

Navigating the Perils of General Average

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Ocean transportation procurement teams and vessel owners alike would do well to pay close attention to the effects of recent notable maritime perils that have triggered claims for general average. The running aground of both the Ever Given in the Suez Canal in March 2021 and the Ever Forward in the Chesapeake Bay in March 2022 are the latest losses to have made these issues headline news. Despite that the principle of general average dates back to the ancient Greeks, these perils have breathed new life into what were recently boilerplate general average provisions. Shippers and their carriers are seeking clarity about how to grapple with these revitalized terms and ways to prepare for the impact that general average claims may have on their legal and commercial interests.

The Law of General Average

The York Antwerp Rules set forth the rights and obligations of both vessel owners and cargo owners when any extraordinary sacrifice or expenditure is intentionally and reasonably made to preserve from peril the vessel, the crew, or the cargo involved in a common maritime venture. For a particular occurrence to constitute a general average loss, the following elements must exist: (1) a common danger to the ship, the cargo, or the crew, which is imminent and apparently inevitable unless there is a voluntary loss of some cargo to save the remainder of the cargo; (2) a voluntary jettison or casting away of part or all of the cargo to avoid the imminent peril to the vessel; and (3) any attempt to avoid the imminent peril of the vessel must be rendered successful. Under such circumstances, if the vessel is damaged or some cargo is lost or jettisoned, the loss or damage must be shared by all of the parties involved in the voyage in proportion to the value of each party's interest. Importantly, carriers can declare general average even where their own negligent navigational errors give rise to the circumstances that triggered the loss, as was the case with both the Ever Given and the Ever Forward.

The Declaration of General Average

The vessel owner may declare general average at any time after the vessel experiences extraordinary expenditures to save the vessel, the crew, or the cargo from peril, including expenses of common safety to complete the voyage, which would include ports of refuge costs, port dues, salvage, maintenance, and emergency repairs. After a declaration for general average is made, the right of a party's interest in the proceeds of the general average fund accrues and becomes enforceable once the voyage is complete, which is when the vessel arrives at its port of destination or calls upon a port of refuge. After the declaration is made, the vessel owner operates as a trustee of the general average fund, and the adjustment of the general average claims is determined pursuant to the York Antwerp Rules, which is carried out by an appointed general average adjuster.

Best Practices for General Average

General average claims must be submitted by the vessel owner's underwriters in writing to the general average adjuster within 12 months from the date of termination of the venture. Since the claims handling process and the complexities of recovering under a general average declaration can be long and costly, Shippers and carriers alike will be well served to implement best practices and pragmatic processes to prepare for a general average declaration by: (1) engaging in arms-length negotiations around the legal and commercial terms concerning general average; (2) procuring and maintaining adequate bonds or levels of cargo, property, and general average disbursements insurance; and (3) maintaining and preserving documents and records related to each movement, which will be needed to support a claim for general average.

While major supply chain disruptions have become ever-present with the effects of COVID-19 and the eruption of war in Ukraine, the recent maritime perils and disruptions in the headlines involve well-established principles where shippers and carriers alike look to navigate these losses as best as possible. The team at Benesch are well versed in all aspects of the ocean transportation market and global supply chains, including the impact of recent disruptions in these spaces, and are available to assist in developing pragmatic approaches to address these challenges.

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