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GENERAL AVERAGE IN MARITIME LAW

As we have noticed in the past few months, there have been legal deliberations and discussion on clauses in agreements that most of us take for granted; these clauses are commonly categorized as general clauses. However, the last one year has taught us that we are living in a time where situations are changing rapidly, whilst we coping with adaption to a new normal. In the midst of all the chaos and confusion caused by COVID-19, the event of the mega container vessel "Ever Given" lodging herself in the Suez Canal, has also shifted the focus on the legal implication and effect of a tiny clause on "general average" embedded in the Bill of Lading. Through this article, we shall have an insight into this clause without getting entangled in the legal nitty-gritty of the current event, which has trigged discussions in this area.

According to Black's Law Dictionary "general average" is defined as "Average resulting from an intentional partial sacrifice of ship or cargo to avoid total loss. The liability is shared by all parties who had an interest in the average." In layman's terms, general average is a legal principle of Maritime Law under which, all parties who are involved in the voyage, are asked to proportionally share the losses resulting from sacrifice made during the voyage. That being said, general average can only be invoked when certain extraordinary sacrifices are made, or expenses incurred to avert a peril that threatens the entire voyage. In such cases the party sustaining the loss confers a common benefit on all the parties to the maritime ventures. Here the party suffering the loss, apart from contract or tort has a right to claim contribution from all participating in the venture.

THOUGHT for the MONTH

"Have the Courage to follow your Heart and Intuitions. They somehow know what you truly want to become"

- STEVE JOBS

Callidus

The doctrine of general average is of ancient origin based on the principle of equity and can be traced back to Rhodian Sea Law, which was a body of regulations governing commercial trade and navigation in the Mediterranean Sea during 800-600 BC. A part of the law dealt with, jettison which is a rule of maritime law which exists today under the name "general average". The Rhodian Sea Law was subsequently adopted by Roman jurisprudence which influenced the rule making activities by all parties involved in long distance sea transport which rolled into the Middle Ages. In the 13th and 14th centuries, Byzantine sea commerce dwindled, and eventually the law became obsolete. The practice of general average was later, formally adopted by the global shipping community under what is known as the York-Antwerp rules 1890. The rules are part of generally accepted maritime insurance principles that undergo regular amendment, the most recent being in 2016.

The York-Antwerp rules sets the guidelines regarding sacrifices and/ or expenditures that can be included for general average contribution and which cannot be included. As per general average, each party will pay the same percentage of amount that they have saved. The process however is much more complicated than we can image, as some parties may be shipping cargo or low value like scrap material, while others more expensive cargo like high class furniture or luxury vehicles etc. Hence without defined set of rules cargo interest may not be willing to bear the blunt let alone to share voyage, fuel cost or crew wages and the like. This is where the York-Antwerp rule come into play.

As per the Rule of Interpretation under the York-Antwerp Rules 2016, except as provided by the Rule Paramount and the numbered Rules, general average shall be adjusted according to the lettered Rules.

Let us therefore look as what are this so called Rule Paramount, the Lettered Rules and the Numbered Rules –

Rule Paramount - In no case shall there be any allowance for sacrifice or expenditure unless reasonably made or incurred.

Apart from this Rule the other Rules are categorised alphabetically from Rule A to Rule G these pertain mainly to general guidelines on what can be construed as general average; while the numerical rules i.e. Rule I to Rule XXIII are based on specific circumstances, sacrifices that can be made and expenditure sharing that can be included as general average.

Alphabetic/ Lettered Rules for basic understanding

Rule A, for instance prescribes the characteristics and extent to which general average will apply, stating in brief that, the expenditure or sacrifice needs to be extraordinary, the act must be intentional and for common safety and that there must be a peril.

Rule B states that the nature of operation undertaken must be commercial, with the measures taken to preserve the cargo and vessel or to prevent the peril.

Rule C enumerates that only losses, damages or expenses, which are the direct consequence of the general average act, shall be allowed as general average, while stating what is not included, like, damage to the environment, damage or loss on account of delay etc.

Rule D says that the right to contribute to the general average, is not affected by the onus on the party who has or has not defaulted, hence all parties have to contribute to the general average.

Rule E the onus of proof is upon the party claiming general average; the issuance of notice for general average to all parties and to the average adjuster, limitation etc.

Rule F expenses and extent to be included in general average.

Rule G that general average is to be adjusted in relation to loss and contribution on values at the time and place when the common maritime adventure ends and the proportions

Numeric/Numbered Rules, randomly selected for comprehension

Rule I – Jettison of cargo when permitted

Rule VI – Salvage Remuneration

Rule X – Expenses at Port of Refuge etc.

Rule XI – Wages and Maintenance of Crew and Other Expenses Putting in to and at a Port of Refuge, etc

Rule XIII – Deductions from Cost of Repairs

Rule XVI – Amount to be Allowed for Cargo Lost or Damaged by Sacrifice

Rule XIX – Undeclared or Wrongfully Declared Cargo

Rule XXIII – Time Bar for Contributing to General Average

The York-Antwerp rules and principle of general average have legal force only if these are included in the bill of lading or charter party agreement.

General Average declaration and its impact mainly on cargo interests

Usually once general average is declared an average adjuster is appointed, whose duty it is to collect all the information in relation to the cargo and make a statement of general average contribution of each party, collect general average security from each party and assist in impartial and effective settlement of the general average.

The general average clause is seen on most carrier's bills of lading which binds all interested in the cargo, carried by the vessel. General average losses are commonly included in standard marine insurance policies, hence it is firstly pertinent for the cargo owners and those interested in the cargo, to ensure that they have

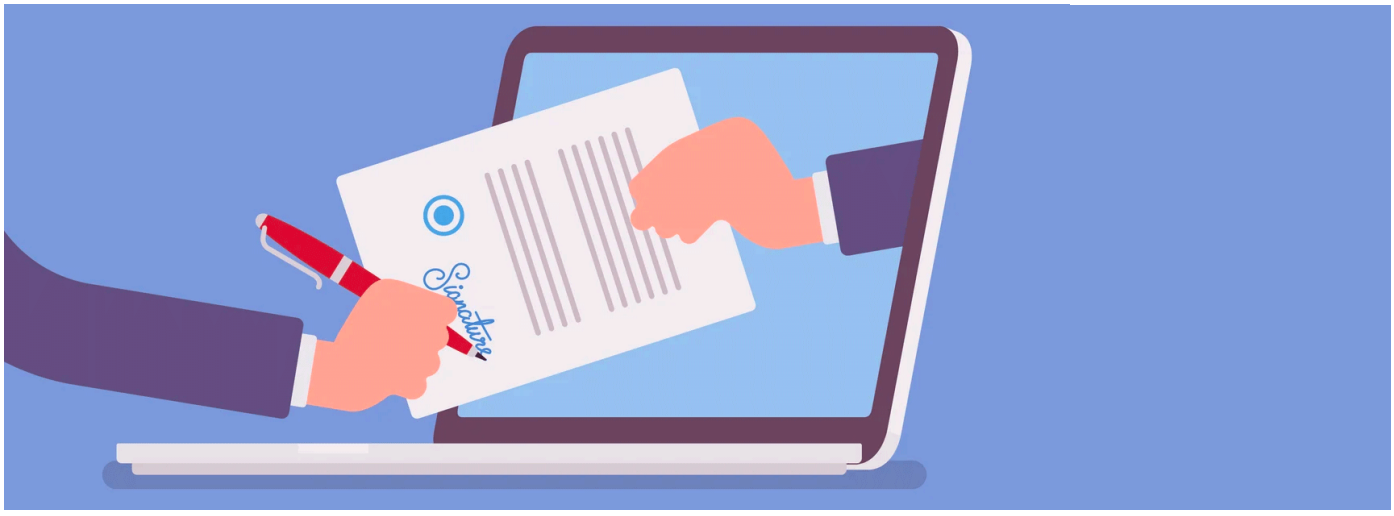
appropriate marine insurance cover, for their goods on board. A declaration of general average can put the owner of uninsured cargo in jeopardy and the cargo could be lost/forfeited, as the vessel owner, as per the clauses in the bill of lading may be in a position to exercise lien over the cargo till the general average contribution is paid.

Thanks to the York-Antwerp rules, the owner of the cargo, is not burdened with a huge liability and is only required to pay an amount proportionate to the value of the cargo that has been saved. Here it is the vessel owner who will need to bear the major chunk of the contribution towards the general average, as the costliest asset saved, is the vessel itself, in most cases. For instance, a ship owner may have to contribute upto 60% of the general average cost, leaving the remaining 40% to be divided amongst cargo owners, depending on the value of their cargo. This principle takes care of the small cargo or single container owners, in relation to owners having multiple containers or huge or expensive cargo, on the vessel.

Though the cargo owners need not pay their share, before they collect their cargoes, they need to provide a general average guarantee, mainly through their cargo insurers, or if they do not have any insurance, in the form of a bank guarantee or a bond or a cash deposit to cover their contribution. The general average contribution will be adjusted subsequently, by general average adjusters, which could take a couple of month to years, depending on the number of cargo interests involved. Despite there being an option to dispute or contest the general average contribution, this is rarely challenged in court, by the cargo owners, primarily due to legal complexity, time, money and effort involved.

To conclude, we need to pay careful attention to all clauses on the reverse side of the bill of lading, taking into account the liability that we may be exposed to, whilst verifying if the insurance cover is adequate. The York-Antwerp rules come as a consolation when general average is invoked, but we need to examine if there could be a better alternative to general average, given its complexity, expense and the time consumed, in finally settling the matter.

E-SIGNATURE FOR THE EXECUTION OF DOCUMENTS IN THE NEW ERA OF REMOTE WORKING



The current restrictions on travel, businesses and social distancing due to the current pandemic COVID 19 has made the simple process of signing and witnessing the legal documents or the business contracts very difficult, with the signatories either working from home or in isolation. In the last year, 2020, we see that most of the businesses have started to have virtual meetings instead of in – person meetings as it is not feasible to conduct business meetings in the same room, and then to circulate the hard copy of the signed documents in the current scenario. Since the traditional face-to-face meetings and signing of documents are no longer possible, the contracting parties had started looking for other alternatives to execute the agreements and contracts to take forward their businesses, and gradually, they have started thinking of using E-Signature to finalize/execute the deals, even when working from home.

An E-Signature or Electronic Signature is a legal way to get consent or approval on an electronic

documents or forms by replacing a handwritten signature, virtually. The ESIGN Act of USA, defines the term electronic signature as "an electronic sound, symbol, or process attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the contract or the record." The UNCITRAL Model Law on Electronic Signature was adopted in 2001, to enable and facilitate the use of electronic signature by establishing criteria of technical consistency for the equivalence between electronic and hand-written signature. This Model law applies where electronic signatures are used in the commercial activities and in order to legally recognize the electronic signatures, it should be reliable and appropriate for which the data message is generated and communicated. Further, to consider it as reliable, it should meet the 4 conditions – (1) it should be linked solely to the signatory; (2) it should be under the sole control of the signatory; (3) any alteration of the electronic signature, made after signing, shall be detectable; (4) where the purpose of the signature is to provide assurance as to the integrity of the underlying information, any alteration of that information shall be detectable. It also imposes a duty on the signatories to use reasonable care to avoid unauthorized use of their electronic signature.

Though most of the countries have adopted the UNCITRAL Model Law into their legislation, it is very important that the contracting parties are familiar with the law in the relevant jurisdiction to make sure that an agreement or contract bearing an electronic signature is legally binding in their respective countries. Most notable countries that have accepted the E-Signature through their local law: for eg., The Information Technology (Amendment) Act, 2008 in India; The Federal Electronic Signature in Global and National Commerce Act in the United States of America; The E-Commerce Law [Law No (1) of 2006 on Electronic Commerce and Transactions in United Arab Emirates; The Electronic Signatures and Certification Business (Act No. 102 of 2000) in Japan; Electronic Commerce Act, 2006 in Malaysia and considers E-Signatures as equivalent to the hand written signature.

When we note that almost all Countries have Statutes regarding E-Signatures, the Companies were/are still hesitant in adopting electronic signatures mainly due to its legality, cost of implementation and effort involved in it. The legality of the E-Signature is one of the main reasons which stop the companies to fully trust the E-Signature.

When all these above mentioned countries confirms that the E-Signature is considered in the same legal capacity as that of a hand written signature, they also allows an electronically executed agreement to be presented as evidence in a Court and also prevents the denial of its legal effect, validity or enforceability solely because it is in electronic form. However, it is also very important to note that the none of the aforementioned countries would accept documents like – The negotiable instruments like Promissory Note or a Bill of Exchange; Power of Attorney; Trust Deed, Wills or any other testamentary dispositions, Real Estate Contracts, or any other Agreements that requires Stamping/Attestation/ Notarization if it is executed electronically, with an E-Signature.

Further, when using an E-Signature, there is an underlying presumption that any document that is signed with an E-Signature is under the sole responsibility of the concerned party who has affixed the E-Signature. The owner of the E-Signature must be very careful because the E-Signature can be used to sign any legal transaction and the burden of proving the non-authenticity of the signature is on the person, who owns the E-Signature.

Usually, if a document with hand written signature is challenged before the Court of Law, the Court compares the copies of the signature along with the testimony of the handwriting experts or witnesses present at the time of signing the document to establish the validity of the signature. For E-Signature, there is no need for going through this expensive and time consuming process, since it can be proved with the help of IP address, Date, Time and Location, when the document was received, viewed and signed. As per experts, this is a more credible method of establishing evidence than a sworn statement of whether a document is sent through E-Mail.

This being the facts about the use of E-Signature, an emerging trend in the new era, while executing a commercial agreement, it is always suggested to include / fulfill the below points in the electronically signed agreements, for protecting the interest of the contracting parties.

1. Include a clause that suggests the consent of the contracting parties to sign the Agreement electronically and that it shall be considered as hand written signature for the purpose of enforceability;
2. Make available to the respective contracting parties, a fully executed copy of the Agreement.
3. Include a suitable governing law and jurisdiction clause, which provides the widest protection for E-signature.

With the current drastic shift in the business environment, the use of E-Signatures provides a way to enhance and simplify work. Trust and relationships built up over time would play an important role as deals are structured while face to face meetings remain constrained

HOT NEWS

DUBAI DISSOLVES SPECIAL TRIBUNAL FOR SETTLING DISPUTES WITH HOME LENDERS

On Monday 17th May 2021, the Hon'ble Ruler of Dubai, dissolved by a Decree, a special Tribunal that was formed to settle the disputes related to mortgage firm, Amlak Finance and Tamweel. The Special Tribunal which was formed by a Decree No. (61) Of 2009 had the jurisdiction to consider and adjudicate any request or claim submitted against Amlak Finance and Tamweel or any of their subsidiaries, including liquidation and dissolving request.

The new Decree annuls the Decree (61) of 2009 and any other legislation that contradicts or challenges its Articles. Pursuant to the new Decree, which will soon be published in the official gazette, all complaints and lawsuits that have been reviewed by the Special Tribunal and haven't received a final judgment will be referred to the concerned Court of First Instance at Dubai Courts.

Courtesy: Khaleej Times

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