

General average in Polish maritime law

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Abstract

The law of general average is one of the oldest institutions in maritime law, which is still applicable in contemporary shipping. Although the role and function of general average have naturally changed throughout centuries of its history (the main reasons therefor being the popularization of maritime insurance, which evolved much later than the general average) and general average has been and is subject to criticism pointing to its anachronistic nature and redundancy in today's maritime economic realities. However practice shows that general average continues to resist these accusations and is commonly used in the practice of maritime commercial trade. This article deals with the issue of general average in light of Polish maritime law regulations, the essence and specificity of these legislative solutions concerning the safety of shipping in Poland, and also gives examples of events that occurred at sea that permit the announcement of an act of the general average. This article also presents considerations with regard to arguments in favour of maintaining the institution of general average as a legal instrument used in shipping, as well as critical voices emphasizing the need to eliminate general average as an institution of maritime law aimed at distributing losses, incurred to avoid a common peril, to the participants of a maritime adventure.

Introduction

The importance of shipping in international trade has generally been steadily increasing for hundreds of years and it is impossible to imagine the functioning of the global economy without this key link. In turn, safety is one of the main factors that influence shipping risks. It is therefore not surprising that the international community has been constantly introducing new legislative solutions conceptualised to improve the safety of shipping, the crews on board, as well as passengers and cargoes carried by sea.

In this context, a characteristic and specific institution of maritime law is general average, whose essence, legal character and function, despite its origins dating back thousands of years, still remain almost unchanged, and the institution itself remains practically up-to-date (Łopuski, 2000).

The genesis of the institution of general average

The very source of the term “average” itself is not unambiguous and obvious. It has been pointed out, however, that most likely this word was found in Arabic, where *havar* means “damage”. Here it is characteristic that the construction of this word in other European languages is very similar – in Spanish: *averia*, in French: *avarie*, in German: *Haverei*, in English: *average*, in Italian: *avaria*, in Russian: *Awarija*, or in Polish: *awaria* (Matysik, 1975; Łopuski, 1982).

At the root of general average is the fundamental principle that any damage suffered in the common interest of persons engaged in a particular maritime business enterprise should be apportioned proportionally among all the participants of the enterprise (Młynarczyk, 1997). The ancient inhabitants of the

Greek island of Rhodes used such a legal concept as the first one during the first centuries BC (Nawrot, 2019). This was reflected in the writings of Roman lawyers from the 1st century BC, where the legal solutions adopted by the Rhodes islanders as *De lege Rhodia de iactu* (the Rhodian sea law on jettison) were defined. The key to understanding the essence of this concept introduced by the ancient Greeks is the following passage of writing: “*The Rhodian law observes the principle that when goods are cast off the ship to relieve the burden of the ship, the loss should be suffered by all involved, because the loss was suffered for the good of all*” (Matysik, 1975). This was therefore the case when cargo was sacrificed by throwing it into the sea in order to save the ship and the remaining part of the cargo (Łopuski, 1982). In the following centuries, the idea of general average developed not only in the Mediterranean basin (here one can mention *Consolato del mare* from the 15th century), but also in the northern part of Europe, as exemplified by the French *Guidon de la mer* from the end of the 16th century, *Ordonnance de la marine* from 1681 or the Ordinance of the city of Rotterdam of 1721 (Matysik, 1975).

It was not until the first half of the 19th century that individual states would regulate the issue of the general average in a separate and individual way. With the passage of time, however, and in view of practical problems arising from its application (in particular situations, in which adjusting general average would mean concerned persons coming from several countries), there would surface postulates to unify the law on the common average (Matysik, 1975). The first rules relating to the international regulation of general average were adopted in York in 1864 (called the York Rules). Thereupon, in 1877, in Antwerp, after further amendments, the rules were renamed the York-Antwerp Rules (*York-Antwerp Rules, YAR*) (Pyc & Zuzewicz-Wiewiórowska, 2012a). These rules would later be revised and amended. At around the middle of the 20th century, the International Maritime Committee, based in Antwerp (*Comité Maritime International, CMI*), was entrusted with work to further reform and amend the international regulation of general average. The Committee is the oldest (founded in 1897) non-profit non-governmental organization in the world, whose aim is to unify international regulations concerning maritime law (CMI, 2019a). The International Maritime Committee currently brings together dozens of national maritime law associations from all over the world. The Polish Maritime Law Association of Szczecin [*Polskie Stowarzyszenie Prawa Morskiego*

w Szczecinie] is also a member of the CMI. The York-Antwerp Rules have been repeatedly reviewed and updated by the International Maritime Committee (e.g. in 1990, 1994, 2004; the latest version dates back to 2016).

Legal regulations on general average in Poland

Under Polish maritime law general average is regulated by the Act of 18 September 2001 – Maritime Code (Section I, Title VII – Maritime Accidents) (Official Journal, 2018). The subject of the regulation concerning general average encompasses a rather narrow scope of matters, i.e. the definition of general average, the rules for allocating losses in general average, a special procedure for determining whether there is general average, calculation of the amount of the losses under general average and their allocation and the time bar for claims.

Therefore, in accordance with Art. 250 § 1 of the Maritime Code, general average is defined as an extraordinary sacrifice, or expenses deliberately and reasonably incurred, in order to save a ship, her cargo carried on her and the freight on account of a common peril. It may be noted, therefore, that the definition in the Polish Maritime Code corresponds, in principle, to the one describing the essence of general average in Rule A of the York-Antwerp Rules: “*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*” (CMI, 2019b).

Article 250 § 2 of the Maritime Code adds that: “*The general average includes only those losses, which are a direct consequence of an act of the general average. Indirect losses, such as losses from demurrage or price differences, do not fall within the general average*”. Again, the regulation in Polish law corresponds to the principles adopted in this respect in the York-Antwerp Rules and, in particular, Rule C, points 1 and 3: “*Only such losses, damages or expenses which are the direct consequences of the general average act shall be allowed as general average. Demurrage, loss of market, and any loss or damage sustained or expense incurred by reason of delay, whether on the voyage or subsequently, and any indirect loss whatsoever, shall not be allowed as general average*” (CMI, 2019b).

According to the above text, and under Polish law, the characteristics of this institution are that an

act of general average only includes “sacrifice or expenses” which are “extraordinary”, i.e. that they should not result from the normal, ordinary operation of a ship, cargo transport or ordinary cargo expenditure (Matysik, 1975).

Moreover, the expenses have to be incurred “deliberately and reasonably” and “in order to save the ship, cargo and freight from a common peril”. However, this “peril” needs to be substantial and sufficiently serious to justify losses under general average and as well as “common” (and therefore must not endanger only the ship or only her cargo (Łopuski, 1965)). All the above mentioned prerequisites comprising the definition of general average have to be fulfilled cumulatively.

The Polish Maritime Code also provides a number of basic principles concerning the allocation of general average losses. Therefore:

- 1) General average losses are apportioned between the ship, cargo and freight according to their actual values at the place and time at which the adventure is concluded (this principle was adopted in Rule G of the YAR) (Pyc & Zużewicz-Wiewiórowska, 2012b).
- 2) General average losses are apportioned even if the peril that gave rise to the extraordinary sacrifices or expenses were attributable to any of the participants in the general average act or to a third party (but such apportionment of losses does not deprive a participant in the general average act of their reverse right to seek reimbursement from the person whose fault caused the losses).
- 3) Apportionment of losses under general average is also to be carried out, where an act of general average has failed to produce the intended result and also where the sacrifice affected the whole vessel or her entire cargo.
- 4) Losses resulting from the loss of, or damage to, some cargo, which has been loaded on to a ship without the knowledge of the shipowner or which has been misstated on acceptance for its carriage are not to be considered as general average; however, such cargo, if salvaged, shall be involved in paying contributions to general average following general principles.
- 5) Losses resulting from the loss of, or damage to, cargo whose value, on acceptance for carriage, was declared below its actual value, is to be treated as general average at its declared value, while obligations encumbered upon the cargo by reason of participation in general average are determined based on its actual value.

The Polish legal system makes a clear distinction between general average and particular average. The latter consists of all damage and losses from a ship, cargo or freight, which do not fall within general average – the damage and losses are borne by the aggrieved party or the person liable for them. Due to the fundamental difference between the nature and legal consequences of an act of general average and particular average, it should be emphasized that the master of a ship should know the characteristic features of general average and be able to distinguish it from an individual average in order to apply the appropriate emergency procedures (Anderson, Measures & Mohamedi, 1997; Łopuski, 1965).

By way of example, typical acts of general average are as follows:

- a) Jettison of cargo (one needs to note, however, that pursuant to Rule I of the YAR: “*No jettison of cargo shall be allowed as general average, unless such cargo is carried in accordance with the recognised custom of the trade*”);
- b) Destruction of, or damage to, cargo or a ship in order to extinguish a fire (respective Rule III of the YAR reads as follows: “*Damage done to a ship and cargo, or either of them, by water or otherwise, including damage by beaching or scuttling a burning ship, in extinguishing a fire on board the ship, shall be allowed as general average; except that no allowance shall be made for damage by smoke however caused or by heat of the fire*”);
- c) Voluntary stranding (pursuant to Rule V of the YAR: “*When a ship is intentionally run on shore for the common safety, whether or not she might have been driven on shore, the consequent loss or damage to the property involved in the common maritime adventure shall be allowed in general average*” (CMI, 2019b).

Average adjustment and average procedure

In accordance with Polish maritime law, it is the average adjuster who determines whether there is general average, calculates the amount of losses under general average and distributes (“dispatches”) them on behalf of the shipowner (Judgment of the Appeal Court of Gdańsk, 1972; Górski et al., 1974). Such an order should be given to the adjuster by the shipowner immediately after the end of a journey, but not later than one month. In case of delay by the shipowner, the order may be given by another participant of the general average.

Detailed general average adjustments are done by the adjuster by applying, in the absence of an agreement between the parties, the rules generally accepted in international maritime trade. This expression: “the rules generally accepted in international maritime trade” means that here the Polish legislation applies one of the two most frequently occurring legislative techniques concerning the reception of the York-Antwerp Rules (which are not, after all, a binding international agreement) – with reference to these Rules (Judgment of the Appeal Court of Gdańsk, 1994; Łopuski, 1996a; Pyć & Zużewicz-Wiewiórska, 2012c). The other method used in other countries is to translate the YAR as faithfully as possible and make them a relatively binding law (Matysik, 1975). The solution adopted by the Polish legislation is the only direct reference to customary international law in the maritime code (Łopuski, 2000).

Only a person entered on the list of adjusters, kept by the Chairman of the Polish Chamber of Commerce, may be the adjuster. A person is only enrolled on the list of adjusters if they meet the qualification requirements provided by the Regulations of the Minister of Infrastructure of 14 April 2004 on the appointment of adjusters and adjustment procedure (Official Journal, 2004). Thus, in accordance with the Regulations, a person may be appointed as the adjuster if they:

- 1) Benefit fully from public rights.
- 2) Enjoy full legal capacity.
- 3) Have an impeccable reputation and give a guarantee of the proper performance of the duties of the adjuster.
- 4) Have a university degree in law, economics or a diploma of a master mariner, speaks fluent English and has practical knowledge of maritime law and the customs of international maritime trade.
- 5) Have demonstrated at least 5 years in dealing with matters relating to general average.
- 6) Have passed an examination on the average adjuster’s practice.

Participants of general average should provide the documents or explanations necessary to perform general average activities within the time limit set by the adjuster. After the lapse of the prescribed ineffective time limit, general average activities may be performed on the basis of the documents and explanations possessed by the adjuster. If the adjuster determines that there is no general average, the adjuster will refuse to prepare general average. In such a situation, the refusal to prepare general average is accompanied by a justification. General average documents and,

in particular, an excerpt from general average and refusal to prepare general average, should include the date and place the document was issued, the name and surname of the adjuster who performed the general average activities, and the signature and seal of the adjuster. The adjuster notifies, against a return receipt, any known participants of general average about the end of the general average procedure, and, if general average has been prepared, sends them the general average or an excerpt from the general average. The date of the end of the general average procedure is the date of the service of the general average or an extract from it or the notification of refusal to prepare general average.

A claim under general average is time-barred within two years from the date of the completion of a journey. Except that the time bar stops being counted during the communication of a claim to the adjuster. The counting resumes as of the date of the service of general average.

Arguments in favour of maintaining the institution of general average or its liquidation (or a limitation of the scope of its application)

It is difficult to find a clear and unambiguous justification for the concept of general average generally, and for its continued existence in modern conditions of international maritime transport in particular, which does not give rise to any reservations or doubts. It is assumed that, at the basis of this institution invented by the ancient Greeks, had lain (lies) the principle of equity, which boils down to the fact that a common sea adventure of a ship and her cargo created a kind of community property. Each such community, on the other hand, caused by acting in the common interest of the participants of such a venture should result in spreading the risk of any potential damage onto all those involved in such an adventure (Matysik, 1975; Łopuski, 1996b).

The institution of general average has been criticized for its anachronistic nature. It has been argued that, given the expansion and development of the marine insurance market, general average is no longer useful and, as such, is redundant. Another argument of the maritime doctrine and practice is the excessive complexity of adjusting damage, for example the lengthy process of such a procedure and its high costs, as well as the fact that it places the carrier in a privileged position over the interest in the cargo (Młynarczyk, 1997). This results in a postulation to limit the use of general average in practice, or

to even eliminate it completely (as a legal institution) from modern commercial shipping. Although critics of the practice claim that the general average nowadays only favours carriers (their underwriters) and adjusters themselves, it should be remembered that this institution is still (although to a limited extent) used in shipping (tramp shipping in particular). In this context, a certain “value” of this institution is that it is relatively uniformly regulated (YAR) at the international level and although the York-Antwerp Rules do not have the character of an international agreement, such regulation facilitates the application of the institution in the practice of international maritime trade. To recap, and given the arguments for and against general average, one should share the view of the literature which emphasizes that although general average is indeed an anachronistic construction,... it is still needed in international maritime transport (Matysik, 1975).

Conclusions

The above characteristics of general average on the basis of the legislative solutions in Poland show that the essence, purpose and legal character of the regulations introduced by the Polish legislation, in the area of maritime law, are closely correlated, associated and consistent with the principles generally accepted in international maritime trade in the area of general average.

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