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Article- “Types of Average in Maritime Transportation”



June 4th 2021- The transformation and expansion of international logistical infrastructure, with new technologies, to cite but a few examples, will demand new solutions and specialisms.

We refer here to the professionals who work with vessels, transport companies, logistical operators, port terminals, cargo transfer stations for inland waterway transports, railway operators, insurers, brokers, reinsurers, as well as risk management consultants, lawyers and loss adjusters who also operate in this market.

A situation that arises a lot in international maritime transport is the **GENERAL AVERAGE**.

The linguistic origin of the term **AVERAGE** is in the Arab word “awâr”, which means a defect.

To better understand the concept, it helps to differentiate **Gross Average, Simple Average and/or Particular Average from Severe Average**, which article 763 of the Code of Commerce defines as follows:

Averages shall be:

General or gross average, and simple or particular average. In the first instance, the value of the loss is shared proportionally between the vessel, freight and cargo; and in the second instance, the value of the loss corresponds only to the vessel or only to the element that sustained the damage or caused the cost.

The common, simple and/or particular average is the damage that affects only the vessel or cargo during the risk period. Only the charterer or the owner of the damaged merchandise is affected and the loss is borne by one single party.

General average: all or any extraordinary damage or cost that results from an intentional, deliberate or voluntary action of the captain of the vessel, with the purpose of maintaining the safety of the vessel and its cargo, in a situation of real or imminent danger, in order to avoid greater harm to the maritime expedition. In this case, the costs are apportioned amongst the owners and/or the consignees of the transported cargo and by the carrier / vessel. In this sense, it is important to note that the concept of gross average does not imply any culpable liability, and furthermore, there is no reason to invoke the gross average if at the time of the loss or expense, the vessel was empty.

To be able to invoke the General Average, there must have been an effectively wilful participation (i.e. a deliberate act) committed by the crew for the common good, in the face of an unforeseen and imminent danger or disaster, even if it required sacrificing private interests and jettisoning the cargo.

Jettisoning, in other words, the elimination or act of dumping or disposing of something, is the act of throwing the cargo/pieces of cargo that are on board a vessel over the side, for the purposes of protecting the vessel and ensuring the preservation of other merchandise present on the vessel, which may not have to be jettisoned.

In this context and as a consequence, it is necessary to compensate the parties affected by the events, considered as an incident in maritime transport, so that not only one party to the transport operation is overburdened by the loss.

In summary, all the persons with an interest in the transport operation will contribute proportionally to paying the indemnity, forming a simultaneous relationship of rights, obligations and duty between the parties.

Having reinforced the points above, we have articles 784 and 785 of the Code of Commerce, which address the payment guarantee for the contributing share:

Art. 784 – The captain has the right to demand, before opening the vessel's hatchways, that the consignees of the cargo guarantee payment of the gross average, to which they are obliged for their respective goods, in the prorating of the common contribution.

Art. 785 – If the consignees refuse to provide that guarantee, the captain may demand the deposit of a legal bond for the effects demanded for the contribution, until such time as payment is made, subrogating the sales price, to pay for the gross average, as soon as the distribution is made.

Moving on, it is important to highlight how the liabilities are calculated, a point which is addressed in article 787 of the Code of Commerce, which states:

Art. 787 – When gross or general averages are settled at the port of cargo delivery, the parties who will contribute to its composition shall be: See subject.

1 – the cargo, including moneys, silver, gold, precious stones and all other values that are on board

2 – the vessel and its belongings, as per the appraisal made in the port where the cargo is unloaded, irrespective of its state;

3 – freight, likewise at half its value.

The contribution does not include the value of provisions on board for maintenance of the vessel, the luggage of the captain, crew and passengers, which is for their personal use, or any elements recovered from the sea by divers at the cost of the owners.

For the purposes of regulating the General Average, two forms sent by the charterer are required (Average Bond and Average Guarantee).

These documents must be filled-in with the containers and data of the Bills of Lading, signed, sealed and sent together with a copy of the invoice to the appointed Average Adjuster.

The Average Bond must be filled-in by the consignees while the Average Guarantee must be filled-in by the insurers. The terms, as well as other details and legal procedures required for the resolution of the claim and total release of the cargos for nationalisation at the destination country, must be sent quickly and signed by the corresponding parties.

Furthermore, the General Average costs will be covered by international transport insurers. For the carriers with insurance, the insurers in charge will mediate and coordinate all the protective measures for the insured cargo.

If the company does not have international transport insurance, it must make a legal deposit in the account indicated by the ship owner, corresponding to the amount defined as its share in the Gross Average. Otherwise, the company will not receive its cargo and it's possible that it will have to pay the costs of delays and storage until the problem is solved, which does not tend to occur at all quickly.

The General Average is regulated by the York Antwerp Rules, the terms of which are incorporated into commercial international maritime contracts. They were originally created in the city of York in 1864 and later, after being subjected to debate, they were implemented in the city of Antwerp and came to be known as the York Antwerp Rules.

They underwent important revisions between 1924 and 1974, the latter being the year of the Hamburg Conference, which gave rise to their current incarnation. The rules are ordered alphabetically (from A to G) and numerically (in Roman Numerals I to XXII); the first section referring to the founding, nature and liability for the average, with the second referring to costs included and excluded, as well as interests, subsidies, deposits and deductions. If there is a discrepancy between the two, the rules defined with letters shall prevail. The York Antwerp Rules were revised in 1890, 1903, 1924, 1974, 1994, 2004 and 2016.

Finally, due to the particularities and complexity of these types of claim regulations, it is important to pay a lot of attention to the root causes that resulted in the Declaration of the General Average, whether they are truly sustainable, if they have a causal link. In summary, it is essential to carry out a proper and critical analysis so that the interests of the other parties involved are not harmed.

Carriers would be well reminded to always contract transport insurance, to ensure they will be duly supported and protected in situations as complex as these.