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## VESSEL OPERATING EXPENSES INCURRED WHILE A VESSEL IS UNDER DETENTION BY PIRATES ARE ALLOWABLE IN GENERAL AVERAGE

### Introduction

General average, as a concept of antiquity, emerged before the advent of marine insurance as an independent mechanism for the redistribution of losses suffered and expenses incurred for safety from peril of the common maritime adventure<sup>1</sup> while a vessel was embarking on a voyage. Being a concept of international import efforts were made by the international community to achieve a measure of uniformity<sup>2</sup> in the principles and practice of general average. These efforts resulted in the adoption of the York-Antwerp Rules (YAR)<sup>3</sup> as a tool for achieving greater uniformity, clarity and simplification on the concept<sup>4</sup>. However, the YAR only have force when they are incorporated into carriage contracts.

Stakeholders in the industry are in agreement that ransom payments fall under generated average and are to be redistributed amongst the maritime adventurers whose interests were

saved as a result of such payments. However, there has been no consensus amongst stakeholders on whether expenses incurred by a shipowner during the period a vessel is been detained by pirates fall under general average and should be redistributed amongst the maritime adventurers involved in the adventure. The Supreme Court of England and Wales (the SC) in a recent decision in **Mitsui & Co Ltd v Beteiligungsgesellschaft LPG Tankerflotte MBH & Co KG & Anor**<sup>5</sup> has held that such expenses, incurred during the period of negotiations for the release of a vessel detained by pirates, are to be redistributed in general average.

There is a need to analyse this decision of the SC vis-à-vis the concept of general average and the provisions of the YAR to determine if the decision is in tandem with the jurisprudence underpinning the concept of general average.

### Factual Background

On 29 January 2009, the chemical carrier *MV Longchamp* ('the vessel') was transiting the Gulf of Aden on a voyage from Rafnes, Norway, to Go Dau, Vietnam, laden with a cargo of 2,728.732 metric tons of Vinyl Chloride Monomer in bulk ("the cargo"). The cargo was carried under a bill of lading dated 6 January 2009 which stated on its face that

"General Average, if any, shall be settled in accordance with the York-Antwerp Rules 1974". At 06.40, seven heavily armed pirates boarded the vessel. The pirates commanded the master to alter course towards the bay of Eyl, Somalia, where she arrived and dropped anchor at 10.36 on 31 January 2009. At 14.05 on 30 January

1. The term 'common maritime adventure' refers to the interests at risk in a sea voyage, ie (primarily) ship, cargo and freight. See Francis D. Rose, *General Average: Law and Practice* 2<sup>nd</sup> ed (2005) 9.
2. Arnold W. Knauth, *Renvoi and Other Conflicts Problems in Transportation Law*, 49 Colum. L. Rev. 1, 11 (1949); Cooke & Cornah, *The Law of General Average and the York-Antwerp Rules* 13<sup>th</sup> ed (2008) 44; Hudson & Harvey, *The York-Antwerp Rules: The Principles and Practice of Average Adjustment* 3<sup>rd</sup> ed (2010) 9.
3. The YAR is divided into the Lettered Rules and the Numbered Rules. The lettered Rules state the general principles of the law of general average while the numbered Rules provide for particular cases in general average regarding loss, damage and expense.
4. Cooke & Cornah, note 2 at 44. The latest version of the YAR is the YAR 2016. However, the YAR 1994 is still widely used in contracts of carriage in the market.
5. (2017) UKSC 68, delivered on 25 October 2017.

2009, a negotiator for the pirates boarded the vessel and demanded a ransom of US\$6m. The vessel's owners ('the **owners**') had meanwhile formed a crisis management team who had set a target settlement figure of US \$1.5m. On 2 February 2009, an initial offer of US\$373,000 was put to the pirates. Negotiations between the pirates' negotiators and the owners' crisis management team continued over the following seven weeks with various offers and counter-offers being made. Eventually on 22 March 2009, after a negotiation period of 51 days, a ransom was agreed in the amount of US\$1.85m. On 27 March 2009, the ransom sum was delivered by being dropped at sea.

At 07.36 on 28 March 2009, the pirates disembarked and at 08.00 that day, the vessel continued her voyage. It was accepted that the US\$1.85m ransom payment itself can be allowed under Rule A of the YAR. It was also accepted that the costs and expenses of the negotiator in relation to the ransom, Captain Ganz, and the costs and expenses of his special advisers, NYA International, are allowable. There was a dispute about the allowability of a sum of around US\$20,640 in respect of media expenses but this was not challenged by the cargo interests before the SC. The essential issue before the SC was whether the vessel-operating expenses incurred during the period of negotiation ("the **negotiation period expenses**") are allowable in general average under Rule F. The negotiated period expenses were (x) US\$75,724.80 for

crew wages paid to the crew, (y) US\$70,058.70 for "high risk area bonus" paid to the crew by reason of the fact that the vessel was detained within the Gulf of Aden. These are additional wages which the crew were entitled to under their contract of employment whilst at sea within a "high risk area"; (z) US\$3,315 for crew maintenance (ie food and supplies) and (xx) US \$11,115.45 for bunkers consumed.

The SC in its decision considered the concept of general average and Rules A, C and F of the YAR 1974 and held that such negotiation period expenses are allowable in general average. The SC in interpreting the provision of Rule F noted the generally accepted practice in the industry (which had been supported by renowned authors on the concept of general average and the YAR) to the effect that the expenses allowable under Rule F were expenses incurred as 'alternatives' (ie for an alternative course of action) to expenses allowable in general average. However, the SC refused to be bound by such practice (which had been adopted by Hoffmann LJ in a dissenting decision<sup>6</sup>) as the Court was of the view that such practice was not in tandem with the wordings of Rule F. The Court in its decision held that '... it may be right for a court to have regard to practices which have developed and principles which have been adopted by practitioners, but they cannot determine the outcome when the issue is ultimately one of law'.

## Legal Analysis

Rule A of the YAR 1974 provides that there is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure. The purport of the provision is that losses suffered and

reasonable expenses intentionally incurred to preserve the common interest of maritime adventurers will be redistributed in general average. This is the underlying philosophy in the concept of general average as a mechanism for redistributing losses and expenses incurred in preserving the interests of common maritime adventurers.

6. *Marida Ltd v Oswal Steel (The Bijela)* [1993] 1 Lloyd's Rep 411 at 423.

Rule F of the YAR 1974 provides that 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. In the application of the provision of Rule F in the industry, the generally accepted practice<sup>7</sup> (though not universally accepted)<sup>8</sup> is that the expenses that can be redistributed under Rule F are only expenses that were incurred as an alternative to the expenses that should have been incurred, ie where a shipowner incurred expenses in taking an alternative course of action to what would have been allowable in general average. However, as rightly held by the SC, such interpretation is not borne out of the clear wordings of Rule F. It is argued that the wordings of Rule F are unambiguous and should be given their literal interpretation, without any qualifications, to the effect that it is not only expenses that are incurred as an 'alternatives' that can be redistributed in general average under Rule F. The argument of the proponents of the 'alternative course of action' principle is tantamount to stating that Rule F applies only where some means which is different from that which might normally be expected is adopted to complete the adventure. This, it is argued, could not have been the intention of the draftsman of the Rules. It is argued that the phrase 'in the

place of' in Rule F does not necessarily mean an 'alternative course of action' different from what might normally be expected but encompasses acts which are not a different course of action. Such an interpretation that allows only 'alternative course of action' would be tantamount to a narrow and constricted interpretation of Rule F.

Further, to hold that it is only expenses that are incurred in an alternative action that are allowable under Rule F will be to impose an extra threshold to the Rule when the Rule has already provided a reasonable threshold by the phrase 'only up to the amount of the general average expense avoided'. It is argued that the provision of Rule F encompasses both expenses incurred as 'alternatives' and expenses that are not 'alternatives' provided that such expenses will be allowed only up to the amount of general average avoided. There is no gainsaying that the negotiation period expenses were incurred by the owners to preserve the vessel and cargo on board while the vessel was under detention by pirates and to ensure the successful completion of the common maritime adventure upon the release of the vessel. The expenses were aimed at preserving the common interests of the adventurers and thus, ought to be allowable in general average.

## Conclusion

The decision of the SC is in tandem with the jurisprudence underpinning the concept of general average from ancient times and which has been epitomised in the YAR. Expenses incurred by a shipowner in order to maintain and preserve a vessel while she is under detention by pirates until she is released from detention are clearly aimed at preserving the interests of the common maritime

adventurers. The SC's decision vividly underpins the need for our courts to be circumspect in applying practices in the maritime industry. Where practices in the industry, no matter how generally accepted by stakeholders, are not in consonance with the law, admiralty courts are not bound by such practices, but are bound to apply the law.

7. See Lowndes & Rudolf, *The Law of General Average and the York-Antwerp Rules*, 14 ed (2013) paras F.01 and F.29;; Hudson & Harvey, *The York-Antwerp Rules: The Principles and Practice of General Average Adjustment*, note 2, para 11.33.  
8. This was reflected in the opinion of the majority of the Advisory Committee of the Average Adjusters Association on the subject.

The YAR represent international arrangement amongst stakeholders in the maritime industry to achieve uniformity in the principles and practices of general average and any attempt to read in words or qualifications in the Rules should be resisted by the courts.

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