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GENERAL AVERAGE, SALVAGE AND THE CONTRACT OF AFFREIGHTMENT

by

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General Average has, in essence, nothing whatever to do with the Contract of Affreightment. Numerous dicta to that effect in the cases reported over the years could be cited, but perhaps a brief look at history would serve as well. It was not until the 14th or 15th Century A.D. that merchants began seriously to explore means of transporting their goods by sea for sale without accompanying them themselves and thus found it necessary to invent contracts, like Bills of Lading and Bills of Exchange, which became necessary as a result of that change in practice. Yet for many centuries before that General Average, certainly in its most elementary form, in relation to jettison, had been an accepted principle of law in all countries engaged in maritime commerce.

The exact basis of that principle has been the subject of much argument, certainly in the English Courts. In the law, as in women's clothes, fashions change. The same essentials are covered, but the manner of doing so varies with the tastes of the time. Thus the basis of the right to General Average has been said to rest on custom, or on grounds of natural equity, or on some implied contract between the parties either at the time the goods were shipped or at the time of the General Average Act, or in some form of agency vested in the Master. These distinctions, albeit fine ones, may have some relevance when considering such matters as jurisdiction applicable and the like, which I will not pursue here even were I competent to do so. They do not however touch on the essence of the problem which I am attempting to tackle, namely the relationship between General Average and the Contract of Affreightment. For to my knowledge it has never been seriously argued that the former arises directly from the latter.

A failure to recognise this is perhaps at the root of much of the

suspicion that exists in some quarters about the equity of the principle of General Average itself. In any Contract of carriage there is the concept that the carrier must exercise some degree of care in fulfilling his contract to carry the goods, with the corollary that if any failure on his part to do so causes loss or damage to the goods, the carrier is liable. Liability in that context depends on the cause of loss. In General Average, however, the cause of the events giving rise to it are irrelevant. It is the nature of the act of volition, of the General Average act itself, that counts, not the antecedent circumstances. Furthermore the right to contribution arises at the time of the sacrifice even though subsequent events may reduce or even negative it. (Hain S.S. Co. v Tate & Lyle 1936) (Chandris v Argo Insurance Co. 1963)

Were things that simple then I would submit that there would be nothing at all inequitable in the idea of an immediate settlement of the General Average, leaving the parties to deal with other rights and liabilities, inter se, whether under contract or otherwise, at a later date. After all the party whose property has been sacrificed or whose money has been spent has incurred his loss for the benefit of others and on their behalf so why should not their first priority be to reimburse him for it, just as they have to reimburse a volunteer salvor who performs a similar function for their benefit?

Here though another important principle enters the picture, the idea that a person cannot recover from another person in respect of the consequences of his own wrong. By wrong is meant, in the context, a fault which is actionable at the time of the General Average act. In practice most such "faults" arise from the term of the Contract of Affreightment, which thus immediately becomes relevant. Whilst rights of contribution between "innocent" parties to the General Average remain, (Strang, Steel & Co. v Scott 1889) the parties at whose suit the fault is actionable have an equitable defence to a claim for General Average contribution

made by the party who is atfault. Bear in mind that this is a defence to such claim, not merely a right to cross claim or a matter of avoidance of circuity of action. (Goulandris Bros v Goldman (B.) & Sons 1958)

Moreover there is a further, more practical difficulty. The law of General Average has developed somewhat differently in different parts of the world so that it is necessary to decide the law applicable. This creates problems particularly if the jurisdiction argument points in the direction of a country which has no established tradition of General Average law at all, as many do not. It has thus become almost invariable practice to insert provisions in the Contract of Affreightment as to the law governing the adjustment of General Average. At the present time this is nearly always a provision for adjustment in accordance with York/Antwerp Rules. Thus in practice not merely are rights of recovery in General Average linked to the terms of the Contract of Affreightment, but even the rules to be applied in adjusting the General Average itself are also so linked through the appropriate provision in charter party or bill of lading.

Thus through the application of one sound legal theory, General Average does not depend upon the Contract of Affreightment. Through the application of another equally sound theory, its practical effectiveness does so depend. It is this contradiction that lies at the root of the main practical problems with General Average at the present time.

One is speaking nowadays, for the most part, of Contracts of Affreightment which provide for the Hague Rules through some form of statutory enactment, such as the Australian Sea Carriage of Goods Act, 1924 and with, as already said, provision for the application of York/Antwerp Rules. The first and most important area in which considerations of General Average and the contract overlap is in relation to the Shipowners' obligation to exercise due diligence to provide a seaworthy ship. Let us first deal with the effects, on General Average, of breach of that obligation.

In order to defend a claim for General Average contribution on those grounds, it is necessary for the Concerned to demonstrate firstly that there is a prima facie case that the vessel was unseaworthy at the commencement of the voyage and secondly that that unseaworthiness was a cause of the accident or occurrence which gave rise to the General Average. If those points can be demonstrated then the onus is upon the Shipowner to show that he exercised due diligence to make the vessel seaworthy.

As to the first point I think I need say little except that in practical terms, with ships with complex machinery of all kinds, there are often grounds for suspicion that a defect of some kind existed or must have existed at the commencement of a given voyage, or for suggesting quite plausibly that a defect which developed during such a voyage must in some way have predated its commencement.

It is then necessary to show that the unseaworthiness was a cause of the events giving rise to the General Average. It has to be emphasized that it need not be a proximate or immediate cause. This is perhaps illustrated most clearly by the case of Smith Hogg & Co. Ltd v Black Sea & Baltic General Insurance (1940). In that case a vessel was improperly loaded with timber, but proceeded safely. When bunkering at the intermediate port, the Master was negligent in the method adopted for taking on bunkers and the result was that the vessel tipped over. It was held that since the original unseaworthiness was an effective cause of the loss, the Shipowner was liable to Cargo. The fact that there was a contributory and in fact more immediate cause, i.e., the negligence of the Master in the management of the ship, which was an excepted peril, did not affect this. As Carver states, in a passage quoted with approval in the case mentioned, "if unfitness of the ship becomes a real cause of loss or damage . . . the Shipowner is responsible, although other causes from whose effect he is excused either at common law or by express contract have contributed to cause the loss".

This fact has important practical implications in that the evidence required to demonstrate the facts in that connection is quite different from the evidence required to demonstrate that a General Average act has taken place. Also important is the fact that that evidence is often different from that required to substantiate a claim on an insurance policy, where the test relates to the proximate cause of the loss or damage. This means in practice that, more often than not, evidence required to substantiate or refute a claim that the loss was caused by unseaworthiness, will frequently not even begin to be accumulated until a General Average Adjustment is submitted to the parties for settlement.

Once Cargo have established prima facie that unseaworthiness was a cause of the General Average, the onus then passes to the Shipowner to establish that he exercised due diligence to make the vessel seaworthy. At first sight this concept of due diligence seems a fair one, but it has to be said that as interpreted subsequently by the Courts, it probably does not reflect the type of bargain between Ship and Cargo interest which was envisaged when the Hague Rules were devised. It is not sufficient for the Shipowner to show that his own management team has been diligent. He may in fact have run a well maintained ship and appointed reputable repairers and sub-contractors through out. This will avail him not al all if any of the latter have, in their turn, erred. Since the decision in the "MUNCASTER CASTLE" case (Riverstone Meat Co.v Lancashire Shipping Co. 1961) it is apparent that the only way he can escape liability for the effects of a condition in his vessel which pre-existed the voyage, is if he can show it to be a latent defect.

It seems worth emphasising that those conditions extend some way beyond any question of culpable fault on the Shipowner's part. Whether that is appropriate in relation to the Contract of Affreightment generally is perhaps arguable and depends upon one's stand point. I cannot help feeling however that such stringency is somehow out of place when considering his right to recover, at least initially, for losses and expenses incurred for the common safety or benefit of all interests. However, on the general issue

there seems little prospect, in the current climate, of the pendulum swinging back the other way.

The next important defence that may arise under the Contract of Affreightment is a defence of deviation. The effects of this are, as you well know, even more extreme in that when an unreasonable deviation has occurred the terms of the Contract of Affreightment, which in the context would include any provisions regarding General Average, disappear altogether.

It is perhaps somewhat curious that in practice the defence of deviation does not seem to arise very frequently in relation to claims for General Average. It may be that one reason for this is that there is very little legal precedent on the question what constitutes a "reasonable" deviation and how far deviation may be excused by liberties, often apparently very wide ones, given in the Bill of Lading. Perhaps it is all a can of worms which even the most enthusiastic of lawyers is wary of opening.

Finally the defence may be raised that the Shipowner, either himself, or through his agents, has failed properly to care for the Cargo during the voyage. Again it is in my experience relatively rare for such a defence to be raised as a complete defence to a General Average claim because management of the cargo as such will seldom give rise to one. The defence probably occurs more frequently in relation to particular types of General Average expenditure or loss rather than to the General Average as such. An example of this is to be found in the case of Federal Commerce & Navigation Co. v Eisenerz (1972), a case in the Canadian Supreme Court. Following a stranding, for which the Shipowner was in no way responsible in terms of the Contract of Carriage, part of the vessel's cargo of pig iron was discharged as a General Average act, but due to negligence on the part of both the Master and the stevedores, the different grades of iron were not segregated and therefore became mixed, which resulted in substantial reduction in the value of the cargo at destination. It was held that the loss of the cargo was not a direct result of the General Average act of forced discharge and therefore allowable in General Average, but

resulted from a fresh breach of contract by the Shipowner through his servants, the stevedores and the Master. Since the negligence of the latter related to management of the cargo it was not an excepted peril.

However as I have said such cases are relatively infrequent and to summarize the position it seems to me to be fair to say that the most frequently used defence under the Contract of Affreightment to a claim for General Average is one based on unseaworthiness and it is that defence which causes the great majority of the problems in practice.

Before passing on to the subject of salvage, I ought perhaps to mention another specific rule by which the parties are bound by contract, namely Rule D of York/Antwerp Rules. My reference can however be brief because in what is to my knowledge the only case in which the terms of that Rule have been considered at any length (the Goulandris case, already mentioned) it was stated that it did no more than convey the position as it existed at common law (in your countries, I believe, as well as mine) which I hope I have correctly outlined above.

Cases involving maritime salvage tend to highlight the problems with which I am dealing. This is primarily because nowadays, when Shipowners seldom give security to salvors on behalf of cargo and when cargo values at a time of shipping recession tend to be greater than ship values, cargo interests almost invariably give separate security and are separately represented in the salvage proceedings. Lawyers representing them seize any opportunity this affords them to examine possible defences under the Contract of Affreightment. Lawyers acting for the ship in their turn advise Shipowners not to give security on behalf of cargo even if those Owners have a commercial incentive and the financial means to do so, because this will put them at a tactical disadvantage if ultimately there is any suggestion of "fault" on the Shipowners' part in terms of the Contract of Carriage.

Maritime salvage proper, as you are aware, is as independent and

different from General Average as the latter is independent of the Contract of Affreightment. The better legal view seems to be that the same is true of salvage under Lloyd's Open Form which, aside from the pollution provisions recently introduced, seems on the whole to preserve the position of salvage proper, but with the substitution of an arbitral tribunal for the Court. The essence of salvage is that the salvor claims against the individual interests salved. Under English law (and I believe under the law in your countries) there is no question, in the absence of special provision in the Contract of Carriage to that effect, of the party subsequently claiming salvage paid by him in General Average.

In this respect the law on the Continent of Europe is somewhat different. There it is argued that if the salvage services themselves were for the common safety, then regardless of the particular type of liability to which they give rise, each party who has paid for such services is entitled to claim the amount of his payment in General Average.

It was partly in order to achieve international uniformity on this point that when some 10 or 15 years ago the York/Antwerp Rules were being examined with a view to revision and up-dating, it was thought desirable to introduce a rule on this subject, which subsequently developed into what is now Rule VI of York/Antwerp Rules 1974. I say partly because I think there were other motives. As one who was personally concerned in promoting the idea of Rule VI, I can vouch for the fact that many influential lawyers in London thought that a rule on these lines was highly desirable from the point of view of simplifying procedures. It was felt to be wasteful that in given cases the process of calculating values should be gone through twice, once for the purpose of the salvage proceedings and again in connection with the General Average and it was hoped that the introduction of the rule in question would reduce the work involved and therefore the total costs. Regrettably, as I hope to show later, this greater simplicity is not being achieved, but it is interesting to reflect that as recently as 10 or 15 years ago the

atmoshphere in at least that part of the legal profession was such as to encourage it.

Having dealt with the theoretical background perhaps I can now pass on to give some illustrations of what happens in practice in a given case, beginning with a case of General Average which does not involve an L.O.F. salvage.

The first time that cargo interests become aware of the fact that a General Average exists is normally when an approach is made to them to provide General Average security. In the United States of America such a request is often the signal for a host of lawyers to descend upon the case, particularly if it is a substantial or complex one. Their excuse for doing so can at that stage only be the possibility that at the end of the road there will be some form of defence to a General Average claim under the Contract of Carriage. Once on the scene, however, they can be a substantial nuisance in other respects, particularly if matters like forwarding of cargo or signature of Non-Separation Agreements are involved. General Average procedures which normally operate smoothly and without argument elsewhere are certainly made more difficult.

Happily in the United Kingdom and, to the best of my knowledge, in your countries, these complications do not usually arise at this stage and the question of General Average security normally proceeds reasonably smoothly and economically, the Concerned in Cargo tending to play an inactive role.

The next stage is for the Adjuster to collect the documents relating to the case. Frequently he is adjusting the Particular Average claim on the Ship as well, in which event he will be attempting to collect evidence as to cause of damage, though not, specifically, evidence leading to the consideration of whether or not due diligence has been exercised. He will nevertheless probably at this early stage of the case, have quite a good inkling as to whether or not there is likely to be a defence to a claim for General Average contribution under the Contract of Affreightment. If so he is

effectively bound, by the terms of Rule D, to ignore it. He must prepare his Adjustment and incorporate evidence in it solely on the basis of establishing whether or not General Average arises and if so, what it amounts to and how it should be apportioned.

I cannot help feeling that nowadays this places the Adjuster in something of a false position. So far as I know, matters have not yet reached the stage where Adjusters are deliberately asked to exclude evidence of cause of damage from General Average Adjustments, or to prepare entirely separate documents for the General Average and Particular Average aspects of a case, but if present trends continue, pressure may well be on them to do this. Furthermore, although in more sophisticated insurance markets it is fully understood that a General Average adjustment deals with General Average alone and not with possible rights and liabilities under the Contract of Carriage, I suspect that there are many who are less knowledgeable and in many cases settle contributions on the basis that if they regard the Adjuster as reputable they should settle contributions as shown in the Adjustment.

It is, I think, for this reason that P and I Clubs are reluctant to intervene on the seaworthiness aspect until an Adjustment has been produced and an attempt to collect made, in the hope that even perhaps in an extreme case of unseaworthiness, there will be at least some parties sufficiently ignorant of the legal niceties to pay under the Adjustment. Understandable enough, but there is something not very healthy about the whole situation.

So the Adjuster proceeds with his Adjustment, completes it and issues it to the various parties, either himself or through the Shipowner, requesting payment from the contributors. Bear in mind that this is the first occasion on which the claim has been quantified and unless a Payment on Account has been obtained, it is the first time the Shipowner has had a claim which he can effectively pursue. If then cargo interests accept both Adjustment and liability and settle all is well and the whole exercise has been

worthwhile. If they accept the Adjustment, but have doubts on the seaworthiness aspect, they will be likely to stall for a time, perhaps asking for further documents and fishing for more information. A period of stalemate may be quite prolonged, with the Shipowner, even though he feels he has a good case, reluctant to instigate proceedings on grounds of cost and cargo interests having no incentive to bring matters to a head.

Thus by the time they do come to a head, some years may have elapsed from the time of the casualty. Yet unless the probability of "fault" has been transparently obvious from the start, only then will serious attempts commence to assemble the evidence necessary to resolve the dispute, evidence which for reasons already explained, has frequently not up to that point been relevant and which no one has therefore had the incentive to accumulate. Such a late start militates against a just final conclusion.

If, as frequently occurs, the issue is ultimately allowed to fizzle out and the claims go by default, then the whole process of adjustment as between the parties has been wasted. It is true that cargo's proportion of General Average will have to be quantified in any event in order to state a claim on the Club or Liability Underwriters and in a single interest case perhaps not a great deal will have been lost in the result. In a multi-interest case, however, the time and effort involved in calculating individual values and contributions, striking balances and attempting settlements with some hundreds of separate interests, is considerable and in the situation envisaged will have been wholly abortive.

When an Adjustment involves an L.O.F. salvage, the question of fault may be investigated somewhat sooner if only, at first, behind the scenes. This is perhaps because in the situation, customary nowadays, of separate security and representation, all parties, including cargo, will have in due course to put money up front to Salvors and Solicitors are likely to be on the scene soon after salvage security is requested.

The complications involved in having separate, and different, security for salvage and General Average seem on the face of it unavoidable. I cannot help wondering though whether many of the tactical points taken with regard to both, can be justified and on what grounds. Thus thepoint may be taken that no General Average security should be provided before the Shipowner is ready to give delivery, when any damage to cargo will be known. This is despite the fact that the cargo will contribute to General Average only if it is delivered and then only on its arrived value. Again, arguments arise about who should take the initiative in providing or collecting salvage security and whether or not the costs of doing so should be recoverable and if so, from whom and on what basis. Much time is spent by cargo Lawyers in calculating cargo values with some precision and ensuring that minimum values are agreed at the arbitration, even when any amounts at issue would be quite insufficient to affect the total amount of the Award.

Given the terms of Rule VI of York/Antwerp Rules 1974, already mentioned, whereby all cost differentials disappear in any event in due course into the melting pot of General Average, it is difficult to think that many of these exertions would be justified were there not seen to be, at the end of the line, a possible dispute as to the seaworthiness of the vessel and were there not therefore a tactical desire for each party to ensure that he had the minimum amount of his own money up front and at stake in such dispute.

All these machinations run contrary to the spirit of cooperation and good sense which General Average embodies. They are also expensive and time consuming and result in delays in settlement of salvage proceedings and therefore of final Adjustment. It has come to my notice recently that there have even been occasions where cargo interests have deliberately failed to provide, or unduly delayed in providing, details of salvage and costs they have settled, for inclusion in the General Average Adjustment, presumably on the grounds that they prefer to proceed against the Ship for

such items and do not wish to have the issue complicated by counter claims for other General Average items. This is a far cry from the intentions of Rule VI. Even more serious, sometimes arguments about provision of security can threaten delay in completion of the voyage and delivery of cargo and I know of cases in which such delay, for a significant period, has in fact been so caused.

This last thought brings me back to what I see as the justification for raising these matters. Lawyers and Adjusters need feel no concern for themselves at the fact that they may have to resolve these complications, for in the long run they are paid for doing so. The concern must be for the commercial interests involved, for Shipowners and Cargo Owners, to whom our two professions surely owe a duty to settle these problems as quickly and economically as possible. There will always be an occasional case that will go sour, but when things begin to go awry in general terms, I feel it is up to us at least to suggest some possible solutions.

The practice of your Association determines that a speech made at one of your conferences must be circulated to participants in advance. To one who is not well used to speaking off the cuff, this is likely to mean the preparation of two speeches. In the comments I shall make to you in Christchurch I hope to consider, amongst other things, some possible solutions to this general problem. In the meantime I hope that my analysis of it may be sufficiently clear to enable you to direct your minds to solutions of your own.