GENERAL AVERAGE
Problems for Solution

By Steve Walker

It is always worthwhile in such matters to go back to where it all started. Unfortunately we do not know when General Average started. Suffice it to say that we are dealing with a practice that has been in existence for many, many centuries. We can surmise as to its need to exist by looking at the method of maritime trade being undertaken so long ago. It consisted mainly of coastal vessels proceeding from port to port with the actual merchants and their wares on board, virtual floating markets. The dangers were sudden storms with the Master (who would be the Owner) of the vessel often being required to jettison ship's gear or cargo in order to achieve safety. The idea of any individual sacrifices in such a situation being shared on a common basis is easy to understand and with any Adjustment being done at the port of arrival by way of direct bargaining between the Owner of the vessel and the various merchants.

Such an undoubtedly sensible practice would have gradually been adopted within the existing maritime community and passed on automatically to new trading centres as they developed.

The fact that General Average gained greater and greater acceptance can only mean that it worked, it was found to be useful and acceptable to the trader involved.

In order to see why General Average has progressed, or perhaps I should say declined, from general acceptance to general dislike it is necessary to examine the considerable developments that have taken place between those early days and where we are today.

1. It is now very rare for the Owner of the vessel to also be the Master. It is even rarer to find the Owners of the cargo actually on board. The Owners (and in our corporate world it is increasingly difficult to identify any actual individuals) are to be found ashore and often far removed from the scene of the action.

   This development has gone a long way towards destroying the common adventure concept of a sea voyage and also precluded the immediate, on the wharf, type settlement referred to earlier. All such matters are delegated to servants, agents etc. who in turn are finding themselves increasingly removed from the direct scene of activity. The commonest

defence to General Average contribution is unseaworthiness of the vessel. This would rarely have existed in the old days. The merchant would have found it difficult to allege that the vessel was unseaworthy to carry his goods when he himself went along with them.

2. Modern communications are undoubtedly efficient but they have helped to create a situation of doubt and uncertainty which I consider to be unhealthy but unavoidable.

As the Owners of the vessels and cargoes found themselves permanently ashore power was delegated to the Master in that he became the servant of the Shipowner and Agent of necessity for the cargo. In the event of some calamity the Master, due to lack of efficient communications, was required to make decisions and take actions that he considered to be necessary - he might repair the ship and recondition of sell cargo so as to be able to complete the voyage. Upon arrival at destination the Master would be required to justify his actions both to the Shipowner and in turn to cargo Owners if they were facing cargo losses or claims for General Average contribution. The free hand given to the Mate might thereby end up getting smacked but at least he would have had the satisfaction of being able to exercise the powers entrusted to him. The Master acting as agent of necessity for the cargo was recognised by the Courts and there were instances where the Master was exonerated for errors of judgement on the simple basis that we are all fallible at times. Nowadays we all have telexes, facsimile machines, telephones on our desks or in our care or pockets and with satellites above us capable of virtually instantaneous transmission to anywhere in the world. The Master has his telex, facsimile and telephones on board and will now report back to his Owners in the event of any disaster with the Owners in turn being able to give instructions on a day by day if not hour by hour basis. But it doesn't stop there. The Courts have held, and one can easily accept the concept, that the Master and/or Owners have a duty to contact the cargo Owners so that they can not only be appraised of the situation but also have the opportunity of agreeing to any proposed actions or instituting their own actions if they so desire. They may as an example wish to take immediate re-delivery of their cargo at some intermediate port after fulfilling any obligations under the Bill of Lading such as payments for freight and discharge costs and the provision of General Average or other securities.

Whilst the direct involvement of cargo interests in a casualty situation is logical and can indeed by beneficial it often leads to the common interest disintegrating into a multiplicity of self-interests and thereby to a position whereby the Master and/or Shipowners are left in doubt as to the correct actions to take for common benefit. Confusion and delay are the enemies in a casualty situation and are now encountered more and more frequently.

3. From its simple origins, probably related to jettison situations, General Average developed to cover more types of losses and to introduce certain categories of expenditure. Some of this expansion would have been by way of natural progression but it is probably fair to say that the concept became to be dominated by legal frameworks, either by way of custom, statue or contract. The difficulty here, especially with custom, was the divergence of views as to what should and should not be the subject of General Average. Shipowners and merchants were soon complaining that a voyage involving some four port of calls would often involve as many different General Average regimes. This was undoubtedly inconvenient but today the problem has been much reduced by the use of Uniform Bills of Lading, the adoption of International Carriage of Goods by Sea Acts and the introduction of subsequent amendment of the York Antwerp Rules. However, problems still remain, most notably in the area of unseaworthiness where the York Antwerp Rules adopt an aloof position by way of Rule D:

"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 adventure, but this shall not prejudice any remedies or defences which may be open against or to that party in respect of such fault."

Attempts have recently been made, in association with the P & I Clubs who effectively Underwrite the Shipowner for General Average contributions from cargo interests, to reduce the instances when cargo interests are presented with requests for General Average contributions when the vessel was clearly unseaworthy. However, such attempts have not received total support and have not therefore been as successful as they could have been.

I might also mention the increasing tendency of General Average contributions being denied for the flimsiest of reasons. This practice began in the U.S.A. and its gradual development in this region should be regretted by all concerned.

4. General Average began before marine insurance and was at least partly required in order to ensure that the livelihood of one merchant was not ruined merely to save that of many others. Nowadays virtually all ships and cargoes are insured thereby reducing the importance of General Average. As an instance I can say that no more than 10% of the turnover of my own office is concerned with General Average.

5. A modern container vessel can have as many as 2 or 3 thousand units on board - some of those units containing as many as a dozen or so separate consignments. To collect General Average Security (and sometimes Salvage Security as well) for perhaps 5000 or more consignments is a logistical nightmare.

We now need a marine disaster. Let us take a modern container vessel with 2500 containers on board, same having been loaded at Hong Kong, Japan, Taiwan and Singapore for discharge at 5 ports in Australia and New Zealand.

A fire breaks out in one of the containers, cause unknown but possibly dangerous and improperly declared or handled cargo and spreads rapidly. Attempts at extinguishing by the crew are unsuccessful and a Salvage company is called. They gain some control of the fire but cannot extinguish it properly until the vessel is out of the wind. A suitable place of shelter is found and the vessel driven ashore. Unfortunately fuel tanks are breached with consequent oil pollution. The fire is then completely extinguished and the vessel taken to a repair port where cargo is force-discharged, the vessel drydocked and repaired and the sound cargo re-loaded.

Quite a problem for the people involved. The Shipowner may well have cover under his policies on the vessel for General Average in full up to $1M but this is wholly inadequate in this case, especially bearing in mind the uncertainty of the extent of cargo sacrifices due to the extinguishing operations and the fact that the oil pollution costs could also fall within the General Average following upon the voluntary stranding of the vessel.

The Adjuster is heavily involved at all stages of such a casualty but there is one point that I would make above all others. I have found my primary duty to often be to keep all of the people involved at least bearing in mind the common adventure rather than concentrating solely on their own self interest. The immediate object of the exercise must be firstly to place the ship and cargo in safety and then to repair the ship so that the sound cargo can be delivered as soon as possible. Also to deal with the pollution and consequent environment problems in a quick and efficient manner. Recriminations should be set aside until a later, although obviously not too late, time. My training and experience as an Average Adjuster helps me to concentrate on the common adventure and I can only hope that my involvement in major casualties helps others to give the same attention.

Many, many parties became involved in major casualties and all of them now tend to seek immediate legal representation to protect their own interests and I find it increasingly difficult to keep everyone pointing in the same direction. It only requires one interest to be overly stubborn and to issue a writ for the whole exercise to degenerate into an all in wrestling match.

Let us now proceed to solutions and to my suggested amendments to the York Antwerp Rules and in this regard I would add that changes can only be made through the Rules since they in turn are incorporated into the agreed Contracts of Affreightment.

Firstly, and perhaps most radically, I would abolish all allowances for sacrifices. This would undoubtedly not please cargo interests since it represents the only areas where they sometimes benefit from General Average. However, most cargoes, like ships, are insured with the recipient of any allowance in General Average invariably being the cargo Insurers who have already settled the damage claim to the Cargo Owners. By how much the abolition of these occasional recoveries would affect cargo insurance claim results and consequently premiums is a matter of conjecture but most people would agree that any increase would be negligible and after a period of time would be forgotten altogether.

The elimination of sacrifices would only leave expenditure of further consideration. Whilst some changes could be made to the York Antwerp Rules I believe that more beneficial changes could be made elsewhere most notably within the policies of insurance on the vessel whereby Hull and Machinery Underwriters agree to bear General Average expenses in full (i.e. without recourse to cargo interest for contribution) up to a set figure. The stipulated figure varies widely from the quite small to as much as $1M or more for large container vessels. The difficulty here is that not all Hull and Machinery policies include such provisions and, therefore, that it is a matter of chance for cargo interests as to which vessel their cargo happens to be on in a given situation.

A better method would be for the York Antwerp Rules to incorporate a provision whereby General Average contributions shall not be claimable unless the General Average exceeds a certain figure. This would then require the Shipowners to necessarily seek added cover under the Hull and Machinery policies or perhaps, and this might be preferable, the Protection and Indemnity insurance.

This process might even encourage Shipowners to amend their Bill of Lading to incorporate General Average exemptions therein.

Having said all of the above I doubt that much will occur in the near future in regard to General Average expenditure. It is a difficult area to deal with and any change such as I have indicated would require a universal approach - something hard to achieve at the best of times.

York Antwerp Rule D deals with rights to contribution and availability of remedies or defences. It effectively enables the Adjustment to be prepared without reference to such matters as unseaworthiness, the cargo interests having the right to raise the defence of unseaworthiness when being asked to make their contribution.

The difficulty here is that preparing a complicated and time-consuming Adjustment for no real purpose (such as where there is patent unseaworthiness) is utterly frustrating and ought to be avoided. Much has been done with P & I Clubs to avoid the worst of cases, the Club agreeing in advance to bear the cargo contribution thereby avoiding such unnecessary work. However, the P & I Clubs err, understandably, on the side of caution

and where there is doubt prefer the Adjustor to initially seek the contributions from cargo and await their reaction thereto.

There ought be be, in my view, a committee to which the facts of a case (as agreed between the parties) can be presented in order to determine whether or not a contribution is properly due. It would not be difficult to amend Rule D to allow for the automatic referral of all doubtful cases to a specific committee.

York Antwerp Rule F is reasonably simple to follow in that it seeks to avoid the Shipowners being penalised when they incur expenses not allowable in General Average in order to avoid expense which would ordinarily be so allowable.

The most frequent, and most troublesome, example is where the Shipowners elect to trans-ship the cargo from a port of refuge rather than to keep the cargo on the original vessel which would have involved continuing General Average detention expenses. The trans-shipment expenses are not directly allowable in General Average and give rise to a further difficulty in that the separation of the cargo from the original vessel also separates the common adventure principle which is at the heart of all General Average situations. To overcome this it is usual for the General Average Security to incorporate what is called the Standard Form of Non-Separation Agreement which reads:-

> "It is agreed that in the event of the vessel's cargo or part thereof being released short of the original destination or being forwarded to original destination by other vessel, vessels or conveyances, rights and liabilities in General Average shall not be affected by such release or forwarding, it being the intention to place the parties concerned as nearly as possible in the same position in this respect as they would have been in the absence of such release or forwarding and with the adventure continuing by the original vessel for so long as justifiable under the law applicable or under the Contract of Affreightment.
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> The basis of contribution to General Average of the property involved shall be the values on delivery at original destination unless sold or otherwise disposed of short of that destination; but where none of her cargo is carried forward in the vessel she shall contribute on the basis of her actual value on the date she completed discharge of her cargo."

This is a convenient document but has been challenged by cargo interests as a indefensible distortion of the York Antwerp Rules. I have also encountered the situation in practice where cargo interests have proposed their own wording for a Non-Separation Agreement but without being willing to inform me as to what practical differences, if any, their wording has to the Standard wording referred to above.

In my view the Standard Form of Non-Separation Agreement ought to be incorporated in the York Antwerp Rules in order to formalise an arrangement that is frequently made in practice but which can and does lead to unnecessary dispute. I can identify no reason as to why cargo interests should wish to discourage Shipowners from trans-shipping their cargo to destination so that it arrives there earlier than it would have by means of the original carrying vessel and at no additional cost.

Rule VI was introduced into the York Antwerp Rules in 1974 and has now been recognised as a mistake. It reads as follows:-

> "Expenditure incurred by the parties to the adventure on account of salvage, whether under contract or otherwise, shall be allowed in General Average to the extent that the salvage operations were undertaken for the purpose of preserving from peril the property involved in the common maritime adventure."

Although Salvage is similar to General Average in terms of relieving the common adventure from peril it has the difference that each individual interest is liable directly to the Salvor. Rule VI sought to bring such payments back into the General Average pot and have them redistributed, the only net differences being in the method of arriving at the value on which the contribution is based. In almost all instances the differences are minor and much less than the time and expense involved.

I will not go into the background and reasons for the introduction of Rule VI. Suffice it to say that the error is now being rectified. However, we have all had to live with it for some 16 years.