

Boekbespreking

Dr. Jolien Kruit, *General Average, Legal Basis and Applicable Law: The Overrated Significance of the York-Antwerp Rules*, Zutphen: Paris Legal Publishers 2017, 436 p.

The ability to bring a successful claim is universally sought by maritime professionals, and by its nature falls into the fundamental band of key maritime business aspects that prompted the international path to maritime law harmonization. As Dr. Jolien Kruit repeatedly points out in her recently published book, '*General Average, Legal Basis and Applicable Law: The Overrated Significance of the York-Antwerp Rules*',¹ it is quite surprising to find the 2000-year-old (and probably much older) burden-sharing mechanism – so often utilized in practice – to be so under-regulated up to the present day.

Maritime adventurers rely on general average (GA) as one of the primary tools to distribute the loss and cost, no matter where the incident takes place. The purpose of a century-long harmonization wave is to anchor basic maritime principles and practical operations, making it easier for the industry and other connected stakeholders to do business, no matter where that business takes them. Dr. Kruit, however, points out that, as far as GA is concerned, harmonization effects are sketchy at best.

The study considers GA's perceived uniformity as a semi-pure fiction, concluding that, irrespective of its longevity, GA does not seem to be as firmly rooted in domestic and international legal order as one might expect. Despite the fact that it is generally considered that the basis for GA lies in the principle of natural justice, and that it is, as demonstrated in Chapter 2, regularly applied in practice, its legal deficiencies raise concerns. The fact that, as demonstrated in Chapter 4, there is no commonly accepted definition of GA further adds to the discrepancies with regard GA legal regulation and practical effectuation. The latter is of particular significance because different legal systems may, and regularly do, require different elements to be satisfied in order to bring a successful contribution claim.

Similarly, whereas the reference to the York-Antwerp Rules (YAR) can be found, as the author states, in almost every contract of affreightment, YAR predominantly focus on adjustment, and are necessarily linked with other (national) regulation and contractual provisions. Indeed, in order for YAR to become binding, they must be empowered by a contract, insurance policy, security form, statutory norm or other binding legal source. Furthermore, Kruit reminds that YAR do not provide for an exhaustive regulation of GA. Quite to the contrary, as analyzed extensively in Chapter 3, the author highlights the fact that YAR do not regulate con-

tribution claim effectuation, and, therefore, necessarily have to be supplemented with other legal sources in order to become practicable and enforceable.

The noted issue adds to legal uncertainty, especially if such sources are not properly aligned. In fact, as the study demonstrates throughout the comparative analysis in Chapter 4, various national legal regimes, insurance policies, security forms and other legal sources regulating GA differ significantly, adding one more argument in favor of a rather vague international understanding of basic GA principles and GA practical application. This comes as no surprise – clearly demonstrated in the comparative analysis throughout the study – as GA is predominantly regulated by contractual means, with the existing GA statutory provisions usually not pertaining to the *ius cogens* category, left predominantly for the parties to evaluate whether to implement as binding. When this is combined with different approach various legal systems take when regulating different aspects in connection to GA in general, one may find quite differing results with regard a particular incident, depending on which particular applicable law does a particular claim adheres to.

The latter is further complicated by the fact that, as Kruit points out, the focus of adjustment and contribution nowadays pertains to an interested party rather than a stricken or affected property itself. Complicated business models present in everyday transactions further complicate the issue of GA adjustment and contribution claims, none of which is covered with YAR, further widening the gap that the differing national legal frameworks cause.

Chapter 4 contains, among other items, a set of particular legal investigations into specific GA-linked legal instruments relevant for the overall substantive and procedural GA operation. Particular emphasis is placed on the issue of adjustment. Kruit pinpoints several major deficiencies in how the legal position of adjusters and legal status of adjustment is currently regulated and effectualized. The author warns of major differences in how various legal systems address and regulate these instances, and how such differences create problems in the practice.

Similarly, the *ius retentionis* – maritime lien with regard to cargo – is not necessarily linked with a specific maritime player. Different legal systems appoint different right holders with regard maritime lien, a fact that significantly influences the position of parties prior to, during and following the adjustment period.

The notion of actionable fault is yet another particular instance analyzed by Kruit. Depending on the jurisdiction,

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1. Jolien Kruit, *General Average, Legal Basis and Applicable Law: The Overrated Significance of the York-Antwerp Rules*, Zutphen: Paris Legal Publishers 2017; based on the doctoral research carried out at the Erasmus University Rotterdam.

actionable fault may or may not give rise to time bar (issue, on its own, differently assessed by different jurisdictions), limitation of liability, exclusion of liability and similar. This, in effect, may give rise to unexpected and significantly differing GA results from a particular incident, depending on which national law is applied.

Dr. Kruit additionally points to the fact that none of the analyzed legal regimes (statutory and contractual) provide an exhaustive set of legal norms governing GA. In fact, as Kruit revealed in the comparative and practical study, it would appear that GA, in practice, operates on the basis of several sources being applied simultaneously, with the previously noted inconsistencies in place. Whereas the contribution amount utilizes property as a net figure, Kruit reminds that contribution claim falls into the *in personam* category. Due to the afore mentioned issue of different sources as per different persons involved in GA, the individual adjustment amounts, although objective in terms of net figure, tend to be subjective in terms of their applicability with regard particular persons involved in GA.

Chapter 5 discusses the implications of noted lack of international uniform conflict of law rule on GA, whereas Chapter 6 discusses the same issue from the European law perspective, in particular with regard to the relevant conflict of law provisions – namely, Rome I and Rome II – with the author being of an opinion that the named Regulations do not provide a suitable regime. Contrary to the traditional notion of *ius loci* appertained to the final port of destination for the common maritime adventure, Dr. Kruit shows that the issue of applicable law with regard to GA is particularly problematic. Relevant *fora* on the contribution claims depend on individual parties and their roles in GA (ie, flag of vessel, place of registration, port of refuge, etc.), and different conflict of law rules arising out of different jurisdictions may produce differing results both regard procedural and substantive rules. Regarding the relevant European law, the author details a number of serious impediments preventing a clear-cut application of Rome I and Rome II Regulations on GA and recommends against utilizing the noted Regulations for GA purposes.

The absence of clear international or European law conflict of law rules on one side, and the difficulty of ascertaining a proper and adequate connecting factor on the other side, make it quite arduous to imagine a workable legal regime to choose which a single national law should apply. Kruit additionally suggests that even if such a norm was envisaged, it could not overpower the claim ground based on various GA claims' legal sources, based on a particular national law. The existence of specialized set of norms, such as the Rome I and Rome II Regulations, as evidenced by analysis in the study, further complicates the application of GA rules.

During one of the recent debates over the nature and scope of GA (at the International Maritime Committee (CMI)), some stakeholders expressly renewed the long-established calls for the abolition of GA. Recognizing the fact that GA is readily accepted in practice '*as is*', endorsed by the promulgation of new YAR version in 2016, Kruit warns that the noted legal discrepancies and deficiencies may eventually bring GA to its downfall, in line with these long-established

calls of GA abolition. The solution is presented in the form of an enhanced lawmaking: a Convention. Kruit argues that an international legal framework in a form of a convention would resolve many of the issues that the current regime is not capable of addressing. The author specifically argues that such an approach '*... would enhance predictability, lead to more procedural and cost efficiency and would make the general average concept less vulnerable for abolition arguments*'.

Dr. Kruit's monograph is a worthy and appreciated contribution to both the theoretical and practical opus of maritime law research. Whereas the study's theoretical strength lies in the fundamental legal research focused on the very essence of GA contribution claim's legal basis, the practical approach is visible through the analysis of numerous practical implications of GA regulation's inconsistencies.

As a practicing lawyer, Jolien Kruit has successfully identified and addressed very difficult issues that arise in everyday GA practice, and formed her opinions and recommendations on how to approach and resolve the issues based on practical solutions that take into account not just the needs of stakeholders, but also the long-established push towards legal harmonization. As a scholar, Jolien Kruit has carried out a diligent and agile contemporary and current analysis of a legal instrument that is too often taken for granted, and has provided new and original incentives for re-evaluation and re-conceptualization of how the numerous and complicated issues in connection to GA are to be resolved in practice.

As such, this monograph is highly recommended not just for practicing lawyers, GA and related insurance experts, interested industry stakeholders, law academics and researchers, but also the wider audience who seeks a clearly written text that may serve as a good introduction and advanced study of GA. In particular, due to its concurrent emphasis on case law, the study should prove to be very useful to lawyers (both practicing and in-house) and law firms practicing maritime law.