GENERAL AVERAGE AND THE YORK-ANTWERP RULES – APPLICATION OF RULE D

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MT 'Cape Bonny' Tankschiffahrts GmbH & Co KG v Ping An Property and Casualty Insurance Company of China Limited
[2017] EWHC 3036 (Comm)

Background

The concept of general average is well known for its ancient history and its universal application. It 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 between the parties interested in the properties involved.[2] For a long period of time, general average did not give rise to (any considerable body of) relevant case law. The York-Antwerp Rules were often regarded as having created a uniform regime.[3] In 2017, however, the 'usually calm waters of general average' were considerably disturbed.[4] Several cases were rendered in the Commonwealth regarding varying general average aspects. In the spring, there was the Australian decision in *Offshore Marine Services v Leighton Contractors* regarding the party who is to pay the general average contribution for the cargo.[5] It was followed in the summer by the High Court's decision in *Cosco Bulk Carriers Co Ltd v Tianjin General Nice Coke*,[6] in which a cargo claim was firmly struck out in summary judgment for lack of foundation of its pleaded allegations. Then, in the autumn, the House of Lords in *The Longchamp*[7] gave further guidance on the application of the York-Antwerp Rules 1994, most notably of Rule F. Finally, the year concluded in December with the High Court's decision in *The Cape Bonny*.[8] This last judgment, which is a good example of the application in practice of Rule D of the York-Antwerp Rules, provides some interesting obiter dicta and is discussed in more detail below.

Facts

The decision's factual background concerns the engine breakdown that the MT *Cape Bonny* suffered in the Western Pacific on 14 July 2011 during the course of a laden voyage from Argentina to China. At the time of the breakdown, a tropical storm or typhoon was present in the area. Towage assistance was arranged by the master. The tug brought the vessel to Yosu, South Korea, as port of discharge. This was an unpreferred but only option after a Japanese port of refuge had refused the vessel to enter and cargo interested parties had indicated that they were unwilling to take receipt of the cargo in China. In the port of refuge, the cargo was transhipped and subsequently brought to its destination on board another vessel. The owners of the *Cape Bonny* declared general average. Financial security for the claim in respect of the cargo's contribution to general average was provided by the cargo underwriters Ping An Insurance. The average guarantee included, inter alia, the remark that a contribution to general average would be paid 'which may hereafter be ascertained to be properly due'. After the general average adjustment's publication, a claim for a general average contribution was brought against the cargo interested parties for the amount of US$2.1 million. The cargo interested parties were unwilling to pay this contribution. They successfully argued that the vessel was unseaworthy before and at the beginning of the voyage, that this would amount to an actionable fault on the owners' part and that this prevented the owners from claiming against them.

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[2] See inter alia York-Antwerp Rules r A.

[3] See eg N G Hudson, M Harvey *The York-Antwerp Rules* (Lloyd's List 2010) 9.

[4] *MT Cape Bonny Tankschiffahrts GmbH & Co KG v Ping An Property and Casualty Insurance Company of China Limited (The Cape Bonny)* [2017] EWHC 3036 (Comm) at para 4 (Teare J): 'The usually calm waters of general average have recently been disturbed by the decision of the Supreme Court in *Mitsui v Beteiligungsgesellschaft LPG Tankerflotte* [2017] UKSC 68'.

[5] [2017] 2 Lloyd's Rep 79. The decision was discussed in *JIML* 23 (2017) 246–49.

[6] [2017] EWHC 2509.

[7] *Mitsui v Beteiligungsgesellschaft LPG Tankerflotte (The Longchamp)* [2017] UKSC 68.

[8] *The Cape Bonny* (n 4).

Decision and commentary

In general average cases, the York-Antwerp Rules generally play an important role in the adjustment and subsequent settlement. The York-Antwerp Rules, however, do not provide for a complete regime. They will have to be applied in conjunction with the applicable law and the provisions of the contract of carriage, if any.[9] In respect of general average expenditures which were caused by the fault of one of the parties to the maritime adventure, this is expressly provided for in Rule D of the York-Antwerp Rules. Although somewhat cryptically formulated, it provides that the fact that general average measures were the fault of one of the parties does not take away the general average character of disbursements that were necessitated by this fault. Whether there was a case of general average should be determined on the basis of the rules set out in the York-Antwerp Rules. However, a general average qualification does not automatically mean that a claim for payment of a contribution can also be successfully brought by the party who made or was responsible for the mistake. The second part of Rule D of the York-Antwerp Rules provides that it has to be decided on the basis of the particular relationship between the claimant and the defendant whether defences are available against a claim for a general average contribution. Under the applicable English law, 'fault' is considered to be a 'legal wrong', which is actionable between the parties at the time when the sacrifice or expenditure is made.[10]

In the subject matter, the Hague-Visby Rules were incorporated in the contract of carriage that regulated the relationship between the shipowners and the cargo interested parties. As a result, the question that was to be answered was whether the owners had complied with their obligations under the Hague-Visby Rules, ie (1) to exercise due diligence for the vessel's seaworthiness before and at the beginning of the voyage and (2) to care for the cargo during the voyage; or whether owners had been actionably at fault. The owners accepted that the vessel was unseaworthy before and at the beginning of the voyage. However, they contested that they had failed to exercise due diligence and that the unseaworthiness in fact caused the damage.

Mr Justice Teare duly considered the evidence provided, including all of the extensive witness statements taken during an eight-day trial, and decided that the owners had failed to comply with their obligation to exercise due diligence to provide a seaworthy vessel before and at the beginning of the voyage. He found that the breakdown of the main engine was caused by foreign particles, which should have been removed from the luboil but had not been removed and subsequently caused damage to main bearing No 1. The absence of bearing clearance measurements by the chief engineer, in view of the available information, was qualified as a failure to exercise due diligence. The judge also held that this mistake in fact caused the engine problems and, as a result, the subsequent general average expenditures. The outcome therefore was that the cargo interested parties were not liable to pay any contribution in general average, as the general average expenditures resulted from the owners' actionable fault.

From a non-general average perspective, the case is interesting as it shows that when engineers and/or technical superintendents do not take the necessary action, that may result in a lack of the required due diligence. It also follows that owners should properly monitor the information available as they are expected to diagnose problems before a breakdown occurs.

From a general average perspective, the case is most interesting for its *obiter dicta*. Superfluously, as there was no obligation for the cargo interested parties to contribute in general average, it was held that the burden of proving that a general average expenditure was reasonably incurred pursuant to Rule E and the Paramount Rule of the York-Antwerp Rules lies upon the party incurring that expenditure. However, it was also stated that the party incurring expenditure pursuant to an urgent decision should be given the benefit of the doubt. Hindsight knowledge should be ignored, whether it was a prompt decision taken by the master or by the shipowners and/or the managers. It was also

[9] This is discussed in some detail in J Kruit *General Average Applicable Law and Legal Basis* (Paris Legal Publishers 2017) 55–67.

[10] *The Cape Bonny* (n 4) para 4; R R Cornah, J Reeder *Lowndes & Rudolf: The Law of General Average and the York-Antwerp Rules* (Sweet & Maxwell 2013) 158–59; Kruit (n 9) 171.

considered that when a casualty occurs at sea, there should in principle be a minimum of delay in arranging assistance. A choice for more expensive but also more urgent assistance does not by definition mean that the additional expenses incurred are unreasonable.

The second relevant matter referred to *obiter* is that the judge gave his support to the not undisputed view that an immobilised vessel is in peril or danger[11] because, without assistance, both ship and cargo are worthless. The judge also considered that he very much doubted that there is a difference between danger or peril for the purposes of general average or for salvage.

Interestingly, the question whether on demand security was provided by the cargo interested parties does not seem to have been discussed. Apparently, it was not argued that the phrase that payment would be made if the contribution has 'properly' been ascertained did automatically give the average guarantee an on demand character and, as a result, the owners a claim under the guarantee regardless of the legal merits. In view of the decision in *The Jute Express*,[12] such argument may have been regarded as having little chance of success.[13]

[11] Cornah (n 10) 89–90, respectively 98 (Teare J).
[12] *The Jute Express* [1991] 2 Lloyds Rep 55.
[13] See, however, *St Maximus Shipping Co Ltd v AP Moller-Maersk A/S (The Maersk Neuchatel)* [2014] EWHC 1643.