

# General average – arbitration and litigation

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# Topics

- Issues involved in claiming and defending GA
- Claiming under bonds and guarantees
- Scope of the arbitration clause
- The arbitration process
- Which sets of rules apply
- Unseaworthiness defences
- The “Longchamp”

# Overview



- Liability for GA contributions arise independently of any contract.
- For a statutory definition of GA contribution, see s. 66(3) MIA 1906:

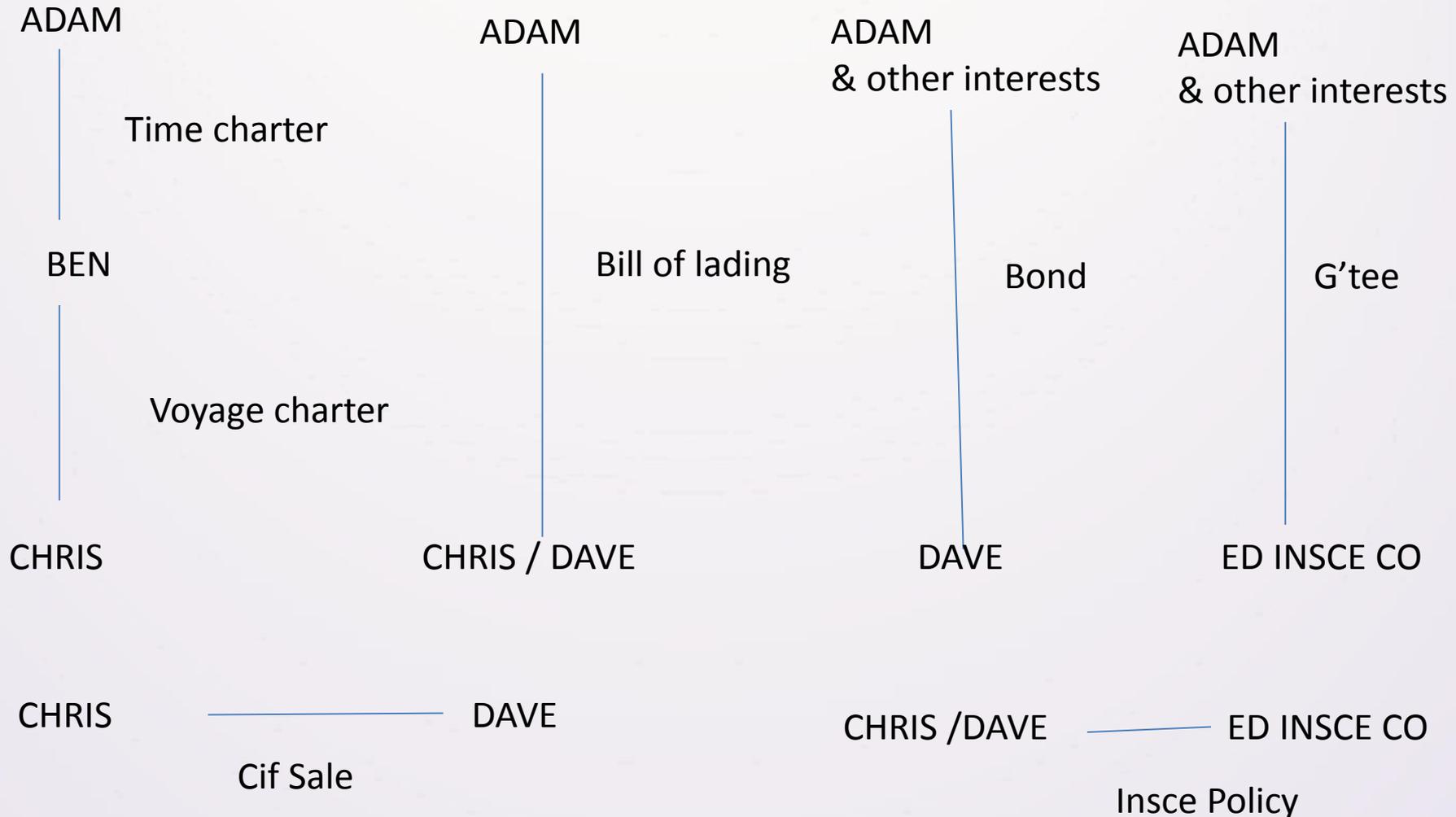
“Where there is a general average loss, the party on whom it falls is entitled, subject to the conditions imposed by maritime law, to a rateable contribution from the other parties interested, and such contribution is called a general average contribution”
- At common law, the obligation to pay general average arises at the time of the sacrifice or expense and rests on the owner of the cargo at that time.
- The common law position can be, and usually is, modified by contract, by a term in the charterparty or bills of lading (or both).
- This lecture seeks to identify the obligations owed under the individual contracts, and considers how those obligations can be enforced.

# The collision between “Snakes” and “Ladders” – The Facts



- The m.v. “Snakes” is a panamax bulk carrier.
- She suffers a collision with m.v. “Ladders” whilst making a bunkering call at Singapore.
- At the time of the collision, she is fully laden with a cargo of coal.
- There is rupturing to shellplating in way of Hold no. 2 and consequent water ingress.
- Professional salvors are engaged on LOF terms.
- The vessel is towed by salvors to a repair yard at Singapore.
- To facilitate repairs, the entirety of the cargo is discharged into barges.
- Wet cargo is sold locally.
- Sound cargo is transshipped to destination aboard substitute tonnage.
- GA is declared and security is taken in the form of an average bond and average guarantee.

# The Contracts



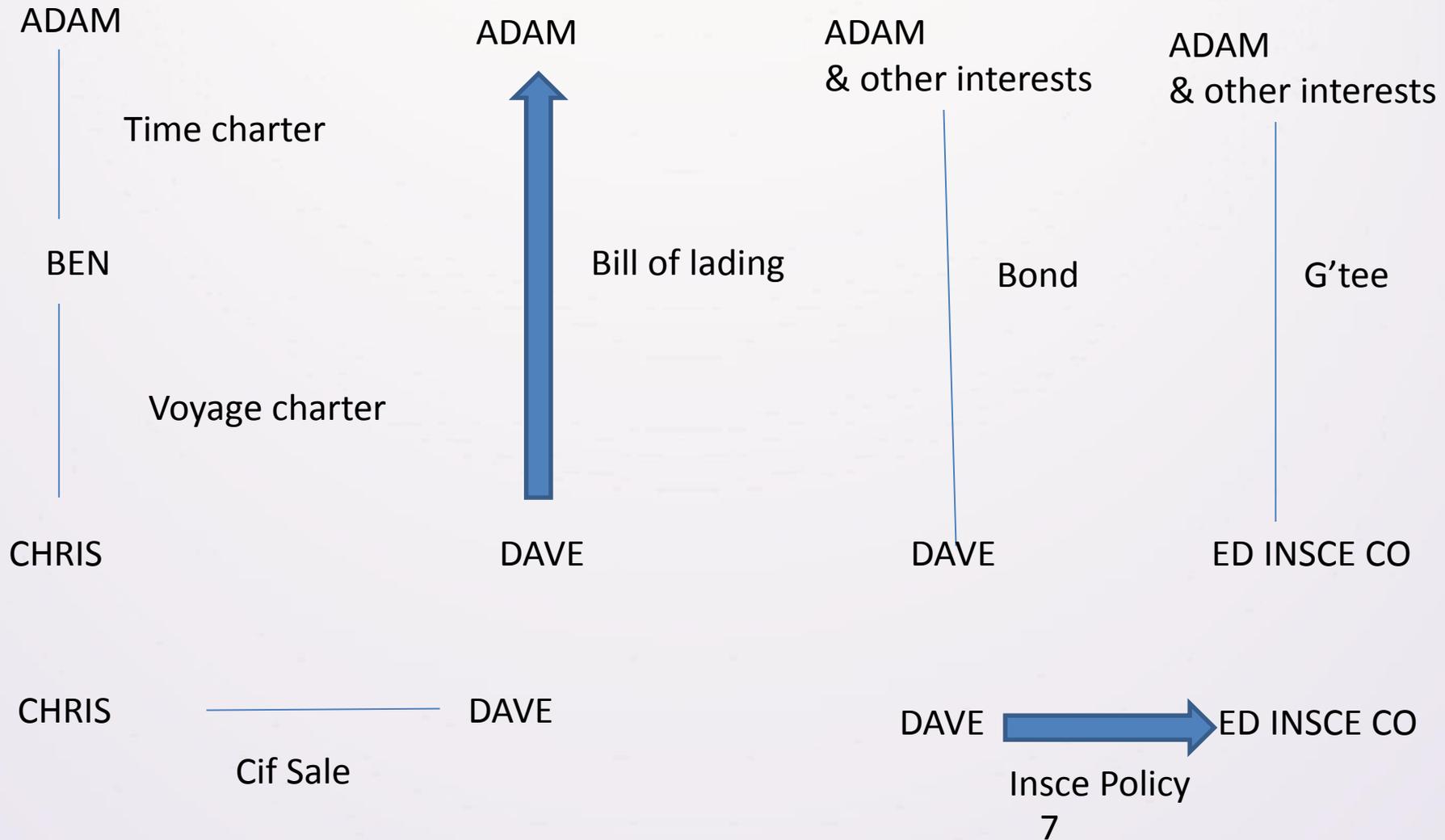
# The dispute



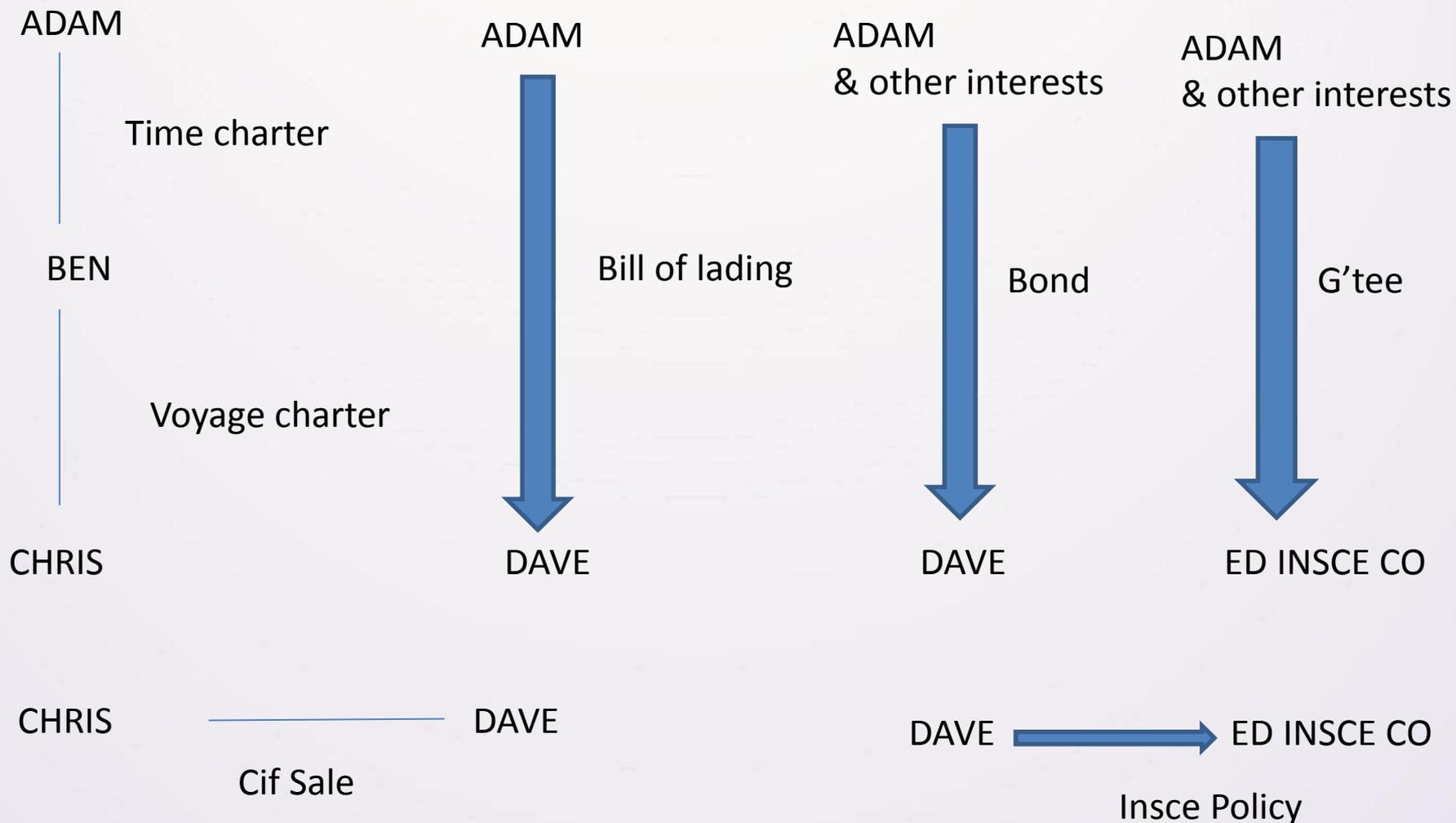
- Whilst the vessel was at Singapore for repairs, representatives of cargo interests & their insurers raised queries and requested that their surveyor be granted access to the vessel, but the requests were refused.
- Cargo interests reasonably suspected that the collision was due to a defective steering system.
- Cargo interests obtained a “Vasso Order” from the Commercial Court, following which their surveyor was granted access.
- In his report, the surveyor stated he had found evidence of defects in the steering system. He considered that these must have been present on commencement of the voyage; that they should have been rectified with the exercise of due diligence; and that the failure to do so caused the incident.
- The shipowner disputes this.
- Cargo interests wish to claim USD 850k for damage to cargo due to contamination with seawater.
- The shipowner wishes to claim UD 200k as cargo’s contribution to general average.

# Under which contracts can claims for damage to cargo be brought?

*(Assume risk and title passed upon shipment)*



# Under which contracts can claims for GA contribution be brought?



Now let's examine the individual contracts....

# Time charter on NYPE '93 form



*“General average shall be adjusted according to York-Antwerp Rules 1974, as amended 1990, or any subsequent modification in London and settled in USD currency.*

*The charterers shall procure that all bills of lading issued during the currency of the Charterparty will contain a provision to the effect that general average shall be adjusted according to York-Antwerp Rules 1974 amended 1990, or any subsequent modification thereof and will include the New Jason Clause” as per Clause 31.*

*Time charter hire shall not contribute to general average.”*

# Time charter – points to note



- The charterer is not ordinarily liable to pay cargo's contribution upon cargo not owned by him.
- Agreement between owner and time charterer that any claim in GA arising between them shall be governed by the stipulated YAR regime -- extends to bunkers.
- Agreement between owner and time charterer that the rights and liabilities in general average of any other parties to the adventure shall be governed by the stipulated YAR regime.
- Agreement that the charterer shall procure that such terms are incorporated in the B/Ls.
- Owner entitled to be indemnified by charterers in respect of any additional liability caused by the master being required to sign B/Ls which impose greater liability than that which owner has assumed under the charter.
- "To be adjusted at" – means the adjustment is to be prepared at, and in accordance with the law and practice of, that place. But does not therefore choose local court.
- What does "or any subsequent modification thereof" mean here?

## Voyage charter on Gencon '94 form



*“General Average shall be adjusted in London unless otherwise agreed in Box 22 according to York-Antwerp Rules 1994 and any subsequent modification thereof. Proprietors of cargo to pay the cargo’s share in the general expenses even if same have been necessitated through neglect or default of the Owners’ servants.”*

# Voyage charter – points to note



Similar points to time charter, but note that:

- Unlike time charterers, voyage charterers will not own bunkers.
- This is an agreement only between the voyage charterer and the disponent owner/time charterer.
- As regards contractual claims by owner from cargo for GA contributions, this contract will not therefore be relevant, even if the voyage charterer still owned the cargo.
- There will be a promise, implied at law, by the voyage charterer to indemnify the disponent owner/time charterer in respect of any additional liability caused by the master being required to sign bills of lading which impose greater liability than that which the disponent owner has assumed under this charter. But note here that the promise relates to *York-Antwerp Rules 1994 and any subsequent modification thereof*. What does this mean?

# Bill of lading on “Congenbill” form



(1) *All terms and conditions, liberties and exceptions of the Charterparty, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated”*

**Note: assume arbitration clause in favour of LMAA arbitration by 3 arbitrators thereby incorporated.**

(2) ***General Paramount Clause.***

...

(3) ***General Average.***

*General Average shall be adjusted, stated and settled according to York-Antwerp Rules 1994, or any subsequent modification thereof, in London unless another place is agreed in the Charter Party.”*

# Bill of lading - points to note

## (1) Claim by Dave for damage to cargo



- There is a contract evidenced by the B/L between Adam and Chris.
- But upon delivery of the B/L with any necessary endorsement to Dave, a contract contained in the B/L will spring into existence between Adam and Dave.
- Rights of suit for any damage will be transferred to Dave pursuant to s. 2(1), COGSA 1992. Hence, Dave has the contractual right to sue Adam.
- Because of the General Paramount Clause, the claim will be subject to Hague / Hague-Visby Rules. Initial unseaworthiness is a breach of Art III Rule 1.
- But pursuant to Art III Rule 6, suit must be brought within one year of delivery of goods or the date when the goods should have been delivered.
- The arbitration agreement obliges Dave to bring the claim in arbitration.
- Note that Adam's claim for a GA contribution will probably not yet have eventuated. The repair accounts may not have been received; the LOF salvage arbitration may not have concluded; the adjustment may not therefore have been drawn up.
- Dave will nevertheless claim a declaration that it is not liable to Adam in respect of any GA contributions. Dave's defence will be initial unseaworthiness.

## Bill of lading – points to note

### (2) Claim by Adam against Dave for GA contribution



- The effect of the GA clause in the B/L is to transfer to the consignee as indorsee of the B/L the common law liability to contribute to general average of whoever had been the owner of the cargo at the time the sacrifice / expenditure was made – *The Potoi Chau* (HL).
- Also, s. 3(2)(a) COGSA 1992 will transfer contractual liabilities for GA to the B/L holder who takes or demands delivery or makes a claim under the contract of carriage.
- As a claim brought by the carrier, the Art. III r. 6 one-year timebar will not apply. Instead the timebar will be 6 years from the date of the sacrifice/expenditure.
- Note that a claim for a contribution under the B/L will fall within the scope of the arbitration agreement.
- Where there are multiple B/Ls, pursuit of claims for GA contributions under B/Ls in arbitration is disadvantageous to the carrier. Since it is not ordinarily possible to conjoin arbitrations, there is the prospect of multiple arbitrations.

# GA Security - introduction



- Shipowner has a possessory lien over cargo until the cargo owner's contribution to general average is paid.
- Shipowner obliged to exercise lien on behalf of other contributing parties.
- Shipowner is entitled to ask for reasonable security in return for giving up his lien.
- As to the form of what amounts to reasonable security, the shipowner gives up his lien in return for:
  - (i) a general average bond, being a promise by the person taking delivery to pay any GA which is properly due; and
  - (ii) security for that obligation, in the form of a cash deposit or a general average guarantee.
- The bond and guarantee represent new contracts, which may contain their own law and jurisdiction clauses, and new causes of action, against new parties, come into existence based on them.

# RHL Average Bond



“In consideration of the delivery to us or to our order, on payment of the freight due, of the goods noted above we agree to pay the proper proportion of any salvage and/or general average and/or special charges which may hereafter be ascertained to be **properly and legally due** from the goods or the shippers or owners thereof under an adjustment prepared in accordance with the provisions of the contract of affreightment governing the carriage of the goods or, failing any such provision, in accordance with the law and practice of the place where the common adventure ended **and which is properly and legally payable in respect of the goods by the shippers or owners thereof.**

We also agree:

- (i) to furnish particulars of the value of the goods, supported by a copy of the commercial invoice rendered to us or, if there is no such invoice, details of the shipped value;
- (ii) to make a payment on account of such sum as is duly certified by the average adjusters to be properly and legally due from the goods and which is properly and legally payable in respect of the goods by the shippers or the owners thereof and
- (iii) that this agreement shall be governed by English Law and the High Court of Justice shall have exclusive jurisdiction over any dispute arising out of this agreement, and each party shall irrevocably submit to the jurisdiction of the English Court.
- (iv) that any period of prescription whether provided by statute law, contract or otherwise, shall commence to run from the date upon which the general average adjustment is issued.

# Average bond – points to note



- The average bond will be given in exchange for the shipowner relinquishing its possessory lien.
- It is given to owners or bareboat charterers of the named vessel.
- It may also be given to the “other parties to the adventure as their interests may appear”.
- It is usually given by the consignee, but it may be given by some other party.
- It gives rise to a new contract under which the shipowner may sue.
- It avoids the need for inquiry into who might otherwise be liable to pay the general average, a fact of which the shipowner may be unaware and which in some circumstances he may be unable to ascertain.
- A choice of forum clause should be included. English High Court has the advantage over arbitration that claims against multiple defendants can proceed in one set of proceedings.
- Subject to its wording and proper interpretation, no liability arises until an adjustment has been published. The time bar is therefore ordinarily 6 years from publication of the adjustment. Here, the time limitation is made express.
- But note the time bar in Rule XXI, YAR 2004 & 2016. How would this interact with an express time limitation provision?
- The bond does not have the effect that the adjustment is binding on the parties, provided at least the words in bold font are included.
- Worth agreeing that X sols are authorised to accept service of process?

# RHL Average Guarantee



“In consideration of the delivery in due course of the goods specified below to the consignees thereof without collection of a deposit, we, the undersigned insurers, hereby undertake to pay to the shipowners or to the Average Adjusters, on behalf of the various parties to the adventure as their interests may appear, any contribution to General Average and/or Salvage and/or Special Charges which may hereafter be ascertained **to be properly and legally due** in respect of the said goods.

“We further agree:-

- (a) to make prompt payment(s) on account of such contribution as may be properly and legally due in respect of the said goods, as soon as the same may be certified by the said Average Adjusters.
- (b) to furnish to the said Average Adjusters at their request all information which is available to us relative to the value and condition of the said goods.
- (c) that this agreement shall be governed by English Law and the High Court of Justice of England and Wales shall have exclusive jurisdiction over any dispute arising out of this agreement and each party shall irrevocably submit to the jurisdiction of that Court.
- (d) that any period of prescription whether provided by statute law, contract or otherwise, shall commence to run from the date upon which the general average adjustment is issued.”

# Average guarantee – points to note



- The average guarantee will be given in exchange for the shipowner relinquishing its possessory lien. It is an alternative to the making of a cash deposit.
- It is given to owners or bareboat charterers of the named vessel.
- It is given to the various parties to the adventure as their interests may appear.
- A choice of forum clause should be included. English High Court has the advantage over arbitration that claims against multiple defendants can proceed in one set of proceedings.
- Subject to its wording and proper interpretation, no liability arises until an adjustment has been published. The time bar is therefore ordinarily 6 years from publication of the adjustment. Here, the time limitation is made express.
- But note the time bar in Rule XXI, YAR 2004 & 2016 applies. How would this interact with the express time limitation provision?
- The guarantee does not have the effect that the adjustment is binding on the parties, provided at least the words in bold font are included.
- Worth agreeing that X sols are authorised to accept service of process?
- It is a question of the true interpretation of the guarantee whether the insurers are assuming either:
  - primary liability
  - secondary liability by way of an undertaking to discharge such liability as the consignee itself undertook under the general average bond.

# How will the dispute proceed?



- Dave/his cargo insurers will pursue the claim for cargo damage on grounds of initial unseaworthiness in arbitration. It will also be seeking a declaration that it is not liable to GA, together with the return of the bonds and guarantees.
- Adam will seek to resist that claim in arbitration.
- Adam will also wish to proceed against Dave under the bond and (especially) Ed Insce Co under the guarantee in Court.
- Will the court grant a case management stay of the court proceedings in favour of the arbitration proceedings?
- What is the significance for the court proceedings of a decision adverse to Adam in the arbitration proceedings?

# Aside from initial seaworthiness, how might Dave contest the adjustment?



- N.b. Adjustment only usually has the status of non-binding opinion. Some lines of enquiry:
  - Sacrifice or expenditure not reasonably made or incurred.
  - Losses, damages or expenses not the direct consequence of the general average act.
  - Proportion of sacrificial / accidental damage is incorrect.
  - Onus of proof that loss or expense allowable has not been discharged.
  - The hypothetical alternative assumed for the Rule F computation is not legitimate / there is another alternative involving a lower cap.

# Time Bars – a cautionary note.



- If YAR 2004 or YAR 2016 apply, there is an express provision in Rule XXI:

“... Any rights to general average contribution, including any rights to claim under general average bonds or guarantees, shall be extinguished unless an action is brought by the party claiming such contribution within a period of one year after the date upon which the general average adjustment was issued.”
- Otherwise, 6 years under section 5, Limitation Act 1980. When does time start running?
  - For claims between parties to the adventure, time begins to run at the date of the general average sacrifice or expenditure (The Potoi Chau)
  - For claims under GA security, depends on the terms of the contract. The contract may provide (expressly or impliedly) that the publication of an adjustment shall be a condition precedent to making any claim thereunder (The Potoi Chau)
  - For claims against insurers for an indemnity in respect of GA contribution, Chandris v Argo Insurance [1963] 2 Lloyd’s Rep 65 says date when sacrifice made or expenditure incurred. But Lowndes & Rudolf suggests otherwise.

# “Longchamp” – The Facts



- Fully laden chemical carrier is hijacked by pirates on 29 January 2009
- On 30 January 2009 the pirates demand a ransom of USD 6 million.
- On 22 March 2009 a ransom payment of USD 1.85 million is agreed.
- During the period of negotiation, expenses totalling USD 180k are incurred, including:
  - Professional media response services.
  - High Risk Area Bonus.
  - Crew Wages.
  - Crew Maintenance.
  - Bunkers
  - Telephone Charges.
- The Adjuster allowed these under Rule F. Was he correct?

# “Longchamp” – Rule F



Conceptual difficulty in treating many of these expenses as directly admissible in GA: prolongs the peril rather than saves from peril.

However, Rule F, YAR 1974 provides:

“Any extra expense incurred in place of another expense which would have been allowable in general average shall be deemed to be general average and so allowed without regard to the saving, if any, to other interests, but only up to the amount of the general average expense avoided.”

# “Longchamp” – owners’ argument



- Payment of ransom in the amount initially demanded of USD 6 million would have been allowable in GA under Rule A, YAR 1974.
- Instead of paying USD 6 million, a period of negotiation was undertaken during which the expenses were necessarily incurred.
- Due to the negotiations – and necessarily also, to the incurrance of the expenses – the amount of the ransom was successfully negotiated to USD 1.85 million.
- The expenses were therefore incurred in avoidance of the USD 4.15 million which would otherwise have been allowed in general average.

# “Longchamp” – AAA opinion



“... The difficulty with this suggested reasoning is that, if the ransom ultimately agreed and paid is treated as the reasonable amount to have been paid, then by definition any greater amount, even if settled earlier, must be regarded as unreasonable to the extent that it exceeds the amount actually settled. Thus there can be no excess which can constitute savings against which the putative substituted expenses can be allowed in General Average. ...”

# “LONGCHAMP” – cargo’s argument in the Comm. Court.



- Rule F applies only if the hypothetical costs or expenses would have been allowable as general average.
- Costs and expenses are only allowable as general average if they are “reasonably ... incurred” within the meaning of Rule A.
- Payment of US\$6 million without attempting to negotiate would not have been reasonable.
- Even if it would have become reasonable to pay ransom at some lesser value, such that expenses incurred in negotiating down from that value would in principle become allowable, the shipowner had not demonstrated what value that should be. Therefore, nothing should be allowed.

# “Longchamp” – The Decision of the Comm. Ct.



According to Stephen Hofmeyr QC (sitting as Deputy High Court Judge), the expenses were all allowable in GA. As regards the Rule F argument:

- The question is not whether a ransom in a particular amount is or is not “reasonable”. The question is whether in particular circumstances the payment of ransom was “reasonably incurred”.
- Save in exceptional circumstances (e.g. where the amount demanded clearly exceeds the value of the property involved) it would not be reasonable to say of a shipowner that the payment was not “reasonably incurred”.
- This result is supported by “natural justice which requires that all should contribute to the substituted expenses ... . The reduction in the amount of the ransom was only achieved by a process of negotiation which necessarily involved the shipowner incurring expense”.

# “Longchamp” – Cargo’s argument in the Court of Appeal.



- Rule F requires there to be “forks in the road”, at which you make a decision between one option or another.
- This means that the expense incurred in pursuing the actual course of action must be of a different kind from the expense which would have been incurred in pursuing the hypothetical course of action.
- Here, there weren’t any “forks in the road” and the expense wasn’t of a different kind.
- The only option for the shipowner was to negotiate and those negotiations would end up wherever they ended up.

# Longchamp – decision of the Court of Appeal.



“Although nobody appears to have considered it to be an option at the time, it is correct that the owners could have agreed to pay the initial ransom demand and, if the pirates had agreed to that, release of the vessel would have followed in due course, and that this could be regarded as an option that was available to owners. That does not, however, address the issue of whether it is an option to take a course of action which is a true alternative to that actually taken. Is a short negotiation with pirates for payment of ransom leading to the release of the vessel a different course of action to a long negotiation with pirates to the same ends? In my judgment it is not; both fundamentally involve doing the same thing. This is to be contrasted, for example, to a clear alternative to obtaining release of the vessel by agreeing and paying a ransom, such as by an operation to regain control of the vessel by use of force.”

- Application for permission to appeal to Supreme Court pending...



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