

ANALYSIS AND COMMENT

LIABILITY FOR THE GENERAL AVERAGE CONTRIBUTION DUE
IN RESPECT OF CARGOJolien Kruit¹

Offshore Marine Services Alliance Pty Ltd v Leighton Contractors Pty Ltd and Another
Federal Court of Australia (7 December 2016; 30 March 2017)
[2017] FCA 333, [2017] 2 Lloyd's Rep 79

Background

The concept of general average provides for an apportionment of extraordinary sacrifices and expenditures intentionally and reasonably made or incurred to protect property involved in a common maritime adventure from peril over the parties interested in the properties involved.² In view of its ancient history³ and the worldwide incorporation of the standard conditions for the adjustment of a general average situation, the York-Antwerp Rules (YAR),⁴ in contracts of carriage, insurance policies and even in some national legislations,⁵ one may expect that the concept would have few open points. The recent decision of the Federal Court of Australia shows that general average questions continue to arise (and see also the decision (27 October 2017) of the House of Lords in *The Longchamp* [2017] UKSC 68, published as this issue goes to press).

The case regards, in the words of Mr Justice McKerracher, a 'novel preliminary question concerning the law of general average'. In essence, the question was which parties should pay the general average contribution due in respect of the cargo.

The case touches upon general average's nature and its legal basis. A general average contribution obviously can only be claimed when there is a legal entitlement to such contribution. Such right may derive from a contract, which nowadays has become the rule rather than the exception, or may be given by a national legal regime. In view of the fact that general average brings together parties with varying relationships towards each other (some may be related contractually, potentially under several varying contracts; others only on the basis of a national legal system), the rules of the game may not always be easy to ascertain.⁶ However, even if it is clear that the claim is brought at (common) law, as in the present case, confusion may still arise as to which parties are to be regarded as the proper general average debtors.

Facts

The facts are straightforward. During a laden voyage of the ballastable flat-top deck barge *JMC 2822* towed by the ocean-going tug *Miclyn Venture* to Barrow Island, the towline parted and the barge ran aground on Ronsard Rocks, off the coast of Western Australia. Offshore Marine, the barge's disponent

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² See inter alia YAR Rule A; Australian Marine Insurance Act s 72; English Marine Insurance Act s 66.

³ See inter alia J Kruit *General Average Applicable Law and Legal Basis* (Legal Publishers 2017) 21–38; R R Cornah, J Reeder Lowndes and Rudolf: *The Law of General Average and the York-Antwerp Rules* (Sweet & Maxwell 2013) 1–9; J Kruit 'General average: general principle plus varying practical application equals uniformity?' (2015) 21 *Journal of International Maritime Law* 190 and the literature and case law referred to therein.

⁴ The YAR's most recent version, the YAR 2016, has been discussed in some detail by various authors in this journal (2016, 433).

⁵ A reference to a version of the YAR has been included, inter alia, in the codifications of Norway, Sweden, Finland, Argentina, Turkey, Spain, Switzerland, Luxembourg and the Netherlands. Other countries, including Poland, Italy and China have modelled their statutory provisions on the YAR. See also Kruit (n 3) 107–108.

⁶ This is discussed in more detail in Lowndes and Rudolf (n 3) 9–16; Kruit (n 3) 85–86, 187–89.

owner and the tug's time charterer, took various measures to secure the common safety of the barge and the cargo loaded therein. The cargo consisted of 'Contractor materials' supplied by Leighton Contractors Pty Ltd (Leighton) respectively Thiess Pty Ltd (Thiess) to the owner of the project and the cargo, Chevron, who had also concluded the contract of carriage with Offshore Marine.

The costs incurred by Offshore Marine to rescue the vessel and the cargo were substantial, ie over AU\$ 4 million. In Offshore Marine's opinion, these expenses qualified as general average disbursements.⁷ Contributions were claimed in respect of the cargo from, inter alia, Leighton and Thiess, parties with some risk in respect of the cargo. It was argued by Offshore Marine that Leighton and Thiess, pursuant to a contract concluded by them with Chevron, were 'responsible for the care, custody, control, safekeeping and preservation' of the cargo.

In the absence of a direct contractual relationship creating liability to contribute in general average, the claims for a contribution were brought at common law and/or pursuant to section 72(3) of the Australian Marine Insurance Act 1909.⁸ Leighton and Thiess argued that, in the absence of a contractual relationship, only the cargo owner could be liable for the contributions due in respect of the cargo and that, as ownership of the cargo on board at the time of the grounding did not lie with them but with Chevron, the claim should be dismissed.

Decision

The preliminary question to be answered by the judge was whether ownership of the cargo was required to attract liability to contribute to general average expenses incurred to safeguard the cargo or whether a responsibility for the cargo was sufficient. The first part of the question was answered by Mr Justice McKerracher in the affirmative and the second part with a clear 'No'. It was held that liability to contribute in general average for the cargo involved in a maritime adventure either attached to its owners or derived from contractual obligations under a bill of lading or general average security.⁹

Commentary

The decision is not controversial if considered from a common law perspective. The judge duly considered the available case law, including the general average classic cases of *Scaife v Tobin*,¹⁰ *Hain Steamship*,¹¹ *Walford*¹² and *The Potoi Chau*¹³ and concluded that, in the absence of a contractual relationship, no suggestion could be found in the cases that an interest in the cargo, other than ownership, attracts liability to contribute in general average. Further support is found in common law writers, who also tend to relate contributions to ownership.¹⁴

Nevertheless, a claim against parties at risk for the cargo cannot be said to have been brought against better judgment. There is a shared common understanding that the general average apportionment concept derives from natural justice,¹⁵ although this does not extend to whether the basis is the shared risk of the maritime adventure (as submitted by Offshore Marine) or ownership of the property involved in the maritime adventure (as argued by Leighton and Thiess).

⁷ Whether a general average situation was present indeed is not discussed in the decision.

⁸ Australian Marine Insurance Act 1909 s 72 is based on s 66 of the 1906 English Marine Insurance Act.

⁹ The court uses the word 'bill of lading'. The same applies in respect of other contracts of carriage, most notably sea waybills and voyage charters.

¹⁰ *Scaife v Tobin* (1832) 3 B & Ad 523.

¹¹ *Tate & Lyle v Hain Steamship Company* (1936) 55 Lloyd's Law Rep 159.

¹² *Walford de Baerdemaeker v Galindez* (1897) 2 Com Cas 137.

¹³ *The Potoi Chau* (*Castle Insurance Co Ltd v Hong Kong Islands Shipping Co Ltd*) [1983] 2 Lloyd's Rep 376. In addition, inter alia, the following older English cases *Birkley v Presgrave* (1801) 1 East 220, 102 ER 86; *Burton v English* (1883) 12 QBD 218 and *Strang, Steel & Co v A Scott & Co* (1889) 14 App Cas 601 were discussed, as well as American case law, most notably *The Hellenic Glory* [1979] 1 Lloyd's Rep 424.

¹⁴ Reference is made inter alia to *Lowndes & Rudolf* (n 3) para 30.58, 30.64; P Benson 'The basis and limits of tort recovery for general average contribution economic loss' (2008) 16 *Torts Law Journal* 1, 4; D Cremean 'Admiralty and Maritime: General Average' (2014) 88 *Australian Law Journal* 703; M White *Australian Maritime Law* (Federation Press 2014) para 6.9.1.

¹⁵ Inter alia *Burton v English* (n 13); *The Hibernia, Taylor and Others v Curtis* (1816) 128 ER 1172; *Strang, Steel & Co v A Scott & Co* (n 13): 'But, in any aspect of it, the rule of contribution has its foundation in the plainest equity'. See also *Kruit* (n 3) 51.

Most of the cases referred to in the Australian decision date back to a much earlier time. Compared to a century ago, when there were no lengthy chains of maritime contracts and/or negotiable documents that were traded several times during a voyage, the position of the cargo owner has changed considerably. Nowadays, it is not unusual for different parties to have divergent interests and relationships in respect of property involved in a maritime adventure. Ownership and risk no longer pass at the same time. Under sale and purchase contracts on FOB, CIF and CFR terms, risks pass to the buyer in the load port. Why should the risk for cargo damage lie upon the party at risk, but should the cargo owner be responsible to pay a general average contribution due in respect of the cargo? As both damages can be regarded as a depreciation of the property's value,¹⁶ the question of why they should be treated differently and paid for by different parties seems a fair one to ask. This is particularly so as this question, in the absence of a clear answer in the YAR,¹⁷ has been asked and answered differently in other jurisdictions.

In several European codifications, ownership is no longer the relevant criterion to establish liability to contribute in general average in respect of the cargo. Although ownership is still applied, for example in Malta and Belgium,¹⁸ other criteria have also been adopted. The Scandinavian legal systems, for example, expressly provide that no statutory in personam liability attaches to the owner of the property carried on board.¹⁹ Liability for the cargo contribution in general average is to be created by means of exercising a lien.²⁰ Dutch law makes the 'receiver' liable for payment of the general average contribution due in respect of the cargo.²¹

Other recent civil law codifications, such as the German and the Spanish national laws, expressly provide that the party at risk is the relevant party.²² In the *travaux préparatoires* to the German statutory provision it is clearly stated that it may be more difficult for a shipowner to determine the moment when ownership passes in international relationships rather than to establish which party bears the risk for loss of or damage to goods, which can generally be established simply on the basis of the commercial invoice.²³ The draftsman of the Dutch Civil Code, Schadee, who happened to be an average adjuster, clarified the choice not to make the cargo owner statutorily liable on practical grounds as well. It was explained that shipowners and other parties should not be burdened by relationships between cargo interested parties *inter se*.²⁴

It should also be noted that it has become standard practice to make contractual general average arrangements in contracts of carriage and in general average security forms.²⁵ From that point of view, neither would taking into account contractual arrangements on the division of risk for the property be too contentious either.²⁶

It may be problematic if making the party at risk liable for the general average contribution would mean that the claim could not be enforced against the property in respect of which the contribution

¹⁶ In some jurisdictions, general average contributions are to be regarded as a depreciation in the cargo's value. See eg Dutch Civil Code s 8:389.

¹⁷ The YAR focus on the properties involved in the maritime adventure rather than on the parties interested in these properties. For more detail see Kruit (n 3) 133–34.

¹⁸ Belgian Maritime Code s 149; Maltese Commercial Code ss 467–68.

¹⁹ Norwegian Maritime Code s 465; Swedish Maritime Code s 17:5. By contrast, the 'reder' is personally liable as a matter of Norwegian and Swedish law (Norwegian Maritime Code s 51; Swedish Maritime Code s 3:36).

²⁰ Which is also possible as a matter of English law. See eg *Scaife v Tobin* (n 10).

²¹ Dutch Civil Code s 8:612 (in Dutch: *de ontvanger*).

²² German Commercial Code § 588(2); Spanish Maritime Code s 349. The new German Commercial Code applies since 2013. The Spanish Maritime Code entered into force in 2014.

²³ Deutscher Bundestag, Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Reform des Seehandelsrecht, Druksache 17/10309 (12 July 2012) 126.

²⁴ M H Claringbould *Parlementaire Geschiedenis van het Nieuwe Burgerlijk Wetboek, Boek 8 Verkeersmiddelen en Vervoer* (Kluwer 1992) 620.

²⁵ This practice was expressly acknowledged by the Privy Council in *The Potoi Chau (Castle Insurance Co Ltd v Hong Kong Islands Shipping Co Ltd)* (n 13).

²⁶ If a bill of lading had been issued in the present matter, Leighton and Thiess might well have been regarded contractually liable, if not directly then possibly as a result of the extended definition of the 'merchant' in a so-called 'merchant clause'.

arose. Under most legal systems, however, that would not be the case. Most national laws grant the shipowner and/or the carrier the right to retain the cargo in order to safeguard payment of a general average contribution.²⁷

In its decision, the Australian court also indicates that if a party at risk for the goods would be liable for the general average contribution, it would have to be determined which risk was sufficient to attract general average liability. This would add 'another layer of complexion', whereas – according to the court – there is only one owner. But would it really make matters more difficult? It may not be an easy task to find the relevant cargo owner either. As indicated above, it may be difficult to trace the owner, especially when cargo is sold several times during a voyage.²⁸ Moreover, it has been held in English case law that the contribution is due from the moment that the general average disbursements are incurred.²⁹ It may be unclear exactly when disbursements start to be incurred for a longer period of time, for example when a vessel stays some for weeks in a port of refuge.³⁰ Which moment is determinative?

This is also apart from the issue that the term 'owner' may be subject to varying interpretations. In that respect, Offshore Marine also argued that the word owner as used in the Marine Insurance Act should be given a wide interpretation. Although the court acknowledged the correctness of Offshore Marine's argument that the word owner in maritime commerce is used to cover a wider range of relationships it held, after due consideration, that the meaning of the term 'owner' as used in the Australian Marine Insurance Act seems to mean 'owner'.³¹

It is added that none of the cases discussed above has suggested an extension of liability beyond ownership.³² Although that appears to be true in respect of the cited cases, it has been held by the English Court of Appeal (Rix LJ) that the term 'owners' includes bareboat charterers for general average purposes.³³ It is also indicated by various writers that in case there is a demise charter, this charterer will be the relevant person for general average purposes.³⁴ Thus, there does appear to be an extension beyond actual ownership. An analogous application to the cargo owner could have been supported with reference to that case law and legal literature. Interestingly, it was apparently not contested either that Offshore Marine was entitled to claim a contribution, even though it was not the tug's nor the barge's owner.

It follows that Offshore Marine's argument that the party bearing the risk for the cargo during the transport is the relevant party for general average purposes is not unreasonable, and actually makes sense from a commercial and practical point of view, as well as from an international perspective. Regardless of whether an appeal is pursued,³⁵ the decision may not be the final word on the matter. In any event, the case is a clear example that the concept of general average from an international perspective is neither regulated nor applied entirely uniformly and that it continues to give rise to legal difficulties.

²⁷ English law provides the shipowner with a common law lien to obtain security for the general average contribution due in respect of the property. See inter alia *The Lehmann Timber (Metall Market OOO v Vitorio Shipping)* [2013] 2 Lloyd's Rep 541. As a matter of German law, a *Pfandrecht* (right of pledge) can be exercised against the cargo owner, even though the party at risk is regarded as the statutory general average debtor. See German Commercial Code § 594.

²⁸ As indicated in the German *travaux préparatoires* (n 23).

²⁹ *Crooks v Allan* (1879) 5 QBD 38, confirmed in *Chandris v Argo Insurance Co Ltd* [1963] 2 Lloyd's Rep 65.

³⁰ See also *Kruit* (n 3) 114.

³¹ Reference is made for an 'obvious example' to s 11 of the Australian Marine Insurance Act.

³² *ibid* para 84.

³³ *The Lehmann Timber (Metal Market OOO v Vitorio Shipping)* (n 27).

³⁴ B Eder and others *Scrutton on Charterparties and Bills of Lading* (Sweet & Maxwell 2015) 308 and in *Lowndes & Rudolf* (n 3) 602.

³⁵ The author is not aware that an appeal has been pursued.