

Charting the General Average in KSA

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In abstract the principle remains almost the same everywhere in the world; nonetheless it ranges in application according to jurisdiction and contract. This article analyses the general average from a domestic perspective to Kingdom of Saudi Arabia (“KSA”) while drawing comparisons with the international practice.

So what is General Average?

The question of general average will face the shipmaster when there is a “force majeure” event (e.g. piracy, fire, powerful storms, etc.) that causes the parties to the sea venture to face probable and foreseeable perils. In such a case of emergency, the shipmaster has to make a choice to alleviate what could be a greater loss by voluntarily jettisoning some of the cargo off-board to save the remainder of cargo and the ship. The basic principle for general average can be summarised as follows:

“that which have been sacrificed for the benefit of all, shall be made good by the contribution of all”

In essence, the general average would result in changing the original legal positions of the parties and redistributes it amongst them according to the risk of peril, so they will be placed in new positions compelling them to share the loss with one another. This principle is also known in Arabic as Qismat Ghorama’a.

As a result of the law of general average, there are many variances in practice as to who should bear the loss, the applicable rules, and how and where to bring a claim.

The Law of General Average in KSA

In the KSA, maritime law is governed by the Commercial Court Law (“CCL”) of 1931. In the absence of a prior agreement amongst the parties on the rules to administer general average, the adjustment of the claim, the Saudi courts will review the proceedings in accordance with Chapter 12 of the CCL.

Chapter 12 of the CCL has 32 articles dealing with the definition and rules of treatment for maritime losses, the required declarations by the shipmaster and others, the adjustment of values and the production of documentary evidence, and the duties of the parties concerned.

In addition to the principals outlined in Chapter 12 of CCL, Saudi Courts may take into account the contractual rules of adjusting and claiming general average. These rules are typically included in charter agreements, bills of lading, contracts of freight, and marine insurance policies. The most internationally recognized standards for average adjusting are the York-Antwerp Rules (“YAR”) of 1974 later amended in 1994, and these will be recognized in KSA.

It is important to note that other local KSA laws may potentially be concerned with the general average adjustment and claim: The law of Procedure before Shariah Courts provides guidance to the local

conventional litigation process; the Saudi Law of Arbitration oversees aspects of local arbitration; and the Saudi Enforcement Law introduces requisites and directions to the enforcement thereof, in addition to the enforcement of foreign judgments and arbitral awards.

Adjustment of General Average in KSA

The general average undergoes two main phases in KSA. First, the advisory phase of adjusting the claim, which is essentially when the claim of average derives merit. Second, is the litigation phase when the claim is raised seeking accreditation and enforcement of the adjustment on the contributing party. The treatment of average adjusting is stipulated in both the CCL and the YAR.

According to the CCL, the shipmaster has to, as soon as possible, declare the state of general average and report the same to the shipowners and the other interest holders. Furthermore, the shipmaster and his fellow marine advisors would have to collectively “sign off” on their official report that would include a description of the events, justifications of sacrifice, and the list of the items jettisoned or damaged in the wake of the event.

Following the official report, interest holders should file a request with an accredited Average Adjuster for adjusting the loss. The Average Adjuster is a specialized professional authorized to administer and advise on the general average. Normally the Average Adjuster expert is appointed by the shipowners who incurred the initial expenses and perhaps most of the loss, yet he will act independently of their influence to administer the adjustment fairly amongst the parties. Hence, the Average Adjuster effectively takes over the administration of the failed voyage and manages its settlement going forward; as such he is responsible for collecting and admitting evidence and relevant persons, manages the guaranties and accounts, registers objections, and produces a conclusive advice on the average adjustment.

The amount of general average will include the cost of repairing the ship, loss freight to the unfinished journey, and the cost to cargo owners where their goods have been partially lost or have diminished in value. The value for items under adjustment will be settled according to the net value at the place and time of terminating the sea venture, taking into account of original values as ascertained by their respective invoices. According to the CCL, the value of the cargo is to be calculated as actual value but the value for the ship and freight is only to be considered for one half of its actual value. Eventually contributing values will be settled in proportion to each party’s respective value.

The General Average Claim in KSA

After the adjustment is completed by the Average Adjuster, it is possible that legal proceedings may be commenced by an interested party to seek the adjustment by KSA Courts or an arbitration tribunal, and also to obtain effective enforcement of such on the defaulting party.

The KSA has no devoted maritime courts, but it has specialized commercial courts or circuits with subject matter jurisdiction over maritime claims and damages including that of general average. International claimants should be aware that Saudi courts honour arbitration clauses regarding general average and the CCL, the parties may agree to arbitration.

A Comparative Glance

The practice of general average in KSA has particular nuances and it is possible to draw a few comparisons to the practice between the CCL and the YAR. It is fair to say that, the CCL is written as a classical civil text and uses such terms as “grave harm” or “general losses” when referring to the general average incident. Conversely, the YAR is a set of modern common law rules that are perhaps more comprehensive and organized with clear subheadings and lettered and numerical rules.

According to the CCL, maritime losses come in one of two categories; they would either be solely and privately borne or they would commonly and collectively contribute for. To differentiate between private

and general losses the CCL applies a three-tier test on the sacrifice; (i) whether it was for the common safety, (ii) whether it was extraordinary, and (iii) whether it was intentional or voluntary.

The YAR also requires all of the said three elements in addition to a fourth element to the standard for the determination of peril; whether it was imminent or whether it could have been avoidable. The YAR is more strict than the CCL as it enables the court to review the shipmaster's "discretionary power" in declaring the event, whereas under the YAR his discretion is subjected to a heightened standard of reasonableness, so much so that the YAR would only admit the general average claim if there was a truly imminent peril and not just a looming one. This qualitative requirement means that the shipmaster cannot take a subjective decision for following precautionary measures and expect the loss to be adjusted as general average. The CCL significantly differs from the YAR as it does enable the court to check the shipmaster decision, as we further explain below.

The CCL imposes a different standard of reasonableness on the shipmaster decision. The threshold test requires that the shipmaster only need to obtain a secondary opinion from his marine advisors and that the items are jettisoned in specific order. According to the CCL, if the shipmaster decided to jettison any items off-board, even as a precautionary measure to escape peril or harbour into safety, he would only need to obtain the advice of his veteran marine navigators and also cargo interest holders if any of them were on board the ship. Also, the master must abide by the following order of jettisoning; (1) the least necessary, (2) the heaviest load, (4) the least valuable, and then (5) items stored on the deck after seeking the advice of veteran marine navigators. This means that even the shipmaster precautionary measures may be considered a reasonable loss and thus may be included in the average adjusting, as long as the shipmaster has followed the procedure to the letter and obtained his advisors consensus to validate his concerns and proposed measures.

Moreover, the CCL lists 6 types of private losses (known as the negative list) to be excluded from what is to be commonly shared by the parties. This negative list is as follows: (1) vessel malfunction, (2) expenditure for salvaging the ship and its cargo, (3) ship mass and ropes lost due to sea perils, (4) replenishment and repair expenditure for emergency docking at refuge port, (5) sailors accommodation expenditure in case of vessel arrest, (6) losses befalling the vessel or its freight.

Conversely and to the exclusion of the aforesaid negative list, the CCL lists 13 types of general average losses beginning with pirate ransom and ending with erecting a temporary dock for the ship. All of the 13 types summarised under one definition pointed in the CCL as follows: "all the harms and damages and expenditure sustained voluntarily, for the entire duration of the event, and for the benefit and safety of all, as reported by the master and navigators".

A final comparison on the treatment of salvaged goods under KSA law is particularly important with regards to the respective duties to the preservation of cargo. For instance, the YAR allows the interested party to withhold from releasing the salvaged goods as considers the goods to be a direct lien for guaranteeing average contribution. In contrast in KSA law, the CCL prohibits such practice and only awards the interested party with a lien over the goods value post liquidation. Intuitively, the CCL also imposes a duty on the shipmaster and interested parties to preserve the cargo by liquidating remaining assets with haste before further deterioration occurs.

A Local Merchant View

The international Saudi merchant should be alert and prepare for a general average event. If the unlikely event happens, he may be required to undertake a cash deposit or a bond to release the remaining cargo. The purchase of an insurance policy with adequate coverage to the general average could save valuable recourses from being locked on account for a prolonged time. Considering that the average bond could potentially exceed the value of the original investment, marine insurance coverage is a sound investment. In return to its financial bail, the insurance company may ask the merchant to relinquish ownership rights over the salvaged goods or its sale value. If the merchant defaults, or instruct the insurance company to

default, he could be at risk of losing the right to object to the settlement and perhaps worse as he may lose the right to receive the rest of his cargo.

It is strongly advised that any Saudi merchant and others taking over his rights and position should seek professional advice as soon as the general average is declared. By doing so, the Saudi merchant will be able to understand their rights and obligations from the very beginning, and will be able to be prepared to face the peril and the consequences that follow.