

### FEATURE

# General Average Security Wording – Possible Pitfalls

The casualty newsletter often features incidents resulting in a declaration of General Average by the vessel owners and which give rise to a requirement on the part of the owners of cargo on board to provide General Average security. In some instances these cases also involve a separate salvage demand where the owners have engaged salvors to provide salvage assistance under such contracts as Lloyd's Open Form. In many cases however owners may opt to simply engage salvors on a commercial basis and seek to include the cost as part of their total GA expenses. There is a general right to challenge the General Average claim under Rule D of the York-Antwerp rules and also to query the reasonableness of the expenses incurred/allowed. The question is when can that challenge be made?

Where General Average security is required to be provided, the ideal scenario is to ensure that those providing the security protect their rights to challenge the claim and avoid paying whilst the challenge is considered. It is therefore essential to ensure that the proposed wording of any General Average security, and particularly the provisions as to payment, are properly and fully considered before security is provided. Cargo interests will want to ensure their rights to defend a GA claim are sufficiently protected. It is of course preferable to be in a defendant position, where you can hold on to your money until you have

established the cause of the GA event and whether the amounts claimed, either in the form of a payment on account demand or the contribution due on publication of a final adjustment, are properly and legally due. General Average security wordings can vary considerably from case to case and Adjusters will often amend their GA security forms to adopt wordings as required by the owners. Whilst there are forms which are proposed and justified as being 'approved' by the various associations of Average Adjusters and are also supposedly accepted by IUMI, careful consideration should be given before insurers sign on the dotted line.

A recent Court decision in the English courts (St Maximus Shipping Co Ltd v AP Moller Maersk A/S (The *Maersk Neuchatel*) [2014] EWHC) has meant now, even more so than before, that all GA wordings should be carefully reviewed before being provided. In this particular case Maersk, as time charterers of the vessel, provided GA security in respect of the containerised cargo on board the *Maersk Neuchatel* with a view to avoiding the inevitable delays which can occur in containership GAs involving the collection of security from thousands of separate cargo interests. Maersk did not seek security from cargo interests at a later date, preferring instead to adopt a commercial approach in favour of their cargo customers.

The guarantee provided that Maersk undertook

*'to pay the proper proportion of any general average and/or special charges which may be hereafter be ascertained to be due from the cargo or the shippers or Owners thereof under an adjustment'*. When the GA Adjustment was published in January 2012, some 4½ years after the casualty, Maersk refused to pay, arguing that they had not given up their right to challenge the GA adjustment. Owners argued that the undertaking to pay on publication of the GA Adjustment was unequivocal. No conditions, such as a requirement that the amounts were legally and properly due or the amounts were payable, had been included in the GA wording. Such conditions would have enabled Maersk to resist payments and assert both a Rule D defence (requiring the owners to prove their entitlement to GA) and/or a quantum based argument to the effect that some of the expenses claimed in the Adjustment were not properly allowable under the applicable York-Antwerp rules. Owners contended that Maersk had to pay on demand under the terms of the guarantee they had provided.

The Judge found that owners' construction of the undertaking in the guarantee was *'not unreasonable, uncommercial or inherently improbable'* and very simply Maersk had signed the contract (the GA Guarantee being a separate contract and promise to pay), the wording of which was not ideal, but which they nevertheless opted for commercial reasons to accept despite possible drawbacks. As a consequence, under the terms of the guarantee Maersk were required to pay the amount determined to be due. The decision of the Court did not prevent Maersk from later seeking to recover from owners any overpayment in a legal challenge to the GA Adjustment. In these circumstances Maersk would then become a claimant. Unfortunately there are many negatives with being a claimant – trying to recover amounts paid – since in the interim a shipowner could go into liquidation or have insufficient assets at a later date to meet the claim. It is far better to be a defendant, resisting payments, in the GA process.

Recently we have experienced many cases where

cargo (and container) interests have faced wordings similar to that required in the *Maersk Neuchatel* where, on construction and having regard to the decision in the *Maersk Neuchatel*, the guarantor would be required to pay on demand. It is always worth seeking to persuade owners to agree amendments with a view to maintaining the rights to defend the claim prior to payment but this can be increasingly difficult when insurers are faced with pressure from cargo receivers to provide security immediately and in many cases a blank refusal from the relevant GA Adjusters to agree changes. Owners have a possessory lien on the property and until the security has been provided to their satisfaction it would seem that there is little to be done. In these situations we are increasingly suggesting that cargo interests adopt a more proactive approach and even consider applying to the appropriate Court for an order confirming that the security proffered by cargo interests amounts to reasonable security and should therefore be accepted by owners. Whilst such steps are unusual they should be worthy of consideration particularly if all the cargo interests are minded to adopt a collective and determined challenge. This is when there is a true benefit in working together. Such action was taken by numerous cargo interests in the case of the *MSC Flaminia*, where the New York Court determined the GA wording offered by cargo interests was reasonable security and the owners were forced to accept this.

Finally, in the *Maersk Neuchatel*, the time charterers had lodged an accompanying email seeking to clarify the terms but the Court determined the wording of the email to be insufficiently clear so as to alter or add to the terms of the Guarantee. When faced with similar resistance we have sought to accompany such GA guarantees with attached conditions in an accompanying email. The *Maersk Neuchatel* decision means conditions must be clear as to their intent but it is open to question as to whether the Court will consider related correspondence or simply look at the guarantee as a stand-alone document.

### NEW CASUALTIES

#### Vega Aries

Bulk carrier, IMO 9488188, Built 2010, 57,000 dwt  
Date of Casualty 23 September 2014 – Late notification  
Voyage Bata, Equatorial Guinea to Douala, Cameroon  
Cargo Unknown  
Type of Casualty Grounding off Douala.  
Type of Claim Possible hull damage and salvage claim



#### MN 7304

Self-propelled barge, no other details  
Date of Casualty 1 October 2014  
Voyage in Hamburg  
Cargo 400 m/t of wheat and 150 m/t of heavy engine parts  
Type of Casualty Water ingress into the engine room  
Type of Claim Hull damage



#### Aksaz C

Combined chemical and oil tanker, IMO 9418509, Built 2007, 5,350 dwt  
Date of Casualty 1 October 2014  
Voyage Las Palmas, Canary Islands

Further casualties overleaf

MSC Flaminia



# Roose + Partners

## NEW CASUALTIES - Continued - edition (81)

to Pembroke, UK  
Cargo 3,000 m/t of fuel additive  
Type of Casualty Engine failure whilst 120 miles off Brest. Assistance was provided by the tug *Abelle Bourbon* and the tanker was towed into Brest on 2 October 2014.  
Type of Claim Possible salvage claim and/or General Average declaration



### Bomar Moon ▣

General cargo vessel, IMO 9390393, Built 2010, 2,804 dwt  
Date of Casualty 2 October 2014  
Voyage Hamburg, Germany to Immingham, UK  
Cargo Unknown

Type of Casualty Engine failure and grounding whilst transiting the Köhlbrand in Hamburg. The vessel was refloated with the assistance of a local tug and proceeded to Steinwerder for a diving inspection.

Type of Claim Possible hull damage and salvage type claim



### Amelia/Isala ▣

Amelia – Passenger ship, Built 2012, 135m  
Isala – Self-propelled barge, 1,121 gt  
Date of Casualty 2 October 2014  
Voyage Unknown  
Cargo 1,050 m/t of salt  
Type of Casualty Collision on the Scheldt-

Rhine Canal following technical problems with the barge which subsequently sank blocking the Canal. Diesel was reported to be leaking from the wreck. Hebo Maritime Service, under orders from the Rijkswaterstaat, have been contracted to remove the wreck which will require the cargo of salt to be offloaded.

Type of Claim Collision damage claim

### Stoc Marcia

Combined chemical and oil tanker, IMO 9390305, Built 2007, 4,634 dwt  
Date of Casualty 2 October 2014  
Voyage Gothenburg to Landskrona, Sweden  
Cargo Unknown

Type of Casualty Fire in the engine room which was extinguished by the ship's fire suppression system. A tug later towed the tanker to Landskrona.

Type of Claim Fire damage claim

### Bake Platform

Natural gas drilling platform, no other details  
Date of Casualty 2 October 2014  
Type of Casualty Fire in the platform's accommodation block. The well was shut off remotely and local emergency response vessels attended and brought the fire under control. The platform was carrying some 41,640 litres of diesel fuel, 8,000 gallons of drilling mud and 1,000 gallons of hydraulic oil.

Type of Claim Fire damage claim



### Cotrans 8 ▣

Self-propelled barge, MMSI 244620972, no other details  
Date of Casualty 2 October 2014  
Voyage Unknown  
Cargo Unknown  
Type of Casualty Allision with the Beukels

Bridge in Rotterdam causing damage to the wheelhouse and a car loaded on deck.

Type of Claim Allision damage claim

### Sunrise 689

Product tanker, IMO 9624196, Built 2012, 5,929 dwt  
Date of Casualty 2 October 2014  
Voyage Singapore to Vietnam  
Cargo 5,226 m/t of oil product  
Type of Casualty Suspected hijack.  
Type of Claim Cargo loss



### Pacific Quartz ▣

Product Tanker, IMO 9573696, Built 2011, 47,941 dwt  
Date of Casualty 3 October 2014  
Voyage Jamnagar Terminal, India to Durban, South Africa  
Cargo 34,821 m/t of diesel

Type of Casualty Struck the bottom whilst entering Durban port during heavy seas. The tanker, which was under the control of a local pilot and proceeding at 8-10 knots, suffered damage to a ballast tank on starboard side resulting in water ingress. The ship was anchored and ballasted down to maintain her stability but was later cleared to enter port to discharge cargo.

Type of Claim Hull damage claim

### Green Austevoll

Reefer, IMO 8819299, Built 1991, 6,000 dwt  
Date of Casualty 3 October 2014  
Voyage Vigo, Spain to Thorshofn, Iceland  
Cargo Frozen fish  
Type of Casualty Allision with the quay at Thorshofn causing damage to the quay.  
Type of Claim Allision damage claim  
P&I Skuld



### Sakonnet Lobster ▣

Fishing vessel, no other details  
Date of Casualty 3 October 2014  
Type of Casualty Sinking whilst off Rhode Island. The crew were safely evacuated.  
Type of Claim Total loss and wreck removal costs



### Prins 4 ▣

Dredger/barge, no other details  
Date of Casualty 5 October 2014  
Type of Casualty Sinking in the port of Dielette, France leading to oil pollution. The dredger had 17,000 litres of diesel oil on board.  
Type of Claim Clean-up operations and wreck removal costs

### Nana 2

General cargo vessel, IMO 9552771, Built 2009, 5,000 dwt  
Date of Casualty 5 October 2014  
Voyage Busan, South Korea to Moscalvo, Russia  
Cargo 1,680 m/t of drilling pipes  
Type of Casualty Engine failure whilst during heavy weather whilst close to the northern tip of Sakhalin Island, Okhotsk sea. This was followed by a cargo shift and the vessel began listing to starboard and drifting towards the shore. The

vessel was able to anchor and effect repairs.

Type of Claim Possible General Average declaration

### Fortuna S

General cargo with container capacity, IMO 7016383, Built 1970, 2,530 dwt  
Date of Casualty 7 October 2014  
Voyage Istanbul, Turkey to Galatz, Romania  
Cargo 2,600 m/t of salt  
Type of Casualty Grounding and reported sinking in the Sulina Channel.  
Type of Claim Total loss claim including cargo



### Parida ▣

Ro-ro with container capacity, IMO 9159933, Built 1999, 5,850 dwt  
Date of Casualty 7 October 2014  
Voyage Scrabster, UK to Antwerp, Belgium  
Cargo radioactive waste

## CASUALTY FOLLOW-UP

**MOL Comfort** – editions 14, 15, 17, 19, 25 & 34 – it will not escaped anyone's notice that the long awaited ClassNK investigation into the breaking up of the containership has been published. ClassNK have found that the ship's drawings and hull structure conformed to their requirements with the pre- and post-construction surveys being satisfactory. The question remains as to whether other Classification Societies would have accepted the design and hull structure.

**Louis Jolliet** – edition – The Transportation Safety Board of Canada has determined that the inexperience of the Chief Mate caused the grounding of the passenger vessel Louis Jolliet ran aground off Sainte-Pétronille, Ile d'Orléans, Quebec on 16 May 2013.

**Type of Casualty** Immobilised by fire off the coast of Aberdeen. The vessel which was drifting towards the *Beatrice Platform* but has since been taken in tow by the tug *Pacific Champion* and is heading to Cromarty Firth.

**Type of Claim** Possible salvage claim and/or General Average declaration

### AM Hamburg

Bulk carrier, IMO 9624093, Built 2013, 81,792 dwt  
Date of Casualty 7 October 2014  
Voyage Dunkirk, France to Terneuzen, Antwerp  
Cargo Unknown

**Type of Casualty** Grounding off Terneuzen on the Wester Scheldt having drifted during cargo operation. Local tugs including the *Multratug 19*, *Multratug 20*, *Multratug 22*, *Barracuda*, *Brugge*, *Evegem* and *Braakman* responded and assisted in the refloating operation.

**Type of Claim** Possible salvage claim

Access all our previous casualty newsletters here 

## LOF NEWS

**Santa Rosa** – edition 81 – remains aground in the Persian Gulf.

**Mercandia IV** – edition – a second investigation into this allision in Skåne has been commenced by Danish police following news that a crew member and passenger both suffered injuries in the accident.

**Neckar Highway** – edition 81 – sailed from Zeebrugge to the Damen Ship Repair Yard in Flushing on 3 October 2013 for collision damage repairs following the collision with the *Baltic Breeze*

**Wanhe** – edition 81 – remains aground off Buenaventura port. Salvage operations continue.

**SCF Yenisei** – edition 81 – the owner of the tanker have declared General Average and we understand Blue Seas Adjusters of London have been appointed as General Average Adjusters