-

Antwerp Rules, which provide guidelines for the adjustment of general average claims. The York-Antwerp Rules 2004 are a voluntary international code of rules on the subject of general average which, in practice, are often incorporated into the contract of marine insurance and which differ in a number of respects from the common law rules. The York-Antwerp Rules are not, however, a complete code and may require to be supplemented by the provisions of the general law applicable to the contract[2].

General average is covered under marine cargo insurance, such as, Institute Cargo Clauses (A) 1.1.82:

## **"2. - General Average Clause**

*This insurance covers general average and salvage charges, adjusted or determined according to the contract of affreightment and/or the governing law and practice, incurred to avoid or in connection with the avoidance of loss from any cause except those excluded in Clauses 4, 5, 6 and 7 or elsewhere in this insurance."*

The costs incurred under general average are shared proportionally among everyone involved in the voyage based on their respective interests, to cover the extraordinary expenses or losses.

All persons whose interest in the adventure is benefited by a general average sacrifice or by a general average expenditure are liable to make a general average contribution[3]. These persons are:

- (a) the shipowner,[4] who is liable in respect of the ship and also in respect of the freight;[5]
- (b) the charterer, if any, who is liable in respect of his interest in the bill of lading freight;[6]
- (c) the owner of the cargo, who is liable in respect of the cargo;[7] and
- (d) any other person who may be liable under some express term in the contract of carriage.

Examples of general average acts include jettisoning part of the cargo or ship's stores, cutting way masts or cables, engaging salvage services, paying money to secure the vessel's release from detention, incurring damage to property belonging to third parties and consequent tortious liability, the expense of ship repairs, reconditioning cargo and other instances, far too numerous to justify a full recital.

## **Salvage**

The Malaysian Federal Court set out in the Law of Salvage in the case of *Fordeco Sdn Bhd v PK Fertilizers Sdn Bhd* [2019] MLJU 596. In delivering the decision of the Court Tan Sri Nallini FJ explained:

### **"The Law on Salvage**

*Salvage has been defined as a service which confers a benefit by saving or helping to save a recognized subject of salvage when in danger from which it cannot be extricated unaided, if and so far as the rendering of such service is voluntary in the sense*

*of being attributable neither to a pre-existing obligation, nor solely for the interests of the salvor (see Kennedy & Rose, Law of Salvage, 6th edition, published by Sweet & Maxwell 2002). Having said that, two points require clarification. The first is that this does not lay down a complete definition of salvage. The term should not be limited by a definition. Second, this definition describes salvage as it subsisted in earlier times. In more modern times, salvage is rendered more commonly by salvors under contract."*[8]

Malaysia has not ratified the Salvage Convention 1989. As a result, Admiralty Courts in Malaysia rely on common law to handle salvage claims within their jurisdiction.[9]

A salvage contract has four key features that set it apart from towage, pilotage, or carriage contracts:[10]

- (a) There must be a recognized subject matter;
- (b) The property in question must be in danger at sea
- (c) The salvors must act voluntarily; and
- (d) The salvage operation must succeed in saving or contributing to saving the endangered property.

Agency of necessity occurs by law in emergencies where someone, like a ship's master, must act to protect another person's property without explicit permission. In *The Gaetano and Maria*[11], Brett J. explained that the shipowner or master is authorized to handle cargo in emergencies due to their obligation to ensure the goods reach their destination, acting in the best interests of all parties involved.

The Lloyd's Open Form (LOF), officially known as the "Lloyd's Standard Form of Salvage Agreement," is a contract used for emergency marine salvage operations. It allows for immediate professional assistance without prior negotiation of terms, facilitating rapid response.

Financial details, legal issues, and party obligations are outlined in the LOF and associated clauses and rules, with the salvor's reward determined after the salvage is complete.[12]

## **General Average and Salvage Liens**

In General Average and Salvage situations, the carrier has a right to lien the cargo unless the cargo owner pays the proportion of the general average and salvage expenses, which are often not calculated by the time the cargo reaches its destination as this will have to await the general average or salvage adjustment.

To release the goods, the carrier typically requires a guarantee from the cargo owner, usually in the form of a bond from the cargo insurers or a bank guarantee. This ensures the carrier is covered for the potential costs until the final contribution amount is determined. Cargo owners cannot take possession of their cargo until they secure the necessary guarantee.

Where the cargo is insured under the usual ICC Clauses both the provision of the bond and the final amount of general average and salvage is covered under the insurance policy.

## **Conclusion**

In conclusion, General Average and Salvage are fundamental principles in maritime law designed to address extraordinary circumstances during a voyage. General Average ensures that the costs of voluntary sacrifices or expenses to save the vessel and cargo are equitably shared among all parties involved.

It requires a formal declaration and adjustment, often guided by the York Antwerp Rules and covered by marine insurance. Salvage, on the other hand, pertains to the rescue of property in peril at sea, with salvors receiving a reward based on the value of the saved property and their efforts. Both concepts ensure fair distribution of costs and incentivize prompt and effective maritime rescue operations.

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1. Modern Maritime Law and Risk Management by Alexandra Mandaraka-Sheppard, 2nd Edition, published by Informa 2009.
  2. Goulandris Bros Ltd v B Goldman & Sons Ltd [1958] 1 QB 74 at 92, [1957] 3 All ER 100 at 106, [1957] 2 Lloyd's Rep 207 at 214.
  3. Fletcher v Alexander (1868) LR 3 CP 375 at 382 per Bovill CJ. 9.
  4. Schmidt v Royal Mail SS Co (1876) 4 Asp MLC 217n.
  5. Moran v Jones (1857) 7 E & B 523.
  6. Frayes v Worms (1865) 19 CBNS 159.
  7. Scaife v Tobin (1832) 3 B & Ad 523.
  8. Fordeco Sdn Bhd v PK Fertilizers Sdn Bhd [2019] MLJU 59.
  9. Senior Courts Act 1981 (UK), Courts of Judicature Act 1964 s 20(2)(j), and section 24.
  10. Ibid.
  11. The Gaetano and Maria (1882) 7 P.D. 137.
  12. Ilian Djadjev, The SCOPIC Clause as a Major Development in Salvage Law, University of Groningen.

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