The Marine Law Box
by Dr. Arun Kasi

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General Average on Piracy Ransom: Water stirred by *The Longchamp* and *The Polar*

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Every sea voyage is a maritime adventure. All parties interested in the adventure share certain risks. For instance, if a laden vessel grounds, and the shipowner incurs the expense of refloating her and bears the damage to her hull and propeller in the course of refloating, the shipowner will be entitled to contribution from the cargo interest representing the value of the cargo saved by the exercise against the value of the vessel saved by the exercise. The refloating exercise is a general average incident, the loss suffered by the shipowner by the refloating exercise is a general average loss, and the contribution that the cargo pays the shipowner is called a general average contribution. The same is true where the engine breaks down and the cost of towing the laden vessel to a place of safety is incurred. However, an exception is that if the breakdown happened because the vessel was unseaworthy at the outset of the voyage, which is a breach of the shipowner's obligations, then the shipowner will not be entitled to contribution. Similarly, ransom paid to pirates to have the ship and the cargo is recoverable in general average in the applicable proportion.

A general average act arises where a party to a maritime adventure makes an extraordinary expenditure or sacrifice in time of peril to preserve the property in peril in the common adventure. General average is a millenniums-old concept of mutual insurance in common maritime adventures that has survived the subsequently emerged concepts of commercial insurance. Nowadays, the general average contribution payable by the cargo interest will be paid by the cargo insurers, while the general average contribution to be made by the shipowner will be met by the H&M insurers. Having said that it must not be overlooked that it is common for importers to

underestimate the importance of insurance and have their cargo transported without insurance.

When a general average sacrifice has been made by the shipowner, it will declare general average. The shipowner is entitled to lien over the cargo for general average contribution due from the cargo interest. In practice, the shipowner will forgo the lien and release the cargo in return for a general average bond (often in the form of Lloyd's Average Bond) from the cargo interest to pay the due general average. The bond must be fortified by a cash deposit (where the cargo is uninsured) or a general average guarantee from the cargo insurers. The shipowner will appoint the general average adjusters to ascertain the contribution due from the cargo interest, which the cargo interest may challenge by court or arbitral proceedings, whichever is applicable.

The sources of law or rules of general average are threefold. First, common law. Secondly, statute such as the UK Marine Insurance Act 1906. Thirdly and very popularly, York Antwerp Rules, a set of standard terms often voluntarily incorporated contractually into bills of ladings and charterparties. The Rules has been in place since 1890 and had gone through various revisions that has now reached the 2016 version.

Two recent cases have stirred the waters on general average contribution payable by cargo interests for ransom paid to been to pirates. The first was *The Longchamp*,[1] decided by the UK Supreme Court in 2017. The Longchamp was boarded and hijacked by pirates on the Gulf of Aden while carrying cargo under a bill of lading subject to the York Antwerp Rules 1974. The pirates asked for USD6 million ransom to disembark and release the vessel. The owner negotiated over 51 days and reduced the ransom to USD1.85 million, which was paid, and the vessel with the cargo was released. The cost of operating expenses incurred by the owners during the 51 days was USD160,000, which the owners claimed in general average contribution from the cargo interests together with the ransom paid. A dispute arose as to whether the USD160,000 operating expenses are allowable in general average. Two provisions of the Rules were relevant. One was Rule F that provides that an extra expense incurred in place of another expense that would be allowance as general

[1] *Mitsui and Co Ltd and others v Beteiligungsgesellschaft LPG Tankerflotte MBH and Co KG and another (The Longchamp)* [2017] UKSC 68.

average is treated as a general average expense. Rule F reads "*Any extra expense incurred in place of another expense which would have been allowable as general average shall be deemed to be general average and so allowed without regard to the saving, if any, to other interests, but only up to the amount of the general average expense avoided.*" The other was Rule C that excludes general average claim for loss sustained through delay. Rule C read "*Only such losses, damages or expenses which are the direct consequence of the general average act shall be allowed as general average. Loss or damage sustained by the ship or cargo through delay, whether on the voyage or subsequently, such as demurrage, and any indirect loss whatsoever, such as loss of market, shall not be admitted as general average*." Lord Neuberger, with whom the majority agreed, resolved the apparent conflict in favour of Rule F and allowed the USD160,000 in general average.

The second was *The Polar*[2] decided by the English High Court in 2020. The Polar was carrying 70,000 mt of fuel oil under a voyage charterparty. Under the charterparty, the charterers were to pay for the kidnap and ransom (K&R) insurance and War Risks policy. The charterparty incorporated York Antwerp Rules. Bills of lading were issued, as often happens, incorporating the charterparty. The vessel was kidnapped while transiting Gulf of Aden. A ransom was paid to the pirates to have the vessel and the cargo released. The owners brought a claim for general average contribution against the cargo owners under the bills pursuant to the York Antwerp Rules for the ransom payment. Sir Nigel Teare held that as between the owners and the charterers the insurance provision created a 'complete code', whereby the charterers will pay the premium and the owners' only resort was to the insurance fund, thus the charterers are relieved from the obligation to pay general average contribution when the insured risk materialises. In coming to this conclusion, his lordship noted that in *The Ocean Victory*,[3] which concerned safe port warranty, the insurance was taken in the joint names of the owners and charterers. In *The Evia No. 2*,[4] also a case concerning safe port warranty, the insurance was not in the joint names. In both these

[2] *Herculito Maritime Ltd and others v Gunvor International BV and others (The Polar)* [2020] EWHC 3318 (Comm).
[3] *The Ocean Victory* [2017] 1 WLR 1793.
[4] *Evia No. 2* [1983] AC 736.

cases, the respective courts held that the insurance provision created a 'complete code' for the owners to recover their losses from the insurer, thus relieving the charterers.

However, coming to the question of whether the exception from the liability to contribute in general average extended to the holders of the bills of lading, Sir Nigel Teare answered it in the negative. His lordship held that the exception in favour of the charterers in the charterparty was not incorporated into the bills of lading by a general incorporation clause. This was because the liability to pay the premium was not on the holders of the bills. Hence, the holder of the bills cannot take the benefit of the exception. Accordingly, the cargo interest was liable to contribute in general average.

Further Reading:

Arun Kasi, The Law of Carriage of Goods by Sea, Singapore, Springer, 2021

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