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General Average – How it Works and Who Pays

A ship breaks down, there is a heap of cargo onboard that is going nowhere as long as the ship is immobile, cargo owners are frantic, costs are mounting ... what happens next and who bears the costs?

It is a vexed situation that has been brought into the spotlight again by the ongoing problems of the containership *Shiling*, which ran into trouble in May after it lost power off Farewell Spit and was left drifting until it was towed into Wellington.

The angst among shippers is palpable when something like this happens. As an example, the media recently highlighted the case of a honey company battling to get NZ\$150,000-worth of product off the *Shiling*, which was bound for Singapore.

The director of DownUnder Honey was left confused by the intricacies of maritime law and insurance once General Average was called (a legal principle of maritime law in which all parties affected by such a situation, proportionally share any losses resulting from it).

“Who is actually responsible for the vessel is a convoluted maze of shipping companies and insurers,” the director said, after being told he’ll likely need to pay a share of NZ\$70,000 to get the container back.

So, what is General Average and how does it work? I’ve written about this principle before but it is a difficult one for the average shipper to grasp so I’ll go over the main elements of it and then will paint a more granular picture of how it actually works in terms of the consignor and consignee’s positions.

General Average is of ancient origin and had its roots in the situation where, for example, a sailing ship got into distress and the crew had to lighten its load by throwing some cargo overboard.

There wouldn’t be time for the crew to debate whose cargo should stay and whose should be chucked in the briny. The imperative was to save the ship otherwise the ship and all the cargo could be lost.

Rather than quarrelling about choices, the principle arose whereby all the merchants whose cargo landed safely would be called on to contribute a portion, based upon a share or percentage of the overall manifest, to the merchant or merchants whose goods had been tossed overboard. That principle of proportionate liability still remains part of the admiralty law of most countries.

So when General Average is declared, your cargo will not be released until you put up a cash bond or your cargo insurer puts up a General Average guarantee. These risks can be covered with marine cargo insurance.

General Average is not an everyday occurrence but it’s not uncommon either. Many General Average calls are made because of vessel breakdowns which result in the ship being immobilised for a prolonged period.

Shiling Brings General Average to Fore

The recent prolonged breakdown of the containership *Shiling* in Wellington Harbour prompted *New Zealand Shipping Gazette*™ columnist Dave MacIntyre to write an explanatory article for readers about the workings of General Average. MLAANZ member Matt Flynn provided legal advice for the article, which is reprinted with permission of that publication.

A couple of examples are the Hyundai Fortune which declared General Average following an explosion and fire in 2006 off the coast of Yemen, and the MSC Sabrina which did the same after grounding in the Saint Lawrence River in 2008.

The Hanjin Osaka declared General Average following an explosion in the ship's engine room in 2012. It took 28 days of repairs in Japan before the ship could resume its voyage.

Now let's look at an example of a specific example of how it worked. The case in question is the Maersk Honam. The vessel caught fire on March 6, 2018 while sailing in the Arabian Sea. Five members of the crew of 27 were killed, including one rescued crew member who died later from injuries.

General Average was called by Maersk when it became obvious the vessel was in such a state the voyage had to be abandoned and that high extraordinary costs would eventuate. It notified customers and partner Mediterranean Shipping Company (MSC) of the decision.

The company appointed Richards Hogg Lindley (RHL) of London as its general adjuster and decided to keep all containers, including MSC's containers, under Maersk's control until security arrangements had been made with the average adjusters, both for General Average and salvage.

(Average adjusters are the people entrusted to look after claims arising due to General Average. They calculate the value of each shipper's saved cargo, which enables them to work out the proportionate contribution needed to meet the total costs for everyone).

RHL then issued an explanatory note on the next steps to be taken by the cargo owners and how much everyone had to chip in. Under General Average, it is common for the cargo owners to stump up quickly with cash or guarantees, to assure the General Adjuster they will pay whatever is deemed to be the final cost. This is required before the cargo can be delivered.

Let's turn to some specific mechanics of how it works and I'm indebted to maritime lawyer Matthew Flynn of McElroys for providing me with answers. Here are my questions and Matt's answers:

1. *Who announces the General Average (GA) decision – is that the shipping line?*

We would typically say the shipowner, but it may also be described as the shipping line in the case of running a container liner service.

2. *At that point, is all cargo "on hold" – ie, the shipper or consignee cannot claim it?*

Most jurisdictions recognise that the shipowner can exercise a lien (ie, refuse to allow delivery) on cargo at destination in respect of General Average losses sustained by any party to the adventure. Provision of GA security in a form acceptable is usually required to secure release of the cargo. Note if there has also been salvage services provided, salvors also have a lien over vessel and cargo, so cargo interests will be required to provide security to salvors for their claims to salvage remuneration.

3. *The cargo owner may have costs arising (eg, penalties for late delivery or spoilage of perishables). Is any allowance made for that, or is that purely a matter for the shipper's insurance?*

This will typically be for cargo owners to incur (and it may or may not involve their insurers depending on terms and nature of losses) but in some cases they may bring a claim against the owner for those if the owner is unable to rely on its right to claim GA from cargo (ie, if there is actionable fault by the shipowner causing the losses and damage to cargo).

4. *If the ship has to finally dock somewhere other than its intended destination, who pays for the onward delivery of cargo?*

Generally the shipowner is required to complete delivery to the named destination under its bill of lading contract, at no additional cost. After an event giving rise to a GA it may pull into a port of refuge, carry out repairs and then continue to complete the intended voyage. But sometimes they may terminate the voyage early – eg, the vessel is so badly damaged

it needs to go for repairs, in which case they will terminate the voyage, take off all the cargo and leave the cargo where it is, a right they may have under their bill of lading terms. Cargo interests may then need to manage its onwards delivery.

5. *Finally, who pays for peripheral costs (eg, a tug or vessel which have come to the distressed ship's aid, and its time spent in port while broken down)?*

These costs are all included in the GA – ie, all extraordinary expense and sacrifice by the owner to safely bring the cargo in and delivered are then pro-rated among all interests. These peripheral costs could include salvage remuneration, towage expenses and costs incurred at the port of refuge.

My thanks to Matt for that advice. I hope it sheds helps shippers find a pathway through the maze of shipping law relating to General Average.

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