

The legal situation and practical application of the general average

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ABSTRACT: The aim of this article is to discuss issues related to average adjustment proceedings, the status of the average adjuster in the national legal order, to discuss the generally accepted principles of general average settlement and to demonstrate the usefulness of these institutions in modern commercial shipping.

KEY WORDS: general average • average adjustment proceedings • average adjustment • average adjuster

INTRODUCTORY REMARKS

The institution of general average, and its usefulness and relevance to modern shipping (beginning in the nineteenth century) is regularly subjected to harsh criticism in the doctrine, professional journals and at international conferences. Opponents of general average suggest that today, in the era of expanded insurance coverage, general average has lost its economic importance, and that it has not adapted to the needs of modern commercial shipping. Proponents point to the social and psychological aspect, the power of tradition and the widespread, almost unanimous acceptance of the rules in maritime commerce by incorporating a declaration of general average in charter contracts, bills of lading and insurance policies. The social and psychological aspect is a very strong argument in favour of general average. The risks associated with commercial shipping such as maritime terrorism and piracy has taken its toll and shaped the institutions of maritime law (including general average).¹ In international debate, general average has as many supporters as opponents. It does not appear that this institution of maritime law existing for such a long time and which has created the existence of the professional group known as average adjusters will be forgotten any time soon.

The basic feature that determines the usefulness of general average is its preventive function. The requirement to bear losses

deliberately and wisely avoids reckless decisions by a captain to perform general average. In addition, the primary function of general average is still valid – to spread the financial consequences of losses between all participants. As a result of the development of marine technology, changes related to the construction of vessels and the type of cargo carried, the scope of application of the institution of general average has changed. Today, the institution of general average is mainly used in tramp shipping. Tramp shipping or tramping is a type of sailing without a fixed timetable, most often full-vessel freight transport resulting from market demand.²

In international maritime commerce, in the absence of agreement between the parties, the settlement of general average (average adjustment proceedings) is carried out under commonly accepted rules of international maritime traffic. The rules referred to in art. 255 § 2 are used primarily in Europe and North America – the York-Antwerp Rules, called in short YAR. The counterpart of the York-Antwerp Rules in the Far East is the Beijing Rules. In the common law system, the average adjuster community has created and printed a set of established rules of practice. The rules are in addition to the York-Antwerp Rules. They come to the fore in case study situations, in which YAR is silent.

Currently, general average in national law and average adjustment proceedings are governed by the Act of 18 September

¹ Prawo morskie pod redakcją J. Łopuski, Vol. 1, part 1 Wstęp do teorii współczesnego prawa morskiego, Oficyna Wydawnicza Branta, page 37.

² The opinion of the European economic and social committee in a white paper regarding a review of Regulation 4056/86 on the application of EC competition rules to maritime transport, Journal of Laws of the European Union C 157/130 dated 28.6.2005 in point 1.6 gives the basic characteristics of tramp shipping. These characteristics can be summarised in ten key points. 1) competitive global markets, 2) an almost perfect competition model, 3) creation of diverse market segments to meet the needs of customers, 4) unstable and unpredictable demand, 5) the presence of many small businesses, 6) the presence of many small businesses, 7) trends corresponding to world trade patterns, 8) ease of entry and exit from the market, 9), cost-effectiveness, 10) responding to the development of new markets and the needs of carriers. In the document, EESC tramp shipping is compared to sea taxis and it is shown that the tramp sector is considered to be one of the very rare examples of perfect competition worldwide. The Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of article 85 and 86 of the Treaty to maritime transport, for the purposes of this Regulation tramp services are defined as the transport of goods in bulk or in holds (break - bulk) by a vessel chartered wholly or partly to one or more shippers on the basis of charter contracts for a time or a journey, or other types of contracts for irregular and non-notified journeys, in the case of which freight rates are in any case freely negotiated in accordance with the conditions of supply and demand.

2001 - the Maritime Code, (Journal of Laws 2013 No. 0 item 758 as amended). General average in the Maritime Code is governed in Chapter I title VII "Marine accidents" (art. 250-256). The regulation of general average and average adjustment proceedings is very concise. The legislature in Articles 250-254 gave definitions of general average, replacement expense and definitions of general average losses and the rules of their division. Provisions relating to the method of settling general average (average adjuster proceedings) are governed by article 255, which has been expanded in relation to the corresponding provision art. 228 in the code from 1961. Limitation periods for claims from general average were regulated in article 256 § 1.³ Polish legislature adopted a mixed method of incorporation - the inclusion of selected YAR rules (five general rules A, C, D, F, G, and one detailed rule marked as XIX) to the Maritime Code and in art. 255 § 2 the method of sending to generally accepted principles of international maritime traffic. The YAR rules incorporated into the MC of 2001 come from the 1950 edition.

The second important document regulating average adjustment proceedings is the Regulation of the Minister of Infrastructure of 14 April 2004 regarding the appointment and conduct average adjusters and the average adjuster conduct. The current regulation, in detail, determines the qualifications required for appointment to the position of average adjuster, the method of appointing an average adjuster, the method of entering and deleting from the list of average adjusters and the mode of average adjustment proceedings.

As already mentioned above, in international shipping for the settlement of general average national regulations are applied as well as generally accepted settlement rules for general average.

YORK-ANTWERP RULES

Although the York-Antwerp Rules are a collection of private rules, and are not an international convention, in international trade they are used almost universally. The rules arose originally as a by-product of failed endeavours to unify international maritime law. The first edition of YAR was drafted in York in 1864 and consisted of 11 rules. These rules did not play a more practical role in the unification of the general average, but they became the starting point for international discussion and were an impulse to create another set of rules at another conference in Antwerp in 1877.⁴ Further successive editions of the YAR came about as a result of numerous compromises, changes, corrections and additions. Each new version of the rules (1890, 1903, 1924.1929, 1950, 1974, 1974/1990, 1994, 2004) was more complete, and more defined, and was characterised by a greater acceptance among participants in international commercial transportation. Today's

2004 edition of YAR and YAR from 1994 consist of three parts: primary rules, the general section (literal rules and) and the specific section (digital rules). The primary rules include the Rule of Interpretation introduced in YAR 1950 and the Paramount Rule introduced into YAR 1994. The main goal of the rule of interpretation - besides stating that YAR takes precedence over the law (of course, only dispositive law and principles of practice) - was to determine the relation of digital rules to literal rules.⁵ The addition to YAR 1994 of a basic rule stating that under no circumstances should sacrifice or expense be taken into account if they were not incurred "reasonably"⁶ was intended to indicate that the criterion of reasonable conduct, which rule A introduces applies generally.⁷ The scope of YAR has undergone numerous and significant changes. The current edition of YAR dating from 2004 was adopted by the International Maritime Committee Meeting held in Vancouver, which was held from 31.05 to 4.06 2004. YAR 2004 consists of seven literal rules, marked in large letters from A to G, and twenty-three titled detailed rules marked with Arabic numerals. Detailed rules are divided into subsections indicated by lowercase letters. In addition, to mark the third row, lowercase Roman numerals are written in brackets. YAR 2004 also includes a few technical and editorial changes. A significant and positive change, from an editorial point of view is to unify the different definitions that refer to the same thing. Examples include phrases such as admitted in, allowed in, as admitted that were everywhere replaced by the words allowed as. However, the method for determining the specific individual standards can raise doubt.⁸ Rules YAR occupy in international maritime traffic a unique position to act to harmonise the settlement of general average.

The provisions of maritime law, which we find in the Maritime Code, are to greater or lesser extent modelled on YAR. There are two common methods for the implementation of the rules into national law. The first method is to translate the rules as faithfully as possible and give them the power of dispositive rules (or binding); the second involves the use in national regulations of a reference to the Rules as principles generally applicable in international maritime traffic. The most common method is mixed, which is used in Polish legislation.

Beijing Rules as alternatives to YAR for settling general average.

Beijing Rules

The Beijing Rules, similar to the York Antwerp Rules discussed in the previous paragraph, are not legal standards and are only a private set of rules of settlement of general average, that take binding force only when the parties agree to it among themselves, by agreement, and include in the transport document a clause appointing the rules as the basis for settlement in the event of general average"⁹. The full name of the

³ See. J. Łopuski, Prawo morskie tom II, część III, Prawo Żeglugi morskiej-stan na 31 XII 1999, Oficyna wydawnicza Branta, Bydgoszcz - Toruń 2000

⁴ S. Matysik, Prawo morskie vol. 3 page 116

⁵ www.richards.co.uk/service5.asp York Antwerp Rule 1994 Rule of interpretation "In the adjustment of general average the following Rules shall apply to the exclusion of any Law and Practice inconsistent therewith. Except as provided by the Rule paramount and the numbered Rules, general average shall be adjusted according to the lettered Rules.

⁶ York Antwerp Rule 1994 In no case shall there be any allowance for sacrifices or expenditure unless reasonably made or incurred"

⁷ J. Łopuski, Prawo morskie tom II część 2, Prawo żegluga morskiej, stan prawny na dzień 31 XII 1999 r., Oficyna Wydawnicza Branta Bydgoszcz - Toruń 2000, page 113

⁸ Z. Kamiński, Prawo morskie vol. XXIII, page 178, see also <http://www.richards.co.uk> York Antwerp Rules 2004.

⁹ B. Ostrowska, Prawo morskie vol. XXIII page 184

Beijing Rules is Rules for Temporary Rules for the Settlement of General Average of the China Council for the Promotion of International Trade. They were adopted by the China Council for the Promotion of International Trade on 1 January 1975 and remain valid. The English version of the rules comes from the Laws and Regulations of the People's Republic of China Governing Foreign-Related Matters (1991.7) collected by the Bureau of Legislative Affairs of the State Council of the People's Republic of China and published by China Legal System Publishing House.¹⁰ In the event of discrepancies between the original text and its English translation, precedence is given to Chinese language version.¹¹ Along with establishing the CCPIT rules is also established the Department of General Average Settlements, which became part of the CCPIT legal department as a specialised agency whose purpose is to promote international trade, shipping and insurance. The construction of the Beijing Rules, unlike the York-Antwerp Rules is uniform and does not contain division into general and specific rules so characteristic of YAR. The rules consist of a preamble and eight titled articles. The appearance and content of the Beijing Rules were heavily influenced by the Hamburg version of YAR 1974, written in the year preceding the adoption of the Beijing Rules. "Comparisons of the Beijing Rules with YAR were made by the Chinese Council for the Promotion of International Trade in its publication Specific Instructions for Average Adjustment. Its aim was to demonstrate the superiority of the Beijing Rules over YAR which, although widely accepted in the world, according to CCPIT they did not have the simplicity and transparency of the new Rules. The Beijing Rules, although they have the same character as the York-Antwerp Rules in maritime trade, do not play such an important role as the York-Antwerp Rules, and are rarely referred to in bills of lading or charter parties.

Rules of Practice

In the common law system, the average adjuster community has created and printed a set of established rules of practice that are an addition to the York-Antwerp Rules. The rules of practice derived from the period when the profession of average adjusters was just developing and was not regulated by law. The first formal association of average adjusters was created in 1869 in Western Europe.

Today, the rules of practice are used by The Association of Average Adjusters (British association), the Association of Average Adjusters of Canada and the Association of Average Adjusters of the United States.

Rules of Practice of the British Association of Average Adjusters

The British set of Rules of Practice dates from 1997 and is composed of five sections marked in uppercase letters from A to F. In the individual sections the following are regulated:

Section A - General rules

Section B - General average

Section C - York-Antwerp Rules

Section D - Damage and repair of a ship

Section E – Loads involved in particular average

Chapter F – Settlement of general average in English law and practice.

The sections are composed of titled sub-points, marked in uppercase letters and ordered by Roman numerals. The British Rules of Practice provide a comprehensive and detailed document.

Rules of Practice of the Association of Average Adjusters of Canada

Canadian rules of practice are divided into two parts. The first part consists of 13 titled articles and refer to rules of practice applicable across the Great Lakes. The rules apply to events arising from contracts of affreightment. The second part concerns the rules of practice other than those that apply to Great Lakes and consists of three sections: general rules, particular average and general average.

Rules of Practice of the Association of Average Adjusters of the United States

The American rules of practice consist of twenty-three concise, titled articles labelled with Roman numerals.

THE LEGAL STATUS OF AVERAGE ADJUSTERS

Neither the doctrine nor legislation give a definite answer to the question of who an average adjuster is. There is no legal definition of an average adjuster. There is also no standardised legal status. Both the legal nature and mode of appointment of an average adjuster is regulated in different countries by national laws or the customs of maritime law. From the point of view of merchant shipping, there should be an international standardisation of the legal status of average adjusters, the creation of an international body to ensure the proper conduct, uniformity and constant modernisation of average adjustment practice. Today, average adjusters are organised in the form of associations. For the most active in Europe include AIDE (International Association of European Average Adjusters) and the Association of Average Adjusters. In the United States, average adjusters are associated in the Association of Average Adjusters of the United States. In Canada they belong to the Association of Average Adjusters of Canada. Only in a few former socialist countries do average adjusters operate as organised average adjuster offices, such as in Bulgaria where they operate as part of the Bulgarian Chamber of Commerce and Industry. Average adjusters exercise the professional powers conferred on them, according to uniform standards of practice. They operate based on national maritime law, international maritime customs, rules of practice and prin-

¹⁰ http://www.chinahotelsreservation.com/china_law/INTERIM_RULES_china_law_FOR_GENERAL213.html

¹¹ B. Ostrowska, *Ibidem*, page 185

principles generally accepted in international maritime traffic. Those who want/have a wish to pursue the profession of an average adjuster must meet certain requirements and pass a difficult and complicated average adjuster's exam and then be added to the list of average adjusters. The rules for appointing average adjusters and average adjustment proceedings in Poland are regulated by a regulation on the appointment and conduct of average adjusters (Regulation of the Minister of Infrastructure of 14 April 2004 regarding the appointment and average adjustment proceedings of 14 April 2004 - Journal of Laws No. 109, item 1158).

As mentioned above, the question of who an average adjuster is or what is its legal status cannot be answered easily. The name in Polish *dyspaszer* is of Romanesque origin: franc. *le dispacheur* - *dyspaszer*.

The general assumption can be accepted that an average adjuster is a highly qualified, reliable, independent specialist in charge of the complex and responsible activity of settling general average. According to the above-cited regulation of 14 April 2004, an average adjuster has a university degree in economics or law and/or a diploma as a sea captain.¹² He has an impeccable reputation, is proficient in English and has a working knowledge of maritime law and the practice of international maritime traffic. His legal status and mode of appointment is different. Depending on the country, an average adjuster is/can be an independent specialist, expert, quasi judge or a person who performs professional services. Countries where average adjusters are considered to be experts include France and Belgium. In France, an average adjuster, called a *dispacheur*, is also known as an expert and *répartiteur*. Furthermore, in France average adjusters can use the services of experts (e.g. for estimating goods). These experts are called *sapiteur*. In the United Kingdom and the United States, average adjusters are organised in associations, but they consider themselves as being a free trade.¹³ In Sweden, maritime legislation gives average adjusters the status of quasi judges. The Polish Maritime Code grants average adjusters the status of an independent expert. Due to the way in which average adjusters are appointed, the following categories can be distinguished: average adjusters appointed on a permanent basis by the competent authorities or chambers of commerce (e.g. Sweden), average adjusters appointed ad hoc by the courts (or, for example, Consuls) at the request of an interested party involved in a general average (e.g. in France), and average adjusters selected from in-

dividuals by mutual agreement of all participants in a general average (e.g. in the UK and the United States).¹⁴

THE LEGAL STATUS OF AVERAGE ADJUSTERS IN THE POLISH MARITIME CODE

The legal status of an average adjuster is formed in different ways by the maritime laws of different countries. As already mentioned in the second paragraph, an average adjuster may be a representative of a free trade (USA), an independent expert (France, Belgium) or a quasi judge. Also in national legislation, the legal nature of average adjusters is shaped differently. Maritime Code of 1961 granted average adjusters the status of a quasi judge. Under the former maritime code, average adjustment proceedings were formalised; an average adjustment could be appealed in court, and after becoming binding it would become enforceable.¹⁵ The amendment of the Maritime Code of 4 January 1991 significantly changed the legal nature of the average adjuster. The change introduced in article 222 § 4 (which includes deleting the phrase "appealing an average adjustment and giving an average adjustment a writ of execution" classified average adjusters to the role of independent experts, and gave an average adjustment an expert character. The Maritime Code of 18 September 2001 regulated this issue in § 4 of art. 255 in the same way as in the amendment of 1991. That amendment was welcomed by the average adjuster community, which called for granting average adjustments expertise status, and average adjusters the status of independent experts. The main aim of average adjustment activities is the consensual settlement of issues that come from average adjustment proceedings. Since the provisions of the new Maritime Code granted average adjusters expert status, there is nothing to stop, in addition to an average adjuster appointed by a ship owner or another participant of a general average in accordance with the applicable law or the provisions of a contract, any other participant from appointing their own average adjuster and commissioning him to prepare an average adjustment.¹⁶ From the point of view of practice, it could be said that the legislative procedure made in the revision of 1991 and maintained in the amended maritime code is adapted to the current needs and conditions of the modern shipping.

AVERAGE ADJUSTMENT PROCEEDINGS

Average adjustment proceedings are a legally defined human activity aimed at the settlement of general average and

¹² Also interesting is the genesis of the alternative provision in the regulation to hold a merchant sea captain diploma. At a time when the provisions of the first regulation for appointing average adjusters and average adjustment proceedings, the first contender for the average adjusters' exam was Wacław Zagrodzki, a man with a distinguished career in merchant shipping and a retired captain. At that time there were no maritime colleges, so captains by the nature of things had only secondary education. Therefore, the legislature made a rational decision to introduce a rule that a candidate must have a specialised higher education degree or a merchant sea captain diploma (own source obtained from an interview in 2007 with the only active average adjuster in Poland at the time – Professor Zenon Kaminski). Currently, the only active average adjuster in Poland is Jan Goetz.

¹³ S. Matysik, *Ibidem*, page 131

¹⁴ L. Józefiak, *Technika i gospodarka morską*, Nr 8-8/1968 *Dyspaszer i postępowanie dyspaszerskie w świetle nowych postanowień prawa polskiego*, page 372.

¹⁵ Art. 222 § 4 of the Maritime Code of 1961 stated that the Minister of Shipping, in consultation with the Minister of Foreign Trade and the Minister of Justice, shall determine by regulation the qualifications required to be appointed to the position of average adjuster, the manner of such an appointment and average adjustment proceedings, appealing an average adjustment and giving an average adjustment an enforcement title. The regulation of the Minister of Shipping of 17.X.1966, in section 13 provides that each participant in a general average may, within three months from the date of completion of the average adjustment proceedings, apply for a change or repeal of the average adjustment by the court. The cases referred to in section 13 are heard the court with jurisdiction over the registered office of the average adjuster where the average adjustment was prepared (section 14.1). A request for a change or the repeal of an average adjustment is submitted directly to the competent court (sec. 15.1). The court shall decide on a change or the repeal of an average adjustment after a hearing (sec. 17). An enforcement clause is issued to an average adjuster by the district court with jurisdiction over the registered office of the average adjuster in which the average adjustment was prepared (sec. 19).

¹⁶ J. Łopuski, *Prawo morskie vol. II part III Prawo żeglugi morskiej stan prawny na dzień 31 XII 1999*, Oficyna Wydawnicza Branta, Bydgoszcz – Toruń 2000, page 128

encouraging its participants to voluntarily cover the shares participating in a general average.

In domestic law, average adjustment proceedings are regulated by the Maritime Code of 1 December 1961 and the s - Maritime Code and the regulation of the Minister of Shipping of 15 September 1966 issued on the basis of art. 222 § 4 regarding the appointment of average adjusters and average adjustment proceedings. On the basis of art. 222 § 4 of the then maritime code, an average adjustment could be appealed and could acquire enforcement power. In accordance with paragraph eighteen of the regulation from 1966, in the event that an average adjustment is not appealed within the prescribed period, or if an appeal for a change or the repeal of an average adjustment is finally rejected, it has the effect of a final court judgment. An enforcement clause is given to an average adjustment by the district court with jurisdiction over the registered average adjustment office in which the average adjustment was prepared (sec. 19 of the regulation). There is then an analogy between the position of an average adjuster and the position of a judge. Since an average adjustment had the character of a court judgment, and the legal nature of an average adjuster could be described as a quasi judge, activities aimed at settling general average should be called average adjustment proceedings. Today, the legal nature of an average adjustment has changed dramatically and now constitutes only an expert opinion, while an average adjuster is an independent expert, and average adjustment proceedings are defined legally as a specific mode of action aimed at determining whether general average occurred and preparing a report in that respect.

METHOD OF APPOINTING AN AVERAGE ADJUSTER - LEGITIMACY TO OPERATE

In the current state of the law, the privilege of appointing average adjusters belongs to ship owners, who are required to commission average adjusters to prepare an average adjustment immediately after a voyage but not later than within one month. In the event of a delay by a ship owner, an order may be given by another participant in a general average. A ship owner may agree on the identity of the average adjuster with the most interested cargo owners. The provisions of merchant shipping agreements often provide ship owners with the exclusive right to choose an average adjuster and the place of settling a general average.¹⁷ The average adjuster is required immediately after receiving an order from a ship owner or another participant of the general average to take the steps necessary to determine whether there is a general average, calculate the amount of loss of the general average and prepare an average adjustment. In accordance with art. 255 § 1a, an average adjustment can be prepared only by an average adjuster from the list of average adjusters maintained by the head of the chamber of

commerce. An order given to an average adjuster by a ship owner, or exceptionally by another participant in a general average, should not be strictly interpreted in the light of art. 734 of the Civil Code. In accordance with section 4 of the regulation of 14 IV 2004, an average adjuster is required to "impartially consider the interests of all participants in a general average." It can therefore be concluded that the term "order" used by the legislature defines only the competence (power) for a ship owner or exceptionally another participant of a general average to perform a conventional act, the effect of which is the duty of an average adjuster to prepare an average adjustment.

DETERMINING THE PARTICIPATING VALUES OF A GENERAL AVERAGE

Participating values in a general average are only those losses, sacrifices and expenses that are a direct act of general average that are deliberately and reasonably incurred in order to save a ship, cargo and freight from a common danger. The determination of the participating value in a general average is made by an average adjuster on the basis of generally accepted principles of international maritime traffic (art. 255 §2). Participating values are the sum value of the vessel, cargo and freight. The amounts of these values shall be determined by making certain deductions. The average adjuster, then, on the basis of documents such as bills, calculations, specifications of costs and bills of lading, determines all the contingencies and sacrifices, i.e. the sum of the general average. The average adjuster determines, also on the basis of the documents supplied to him, the amount that constitutes a particular adjustment – those that bear losses and those that do not (art. 254 km). The average adjuster creates two amounts: the sum of the participating values and the total amount of sacrifices and expenditures of the general average.¹⁸ The last part of the work of an average adjuster is to determine what percentage of the total amount of expenditures and sacrifices is the sum of participating values.

PREPARATION AND DELIVERY OF AN AVERAGE ADJUSTMENT

The document regulating the method of preparation and delivery of an average adjustment is the Regulation of the Minister of Infrastructure of 14 April 2004 on the appointment of average adjusters and the conduct of average adjustment proceedings.

PREPARATION OF AN AVERAGE ADJUSTMENT

In accordance with § 7 section 1, an average adjuster refuses to prepare an average adjustment if it is established that there is no general average. To refuse the preparation of an

¹⁷ In accordance with clause 49 of Nuvoy-84 charter "an owner shall have the right to decide the place where the adjustment will be drawn up and to appoint the average adjuster".

¹⁸ S. Matysik, *Podręcznik prawa morskiego*, Warsaw 1967, page 238.

average adjustment, an average adjuster must attach a justification (§ 7 section 2). Average adjustment documents, in particular the average adjustment, extract from the average adjustment and a refusal to prepare an average adjustment, should include the date and place of issue of the document, the name of the average adjuster who carried out the average adjustment activities and the signature and stamp of the average adjuster.

MODE OF DELIVERY OF AN AVERAGE ADJUSTMENT

The mode of delivery of an average adjustment is sanctioned in § 9 section 1 of the Regulation. In accordance with this paragraph, the average adjuster shall notify, with acknowledgment of receipt, all known participants in a general average about the completion of the conduct of average adjustment proceedings, and if the an average adjustment is prepared they shall be sent the average adjustment or an extract from the average adjustment. In accordance with section two of the paragraph discussed, the date of completion of average adjustment proceedings is considered to be the date of delivery of the average adjustment or extract from the average adjustment or notification of a refusal to prepare an average adjustment. The issue discussed in this part of the work was regulated in a general way. The use in § 9 of the phrase "notification with confirmed acknowledgment of receipt" can be interpreted as giving the average adjuster the possibility of deciding as to the form of notification. The wording of the ninth paragraph creates a presumption that notification will be effective in any form legally permissible that allows a return receipt to be obtained, so both in the form of a registered letter or in the form of email with a receipt. According to the current law, an average adjustment is a document that should be prepared in an ordinary written form solely for the purposes of evidence (*ad probationem*).

AVERAGE ADJUSTMENT AS A PROCEEDING IN ACCORDANCE WITH ART. 255 OF THE MARITIME CODE

In the dictionary, an average adjustment is understood as a settlement of losses due to an emergency on a ship and the distribution of losses and expenses between the parties concerned.¹⁹ Article 255 § 1 states that the preparation of an average adjustment is made by an average adjuster on the basis of an order from a ship owner. An order should be made to an average adjuster by a ship owner immediately after the completion of a voyage, but no later than within one month. In the event of a delay by a ship owner, an order may be given by another participant in a general average (255 § 3). As part of an order, an average adjuster shall determine whether an act of general average has occurred, calculate the amount of loss of the general average and spread it among

participants in the general average according to their share. An average adjuster, when making a detailed settlement of a general average shall in the first place be guided by the agreement between the parties (participants in a general average). In the absence of an agreement between the parties, an average adjuster shall apply universally accepted principles of international maritime traffic (see chap. I § 4-5).

AVERAGE ADJUSTMENT AS THE FINAL DOCUMENT IN AVERAGE ADJUSTMENT PROCEEDINGS

The document, which sets out the property rights and obligations of participants in a general average and is the basis for their mutual settlements, is called an average adjustment or general average adjustment statements. The meaning and legal effect of an average adjustment should be assessed in accordance with the laws in force in the place of its preparation. However, if all the interested parties in a general average are Polish then Polish law applies (art. 357 MC). Under the maritime code, the settlement of a general average contained in an average settlement has an expertise character and is treated as an expert opinion. From the formal and legal point of view, an average adjustment is not binding on any participant and the recognition of an average adjustment is left to the discretion of each party. In practice, however, the performance of an average adjustment is voluntary. The legal nature of an average adjustment is regulated in a similar way in the legal systems of the European continent and North America. Only in a few countries do laws impose more far-reaching legal consequences on average adjusters. In Sweden, an average adjustment is equated in its consequences with a final court judgment if it is not contested within 30 days from the date of its preparation.²⁰

CIRCUMSTANCES OF DELIVERING AN AVERAGE ADJUSTMENT TO THE PARTICIPANTS OF AVERAGE ADJUSTMENT PROCEEDINGS

An average adjustment is prepared by an average adjuster if on the basis of documents it is established that an act of general average has taken place. The average adjuster is required to inform the participants of a general average about the preparation of an average adjustment and the completion of average adjustment proceedings. Notification about the completion of proceedings shall be sent by the average adjuster to participants with confirmed acknowledgement of receipt and if an average adjustment is prepared they shall be sent the average adjustment or an extract from the average adjustment. The date of completion of average adjustment proceedings is considered to be the date of delivery of the average adjustment or an extract from the average adjustment.

¹⁹ Słownik wyrazów obcych PWN, Wydawnictwo Naukowe PWN, Warsaw 1999, page 260.

²⁰ L. Józefiak, *Technika i Gospodarka Morska* No. 1968 8/9., pages 373-375.

CONCLUSIONS

The aim of this article is to discuss the institution of the general average, the universally accepted rules for its settlement, discuss issues related to the conduct of average adjustment, the legal status of an average adjuster, the legal status of an average adjustment and demonstrate the usefulness of these institutions in modern commercial shipping.

General average is one of the oldest institutions of maritime law, but by regulating the settlement of general average in the form of a private body of law, assisted by rules of practice developed by the average adjustment community, it retains the flexibility characteristic of soft law. The institution of general average allows those participating in the international exchange of goods and services by sea flexibility in the legal relationship in terms of settlement of general average and average adjustment proceedings. The voluntary character of the York-Antwerp Rules, or alternatively, the Beijing Rules, promotes the global incorporation of provisions and principles generally accepted for the settlement of general average to bills of lading or charter-parties.

An analysis of the doctrine of maritime law and the trends shaping the rules of maritime law in the field of general average, both in Poland and in the world, indicate the development of the institution.

The usefulness and usability of general average is not abstract, but rather it has a practical usefulness for strong and well-organised interest groups interested in general average. The first group to lobby for the existence of this institution are average adjusters, whose professional activity is closely related to the existence of general average. Another extremely powerful interest group are ship owners, who, thanks to general average have the ability to shift some of the costs associated with liability for damages arising from general average to other participants in the general average act, or to third parties. Alongside average adjusters and ship owners there is a third interested party: insurance and/or reinsurance societies and insurance clubs (e.g. P&I).

General adjustment has a particular commercial significance for insurers and reinsurers. The existence of the institution of general average provides a basis to include it as an insurable risk. General average insurance is expressed as a particular insurance premium provided by the policyholder to the insurer. Such insurance premiums paid to insurance societies that protect against events that may arise as a result of an act of general average are relatively high, while cases of general average rarely occur. General average retains its relevance and vitality as long as there are highly organised operators in the insurance and reinsurance market. It should be emphasised that the settlement of general average by qualified experts (average adjusters) is and will be a subsidiary factor for later purely financial settlements between insurers.

Another factor that determines the existence and development, correlated with average adjustment proceedings, of a general average is the regulation of the legal status of average adjusters and the average adjustments that they prepare in the Maritime Code and the Regulation of the Minister of Infrastructure of 14 April 2004 on the appointment of average adjusters and the conduct of average adjustment proceedings. Under article 255 § 4 of the Maritime Code and the above regulation issued on its basis, average adjustment proceedings and average adjustment were deformed. In the current legal system, as has already been demonstrated, an average adjustment does not have any legal effect and its provisions are not binding on any party. An average adjustment is simply an opinion prepared by an independent expert. In practice, an average adjustment is a very strong argument in the resolution of any eventual dispute. Taking into account the international dimension of maritime trade, depriving the average adjustment of the power of a court order provides greater security to business transactions and allows the parties to shape the legal relationship at their discretion. Eventual disputes between the parties of a general average be settled both in a general court as well as in an arbitration court.

The essence of the general average also guarantees that the expenses and damages will be made reasonably and deliberately by a ship's captain in order to save common property and will take into account the individual interests of each participant in a joint sea voyage. Thus, a general average is a guarantee of objective of action by a ship's captain and substantially prevents possible disputes between the owners of cargo.

Taking into account the characteristics of the international maritime community, commitment to tradition and a strong sense of solidarity and community, in the opinion of the author there should be widespread standardisation of the legal status of average adjustment and the legal status of the average adjuster. In addition, an institution should be established that would set professional standards for average adjusters, campaigned on behalf of the international promotion and integration of average adjuster communities in different continents, countries and regions and scrutinise the application professional ethics by average adjusters.

The institution of general average in the doctrine of maritime law is often referred to as an anachronism of maritime law. However, one can formulate a contrary thesis that it is a Zahir of maritime law, an institution that is rooted in the minds of shipping practitioners and theorists, and thus ensures the continuous operation of maritime trade. The abolition of general average is possible only in a global context. The abolition of general average by only one country would create significant adverse effects in the maritime trade of that country. The view can be held that general average, and the average adjustment proceedings associated with it, will function as long as there are insurance companies operating in the market.

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