



General average in maritime law: International experience and considerations for Vietnam

Vu Kim Hanh Dung^{*}, Bui Doan Minh Tri, Nguyen Thanh Mai, Tran Thi Nguyet Quy, Pham Tran Thien Huong, Vu Thi Ngoc Chi

University of Economics and Law, Ho Chi Minh City, Vietnam and Vietnam National University, Ho Chi Minh City, Vietnam

Correspondence

Vu Kim Hanh Dung, University of Economics and Law, Ho Chi Minh City, Vietnam and Vietnam National University, Ho Chi Minh City, Vietnam
Email: dungvkh@uel.edu.vn

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ABSTRACT

The transportation of goods by sea is conducted based on carriage contracts, which stipulate the rights and obligations of the involved parties, the carrier's responsibilities, as well as provisions for dispute resolution, compensation for damages, and the allocation of losses in case of risks, ... This is a complex process that requires a thorough understanding of maritime law and international principles related to marine transport. During the transportation process, one of the most important aspects is the identification of the general average — a long-standing legal concept in international maritime law. General average involves the difficult decisions that a captain or shipowner must make in emergencies, such as sacrificing cargo or incurring extraordinary expenses to save the ship and goods from common danger.

The challenge lies in defining what constitutes "sacrifice" or "extraordinary expenses" that align with the concept of the general average. This is not only a matter of legal interpretation but also relates to the rights and obligations of parties involved in the transportation of goods, particularly the responsibilities of the shipowner and carrier regarding the determining general average in specific cases exactly. Currently, Vietnam regulations, especially the Maritime Code 2015, have yet to provide specific and clear guidelines on handling cases of general average. This creates difficulties in the application of laws, the resolution of disputes, and the compensation of losses when incidents occur during the transport of goods.

In the international context, many countries have implemented more specific regulations and standards regarding the general average, based on the common principles outlined in the York-Antwerp Rules — a well-known set of international guidelines in the maritime field. These rules not only provide a clear legal framework for determining reasonable costs and sacrifices but also help relevant parties foresee their responsibilities in emergencies. For Vietnam, learning from international experience to enhance legal regulations in this area is both a necessary and urgent issue.

Key words: General average, contract of carriage of goods by sea, York-Antwerp Rules

INTRODUCTION

Hundreds of years ago, the transportation of goods by sea had to face many dangers such as fire, pirates, storms, etc. and the parties involved in the voyage had to bear certain risks. Then, the general average (hereinafter referred to as "GA") emerged as an independent mechanism in ancient times to adjust losses incurred to ensure the safety of common maritime adventures. Today, to adapt to the global integration process, the need to exchange goods between countries and territories is increasing. The more vibrant international trade is, the more necessary the existence and development of the GA becomes. Thanks to its effectiveness as a tool for adjusting losses and risks in common maritime adventure, the GA has been recognized and regulated in the laws of many countries around the world, including Vietnam.

However, the authors found that there have not been many research works or databases on GA in con-

tract of carriage of goods by sea in Vietnam. Besides, Vietnamese law in general and the Vietnam Maritime Code 2015 in particular have not had clear regulations on this issue. The process of determining GA is a complex and time-consuming assignment. Therefore, the authors chose the issue "General Average in Contract of Carriage of Goods by Sea: International Experience and Lessons for Vietnam" as a research topic and to offer recommendations to improve our domestic law. In this article, the authors focus on clarifying two main objectives: (1) Analyzing the conditions under which a loss is considered a general average as well as identifying specific examples of general average losses and (2) proposing solutions to improve the Vietnam Maritime Code concerning the regime of "General Average".

The purpose of the first objective is to help readers clearly understand the conditions that losses must

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meet to be considered general average, while also providing practical illustrations to enhance readers' understanding of basic general average in real-world scenarios. Therefore, the authors first analyze the conditions under which a loss can be considered a general average. Additionally, the authors examine some of the fundamental types of GA to illustrate for the readers which losses are classified as GA in specific situations.^a

Furthermore, to achieve the second objective of proposing solutions to improve the Vietnam Maritime Code concerning the regime of General Average, the authors analyze domestic and international cases related to GA (particularly those applying the York-Antwerp Rules (hereinafter referred to as "YAR") on GA^b). The authors also compare and contrast the regulations of other countries on GA to provide the most objective and comprehensive recommendations.

RESEARCH METHODOLOGY

The authors employ the following research methods to complete this study:

* Analytical and Synthesis Method

In this study, the authors analyze and synthesize regulations and viewpoints on the general average in maritime cargo transport contracts. This method is also used to summarize researched perspectives and compare them with international and foreign laws to draw experiences for improving Vietnamese laws in this area.

* Comparative law method

The authors apply this method throughout the study to compare and contrast relevant regulations in various jurisdictions with foreign laws (the laws of the United Kingdom, Singapore, the People's Republic of China, South Korea, Japan, the Federal Republic of Germany), international laws (the Hague-Visby Rules), international customs, and model contracts (the York-Antwerp Rules, Gencon, Shellvoy), as well as with Vietnamese law, to derive multidimensional conclusions. Through this approach, the study identifies strengths and weaknesses of Vietnamese law and proposes solutions for enhancing Vietnamese Maritime Law provisions on the general average.

^aThe authors focus on analyzing specific general average based on two criteria: (1) whether the general average is commonly encountered in practice, and (2) whether the general average remains a subject of significant debate. Given that there are countless instances of general average in practice, it is not feasible to analyze all possible cases within the scope of this article.

^bThe authors chose YAR for analysis because it is the most commonly used set of rules on general average, trusted by cargo owners, shipowners, and other parties involved in sea transportation operations to apply to their contracts of carriage for the adjustment of general average when they occur.

RESULTS AND DISCUSSION

Overview of the "General Average" theory

GA is applied throughout the world as part of maritime law. In general, GA refers to a doctrine of maritime law that provides for the proportionate sharing by all parties to a maritime adventure of losses incurred where cargo is sacrificed in the event of a peril or expenses incurred for the common benefit of the parties to the adventure.¹

There are four main sources of GA regulations. *Firstly*, laws and customs of trade are fundamental sources of GA regulations. Before GA principle was embodied in the YAR, the adjustment of GA was governed by the law and custom of the place where the voyage ended.² *Secondly*, case law also contributes to the understanding of GA principles. Court decisions are another source of the GA principle. *Thirdly*, statutes in some jurisdictions include GA principles. For instance, many Scandinavian countries have periodically enacted various versions of the YAR into their national statutes, which govern GA adjustments within their legal systems.¹ *Finally*, YAR is considered the most widely accepted international document regulating GA adjustments. YAR is applied by most countries as the primary framework for dealing with GA cases.

Regarding the concept of GA, most reference countries widely apply it to partly minimize the damage caused by unexpected factors to the entire vessels. In Vietnam, the concept of GA is specified in Clause 1, Article 292 of the Vietnam Maritime Code 2015, specifically: "General average is any extraordinary sacrifice and expenditure is intentionally and reasonably made or incurred for the common safety in order to save the ship, goods, luggage, freight services, and passengers from common peril." This means that an action in GA arises if and only if any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred, with the common safety for the purpose of preserving property on a common maritime voyage from danger.

Where there is a GA act, any extraordinary sacrifice or expenditure reasonably and voluntarily incurred shall be calculated and allocated among the participants.³ This allocation is intended to preserve the property threatened in the common voyage. Depending on the case, there will be a corresponding provision for the party suffering the loss to receive a contribution from the participants, who may be the shipper, the carrier, the consignee, etc. The cost of such sacrifice or expense must be allocated proportionately among all the

interests in the voyage, including the interests resulting from such sacrifice or expense.

In general, GA principle is developed on the principle of fairness to preserve the common interests of all parties involved in a contract for the carriage of goods by sea.⁴ The adjustment of GA in a contract of carriage by sea plays an indispensable role because these clauses carry a series of important values and meanings for the parties involved in the contract. The concept of GA extends beyond the basic notion of cost-sharing; it also encompasses the broader goal of protecting the common safety of the entire shipping system. The key functions of GA can be summarized in four main points:

- (i) To encourage ship owners and all parties involved to take necessary and prompt relief measures to preserve ships and cargo from unusual dangers.
- (ii) To ensure that all parties involved in the transport bear their share of the GA in a fair and reasonable manner.⁵
- (iii) To facilitate the GA adjustment process.
- (iv) To promote cooperation and trust.

In conclusion, GA provisions are indispensable not only for the preservation of maritime safety but also for ensuring the rights of all parties involved in the transport. By fostering fairness and cooperation, GA contributes to a sustainable and effective global shipping industry.

Conditions for determining General Average

Rule A of the YAR establishes that an action in GA arises if and only if any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for common safety for the purpose of preserving property from peril during a common maritime adventure. Thus, there are 5 important conditions to determine the GA: (1) extraordinary sacrifice or expenditure, (2) intentional act, (3) reasonable act, (4) time of peril and (5) for the common safety of the adventure.

Extraordinary sacrifice or expenditure

The YAR stipulates that one of the factors to determine GA is either extraordinary sacrifice or extraordinary expense. In fact, sacrifices may include cargo, ships and freight, etc. while extraordinary expenses that may arise are salvage, refuge costs at the port of refuge, environmental costs, substituted expenses, etc.

A typical case involving sacrifice is *Robinson v Price*⁶, where during a voyage, the vessel had a leak causing water to flood into itself. To stay afloat, the vessel must

continuously pump water out. By doing this action, the vessel quickly used up all the coal, cargo and parts of the vessel were forced to be burned to get fuel to continue pumping water. As this sacrifice was unusual, the loss of parts of the vessel and its cargo was considered GA.

Regarding expenses, in *Société Nouvelle d'Armement v Spillers & Bakers Ltd.*⁷, the captain hired a tugboat to tow their vessel from Ireland to England to avoid being attacked by undersea submarines during World War I. Typically, a tugboat is engaged to assist a vessel in entering and leaving port, however, in this instance, the tugboat intervened in the vessel's voyage. However, the Court held that towing costs were not GA because they were not unusual during wartime.

In short, a sacrifice or expenditure must be of an extraordinary nature to be considered a GA.⁸ Therefore, ordinary expenses or losses incurred by the shipowner when performing the contract of carriage are not recognized as GA.

Intentional act

The sacrifice or expenditure shall be made or incurred intentionally.⁸ This means that the action must be chosen according to the free will of the decision maker and there are no accidental losses. Losses due to the effects of natural factors are only counted as particular averages, regardless of their unusual nature.⁹ For example, when a fire occurs, using water to put out the fire is intentional. Therefore, water damage can be recognized as a GA, while fire damage remains a particular average because it arises due to an accident. The intentional act is either that of the captain or an act that he has ratified or approved.⁹ In case of emergency or for any reason the captain is absent, if the chief officer or another person on board makes a decision, the action will still be considered as GA, provided that in such a situation the captain would make the same decision.

In *Athel Line v London & Liverpool WRA*¹⁰, two vessels in a convoy departing from Bermuda to the UK had to return to Bermuda on orders from the Convoy Commander. As a result, the two vessels consumed more fuel and stores. The court held that the losses due to this delay were not the GA because the expenses were the result of blind compliance with orders from higher authority rather than a deliberate action by the captain. It can be seen that a forced action is not an intentional action, so the loss caused by it is not considered a GA.

Reasonable act

For a sacrifice or expenditure to qualify as a GA, it must be reasonably made or incurred.⁸ The captain's action would be reasonable if taken with due discretion based on the information available to the captain at the time of the action.¹

In *The Cape Bonny*¹¹, when the engine broke down, the ship booked a tugboat for \$55,000 per day, despite the apparent availability of another tugboat at approximately \$40,000. The court held that the decision to order the more expensive tugboat was reasonable under the circumstances. As immobilization due to engine failure is a danger that must be resolved immediately even in fine weather. Furthermore, in this case, the ship is also likely to be in danger due to the risk of storm MA-ON.

The Rule Paramount of YAR emphasized the reasonableness requirement of a GA action that *"In no case shall there be any allowance for sacrifice or expenditure unless reasonably made or incurred"*. The phrase "all the circumstances" in this provision made reasonableness of action the paramount criterion for a valid GA claim under the YAR.

Time of peril

A sacrifice or expenditure must be made or borne in times of peril.⁸ This means that the danger has to threaten the safety of the vessel and its cargo, it must exist in reality and not be imaginary. A sacrifice resulting from an erroneous assessment of the existence of a danger is not considered a GA.¹²

In *Joseph Watson and Sons Ltd v Fireman's Fund Insurance Co*¹³, the captain believed the vessel was on fire and to extinguish it, he put steam into the cargo hold, which damaged the cargo. In fact, the ship never caught fire. It was held that there was no GA because there was no real peril.

Although the hazard must be real, it does not need to be immediate. In *Vlassopoulos v The British & Foreign Marine Insurance Co Ltd*¹⁴, the ship was placed in a port of refuge to have a faulty propeller repaired. The expenses incurred were recognized as GA since although the ship was not in actual peril at the time it entered the port of refuge, the action was reasonable to avoid potential danger later in the voyage. In other words, even though the danger has not yet occurred, it still exists. Thus, costs arising from reasonable actions to avoid potential dangers during the voyage may also be recognized as GA.

Common safety

To contribute to the GA, sacrifice or expenditure must be made for the common safety of the common maritime voyage.⁹ Therefore, a sacrifice or expenditure incurred just to ensure the safety of a part of the property during the voyage is not a GA. This principle represents the will of sacrifice, which is to put common safety first, the losses of the minority can be sacrificed to ensure the benefits and safety of the majority. This principle leads to the following two consequences:

First, expenses incurred after a cargo has been brought to safety cannot be included in GA.⁹ These costs are considered to be beyond the scope of GA, as they do not contribute to the immediate preservation of the cargo during the voyage. Additionally, any expenditures related to routine maintenance or repairs carried out after the cargo's safety is ensured are typically excluded from GA contributions.

Second, the GA depends on the ultimate success of the sea voyage.⁹ The act of sacrifice must truly bring safety to both vessels and cargoes. If it does not bring common benefits or does not make the voyage successful, it is not recognized as a GA.

In short, sacrifices and expenses are recognized as GA when they are made or incurred voluntarily and reasonably in time of emergency for the purpose of preserving property in danger during the common voyage. A loss that does not satisfy the above analyzed conditions is counted as a "particular average" and the other parties in the common maritime voyage do not have to share this type of average.

Sacrifices or expenditures qualify as General Average in specific cases

Jettisoned cargo

The most popular GA case is about the cargo being sacrificed when they are jettisoned from ship to ensure the common safety.⁹ In normal circumstances, when goods are jettisoned for reasons of general safety, all losses resulting from this action are considered GA losses. These losses may affect the ship itself or other cargo, as long as they directly arise from the sacrifice of the jettisoned goods.¹⁵ However, to mitigate the contribution to GA from such losses, Rule I of the YAR specifies that cargo jettisoned shall only be considered a GA loss if the cargo was carried in accordance with recognized commercial usage.¹⁶ Alongside those general principles, the determination of GA arising from the jettisoned cargo from the vessel needs to be examined in specific cases such as jettisoned cargo resulting from the fault of this cargo, jettisoned cargo on deck, or incidents of damage caused by the jettisoned cargo.

Jettisoned cargo resulting from the fault of this cargo

A theory, established and applied in practice among parties allocating GA, holds that the sacrifice of an object that is itself the cause of danger, even if necessary, will not contribute to GA.¹⁷ For example, goods may self-destruct to the extent that they are no longer fit for carriage, or goods may become dangerously hot, posing a threat to the safety of the vessel, and therefore be jettisoned. In such cases, the goods are not contributed to the GA as they are the cause of the danger. However, this theory has been shaken and narrowed in scope by court decisions¹⁷, notably including the following cases:

In *Johnson v. Chapman*¹⁸, a vessel laden with cargo on deck encountered adverse weather conditions, during which two significant events should be emphasized. Firstly, a large wave struck the cargo on deck, causing some materials to impact the pump, rendering it inoperable. Subsequently, the crew repositioned and secured the cargo. Secondly, seawater flooded the deck, causing the cargo to shift and collide with pumps on both sides. To avoid damaging the pumps and the vessel's integrity, and for the general safety of the voyage, the captain threw some cargo overboard. The cargo owner sued the shipowner to claim contribution to GA for the jettisoned cargo. This claim was contested on the basis that the cargo was jettisoned in a damaged condition. Additionally, it was argued that there was a custom among parties allocating GA not to recognize jettisoned defective cargo as GA. However, the Court decided that the jettisoned cargo in this case indeed constituted GA. This is because the cargo had previously been secured once adrift, hence it was evidently not in a damaged condition (in the sense of having become lost or irretrievable or unusable upon recovery). The danger posed by the cargo was a common peril faced by all, including the vessel, cargo, and crew, so the jettisoned cargo can be considered a contributing factor to GA. It can be seen that the aforementioned theory does not apply to cargo shifted or damaged due to maritime accidents.

Jettisoned cargo on deck

In the rule concerning the jettisoned cargo as GA, there is an ancient and well-established exception that if cargo carried on the deck of a vessel is thrown overboard, generally, it will not be compensated for through contribution, although if saved, it must contribute to GA like other cargo interests.¹⁷ This means that cargo on deck thrown off the vessel is not considered GA, but if they are ensured safety through sacrifice or other expenses, the owners of cargo on deck

still have to contribute to GA. This is because cargo carried on deck is more likely to be damaged by seawater. They also affect the stability of the vessel, increase difficulties in maneuvering, and impede vessel handling in times of peril. Their jettison is "the proper casting away of an unreasonable burden, and not a sacrifice for the common safety".¹⁹ In general, the deck of a vessel is not a suitable place for cargo stowage, so their owners have no right to claim contribution.

However, there is an exception that the jettisoned cargo on deck will give rise to a contribution to GA when carried in accordance with recognized commercial usage or with the consent of all interested parties in the voyage.⁹ This exception acknowledges that such actions, when agreed upon collectively and performed under standard maritime practices, may be justified and contribute to GA to cover the shared costs incurred.

Such as, in case *Burton v. English*²⁰, the vessel was chartered to transport a full load of timber from a port in the Baltic region to London. The charter party contains a clause: "The vessel to be provided with full deck cargo capacity, if required, at full freight... but seller to bear risk". It was demonstrated that there is a custom of timber being carried on deck in similar voyages. The Court of Appeal determined that when cargo is carried on deck according to commercial custom, its jettison must be considered a GA loss, despite a provision in the charter party stating that cargo on deck is "at seller's risk". At the Queen's Bench Division, it was decided that the phrase "at seller's risk" only exempts the shipowner from liability to contribute to the lawful jettisoned cargo loss.

In conclusion, the jettisoned cargo carried on deck does not contribute to GA unless there is commercial usage or the consent of all interested parties in the voyage.

Salvage cost

Salvage first appeared in Rule VI YAR 1974. The purpose of this rule is to force the parties to bear the cost of salvage whether it is stipulated in the contract or not, and at the same time recognize salvage as GA after the end of the common voyage when this salvage action is taken for the common safety.^{21,22}

However, as Rule VI evolved to the YAR 2004 version, salvage costs were no longer recognized as GA,²³ leading to this version being rarely used in contracts. Therefore, at the 2012 CMI Conference in Beijing, the International Working Group (IWG) was established to draft a new set of Rules to meet this requirement, which is the YAR 2016 version.

Accordingly, Rule VI of YAR 2016 provides that any payment in the nature of salvage, made for the purpose of preserving the property concerned from peril during a common adventure at sea, whether under contract or arising independently from the contract is considered GA. However, this rule is applied differently depending on the legal perspective of each country, leading to different consequences for the payment of salvage costs.

In several countries, pure salvage (salvage without a contract) is still accepted if it meets the relevant conditions.²⁴ Accordingly, this salvage operation arises when a person, voluntarily (that is, without any pre-existing contractual or legal obligation), acts to protect or contribute to the preservation of any vessel, cargo, or other salvage object at sea from danger.²⁵ Thus, it can be seen that when performing obligations under a pre-existing contract, salvage will not be considered a voluntary activity according to customary salvage law.

Unlike pure salvage, contractual salvage is carried out based on agreements between the ship owner and the prospective salvor, and this contract is binding on the parties.^c Typically, salvage agreements are based on a standard form; The most widely known form today is Lloyd's Standard Form of Salvage Agreement.^{24,26} Accordingly, LOF is the most commonly used form for a "no cure - no pay" contract^d, meaning that the salvor will only receive a reward for his salvage service if the salvage operation is successful. However, the "no cure - no pay" clause still has an exception. When the salvage is unsuccessful, but the salvage ship has prevented the risk of causing damage to the environment, it will still receive an award.²⁷

For both types of salvage mentioned above, according to Rules VI YAR 2016, they are considered GA. In *Jason*²⁸, the United States Court of Appeals (Fifth Area) rendered that all salvage costs paid to salvors are determined based on various criteria related to the facts of the situation and at that time are recorded as GA. In other cases, the GA adjustment agencies might propose to the parties that if it is found that recalculating salvage costs according to GA will not significantly alter the figures or lead to extraordinary costs. The parties may then decide whether to include salvage costs in GA or not.²⁹

^cVietnam's maritime law only recognizes salvage activities carried out on the basis of maritime salvage contracts, specifically in Article 264(1) of the Vietnam Maritime Code 2015.

^dAccording to the concept of "no cure, no pay" stipulated in the International Convention on Salvage 1989, salvors can only receive a salvage award if they succeed, otherwise, they must bear the responsibility themselves as risk of having an incident that leads to failure to salvage.

Therefore, whether salvage costs are recognized as GA depends on the version of the YAR that the parties agree to apply. However, if the parties choose to apply the YAR 2016 to their contract and incorporate them with the BIMCO (Baltic and International Maritime Council) standard carriage contract, then salvage costs shall be recorded as GA.

Repair and expenses at port of refuge

Temporary repairs

According to Rule XIV YAR 2016, the costs of temporary repairs to the vessel at the loading or discharge port for GA purposes or to repair damages to the vessel resulting from the sacrifice of GA are considered GA. This means that all temporary repair costs in this case are considered GA.

Furthermore, in the case of temporary repairs to the vessel damaged by an accident to enable the completion of the voyage, such repairs must be carried out reasonably to minimize the GA incurred.³⁰ This is a difference in the YAR 2016 version^e compared to the YAR 2004 version. For the YAR 2004, the costs of temporary repairs considered GA, in this case, would be limited as follows: the temporary repair costs plus the permanent repair costs at the destination (not the port of refuge) exceeding the permanent repair costs that would normally be carried out at the port of refuge.³¹ The costs of temporary repairs considered GA are expressed by the following formula:

Expenses considered as GA = TRPR + PR – PRPR

In which:

TRPR: temporary repair costs at the port of refuge;

PR: permanent repair cost at destination;

PRPR: permanent repair if conducted at the port of refuge.

The following example will illustrate the regulation clearly: in the event that a vessel needs to repair at a port of refuge to continue its voyage, the temporary repair costs amount to 3 billion VND, and upon arrival at the destination port, the vessel proceeds with permanent repair costs at the port of destination at 6 billion VND; conversely, assuming that if permanent repairs are carried out at the port of refuge, the cost would be 10 billion VND (without temporary repairs and permanent repairs at the destination port).

Applying the YAR 2016 version, the 3 billion VND would be considered GA because all temporary repair costs are now considered GA under Rule XIV. However, if the YAR 2004 version were applied, the cost of temporary repairs to the vessel damaged by an

^eYAR 2016 and YAR 1994 have the same provision about temporary repairing cost.

accident would not be considered GA because, when applying the formula, the temporary repair costs and the permanent repair costs at the destination port are lower than the full repair costs if carried out at the port of refuge.

In a similar case, the permanent repair costs at the destination are still 6 billion VND, and the permanent repair costs if conducted at the port of refuge are still 10 billion VND. However, the temporary repair costs now amount to 5 billion VND. In this case, the total amount of temporary repair costs and permanent repair costs at the destination are 11 billion VND. The excess of 1 billion VND over the permanent repair costs at the port of refuge would be considered GA under YAR 2004.

This has led to shipowners, historically, tending to carry out permanent repairs immediately at the port of refuge under the YAR 2004 version. These repairs take much longer than temporary repairs, posing greater risks for cargo owners in terms of costs and market loss.¹ This is also one of the reasons why cargo owners have restricted the use of this version and revised the provision in the YAR 2016 version by allowing for the temporary repair costs in the event of a vessel accident to complete the voyage.

Furthermore, to accurately ascertain reasonable expenses during the repair process, other costs such as reasonable or necessary expenses incurred in moving a vessel from one port to another when the original port is inadequate for repairs are deemed reasonable repair costs. These expenses include, but are not limited to, crew wages, provisions, towing fees, port dues, or fuel.³²⁻³⁴

Expenses at port of refuge

Under the common law and Section 66 of the UK Marine Insurance Act 1963, there remains much debate regarding which expenses at a port of refuge or any other place for ensuring common safety (hereinafter referred to as “*port of refuge*”) are considered GA. Through case law, expenses of entering the port of refuge and discharging cargo are considered GA, whereas expenses such as departure from the port or reloading cargo onto the vessel still have various perspectives. In *Atwood v Sellar*³⁵, the costs of entering and leaving the port of refuge, as well as the costs of discharging and reloading cargo, were deemed GA. Conversely, in *Svendsen v Wallace*³⁶, only the expenses of entering the port of refuge and discharging cargo were considered GA, while the expenses of departure and reloading cargo were not.⁸

In contrast to the disputes within the common law, the YAR 2016 provides clear and consistent provisions

regarding the expenses considered GA at the port of refuge. In situations similar to the two aforementioned cases, if the YAR 2016 is applied, the costs of entering and leaving the port of refuge, as well as the costs of discharging and reloading cargo, are all considered GA if carried out for the common safety in the event of an accident, sacrifice, or any other extraordinary circumstance.³⁴ Additionally, under Rule XI YAR 2016, expenses incurred during the time spent at the port of refuge such as wages and allowances for the master, officers, and crew, fuel, consumed reserve provisions during the extended voyage duration are also considered GA if they meet the conditions deemed GA under Rule X.

Piracy and Kidnap and Ransom Insurance

Kidnap and Ransom (hereinafter referred to as “*K&R*”) at sea occurs when pirates^f engage in “shopping”³⁷ raids, which may result in property loss, or more seriously, threaten the lives of shipowners and crews as shipowners and crews hold little value to pirates. They could be killed, thrown overboard, or left adrift.³⁸

Previously, K&R insurance was developed to indemnify shipowners against risks from pirate attacks. In *Hicks v. Palington*³⁹, where property was voluntarily surrendered to pirates in exchange for the release of the vessel, cargo, and crew, such sacrifice was deemed a GA loss. In such cases, insurance compensation is based on the loss of goods seized.

However, modern piracy tends to involve attacking vessels and holding crew members hostage for ransom. Moreover, besides ransom payments, significant additional expenses arise to ensure the release of the vessel and cargo, such as payments to negotiation teams, transportation of ransom, ransom insurance, as well as initial search costs.⁴⁰ It's worth noting that expenses including crew wages, vessel maintenance, and fuel consumed during the time the vessel is avoiding being detected after a pirate attack, or while detained awaiting negotiation for vessel release, are excluded under Rule C(3) of YAR 2016 from the GA.

In the case of *MV Longchamp*⁴¹, a crucial issue in the appeal was whether operational expenses incurred during negotiations could be included in the GA under Rule F YAR 1974^g. After deliberation, the UK Supreme Court accepted the owner's appeal. It ruled

^fPiracy (as defined by Carver in the 4th edition of the study ‘Carriage of Goods by Sea’) refers to acts of robbery, violence, or coercion at sea, carried out by individuals external to the vessel, crew members, or passengers within the vessel.

^gThe F Rule of YAR 2016, while replacing the term ‘extra expense’ from the YAR 1974 with ‘additional expense’, still carries a similar meaning.

that reducing the ransom payment to \$1.85 million was not a “substitute action” for the initially demanded ransom but a variation.⁴² Accordingly, Rule F does not mandate expenses arising after a substitute action. Thus, expenses incurred during ransom negotiations shall be recognized in the GA loss. Additionally, the court held that Rule C was not applicable in this case: “Rule C applies to expenses and other payments required to be indemnified as GA losses resulting from an action causing GA... This rule does not apply to expenses referred to in Rule E... By definition, the amounts that may be recovered under Rule F are not to be taken into GA, but are alternative choices to the amounts allowed”. Furthermore, there’s no need to consider the owner’s intention when assessing an expense under Rule F, and even if the shipowner agreed to the initial ransom, costs due to delay may still arise and should be considered part of the shared costs. Under English law, paying ransom itself is not illegal;⁴³ Therefore, if the ransom meets the 5 criteria of Rule A YAR, it may be considered a GA.^h However, in Somali piracy cases, there’s a perspective that piracy is to fund terrorist activities, which according to modern anti-terrorism laws, financing terrorism directly or indirectly is illegal.⁴⁰ Therefore, expenses related to kidnap and ransom may not be considered GA. Thus, whether expenses related to kidnapping and ransom are considered GA depends on the domestic law where the ship is destined. If the parties do not have clear provisions agreeing on the applicable law in the carriage contract, it will govern the activities contributing to the GA.

GA loss caused by the fault of a party in the common maritime adventure

The right to claim contribution to GA is independent and not dependent on the cause of the GA. When a GA occurs, any party may demand contribution from other interested parties without considering whether the fault lies with them. This stems from the fact that, in many cases, the interested parties have an obligation to contribute to GA to immediately remedy potential damages, such as oil spills, which pose a risk of marine environmental pollution. However, this contribution to GA will not prejudice any form of compensation or defense that may be pursued against the party responsible for this fault. This means that, at the time of the GA occurrence, interested parties have an obligation to contribute to address the consequences, but they retain the right to initiate separate legal proceedings to recover the amount they have contributed

to the GA from the party at fault for the GA. Prioritizing the exercise of the right to contribute to GA will not prejudice or limit the rights of other entities to exercise rights of complaint or litigation against the party causing the fault leading to the GA incident.⁴⁴ This issue is recognized in Rule D YAR 2016. As a consequence of this rule, a party suffering loss from the GA incident may be compensating for other interested parties from the contribution they have made to the GA.⁴⁵

The case of a vessel being unseaworthy is one of the typical examples of a GA loss arising from the fault of one party. In *Alize 1954 and another v Allianz Elementar Versicherungs AG and others*⁴⁶, the vessel CMA CGM Libra was berthed at Xiamen port, and upon commencement of the voyage, the working chart malfunctioned, failing to indicate the risk of shallower depth outside the navigational channel, which could endanger the vessel. The second officer prepared a passage plan based on the faulty working chart without noting the hazardous positions. This led the vessel to enter shallow waters and run aground. Consequently, the shipowner had to pay for the incurred expenses for salvage operations and refloating the vessel. Subsequently, the shipowner declared GA and demanded contribution from all interested parties under YAR. However, some cargo owners disagreed with the shipowner’s contribution demand, so the shipowner sued for contribution against these cargo owners. According to Rule D YAR 2016, the damaged party is entitled to contribution for sacrifices or extraordinary expenses it had to bear, even if it was at fault for the GA event. However, this right of the at-fault party does not affect the ability of interested parties to file claims/litigation against that party’s fault. In the aforementioned case, cargo owners argued that the vessel was unseaworthy from the outset of the voyage due to the shipowner’s failure to accurately update the working chart. The Court concluded that the shipowner breached the duty under Article III(1) of the Hague-Visby Rules to exercise due diligence to make the vessel seaworthy at the commencement of the voyage and therefore was not entitled to any exceptions under Article IV(2) of the Hague-Visby Rules. In this case, the authors agree with the Court’s finding that the shipowner must compensate cargo interest for the amount they contributed or were not required to continue contributing to the GA in case they had not contributed. This is because, from the outset of the voyage, the vessel was unseaworthy due to faults arising from the nautical chart and the faulty working

^hFive conditions which were analyzed by authors in sub-paragraph Overview of the “General Average” theory

chart. Nautical charts and working charts are documents related to the voyage aimed at ensuring the vessel's seaworthiness.⁴⁷ Therefore, when failing to ensure these factors to guarantee the vessel's seaworthiness, in the event of a complaint from parties with related interests, the shipowner will have to compensate parties with related interests for the amount they contributed or were not required to continue contributing to the GA in case they had not contributed.

However, in another case, the shipowner was exempt from liability under Article IV(2)(b) of the Hague-Visby Rules and had the right to claim a GA contribution from cargo interest. In *Glencore Energy UK Ltd v Freeport Holdings Ltd*, a dispute arose between the cargo owner (Glencore) and the shipowner regarding the expenses of the salvage operation. During the voyage, the chief engineer intentionally set fire to the ship's engine room, resulting in the vessel being immobilized and requiring salvage to be brought safely back to port. These salvage costs were deemed a GA, and the cargo owners reimbursed the salvage expenses to the salvors. At the time of the litigation, the cargo owner sued the shipowner on the grounds that the GA arose from the shipowner's direct fault in deliberately setting fire to the engine, and therefore, the shipowner was liable to compensate for the GA incurred by the cargo owners. However, the shipowner argued that they were exempt from liability and had the right to claim a GA contribution from the cargo owners. In the Appellate Court session, the judges ruled that the shipowner was exempt from liability and had the right to claim a GA contribution. This conclusion was based on two grounds: (i) the fire did not result from the carrier's actual fault or intentional act; they determined that the fire arose from the intentional act of the chief engineer (a member of the crew) rather than the intentional act of the carrier, while also determining that the chief engineer did not exercise civil competence when performing the act; and (ii) the fire did not result from a breach of the carrier's obligation as provided for in Article III(1)(a) of the Hague-Visby Rules. Therefore, the shipowner was exempt from liability under Article IV(2)(b) of the Hague-Visby Rules and had the right to claim a GA contribution from parties with related interests.^{48,49}

From the above cases, it can be observed that claiming a GA contribution in cases where the fault arises from the actions of the shipowner/crew is very complex. Parties need to determine whether shipowners are exempt from liability under relevant international conventions (such as the Hague-Visby Rules). If it is determined that the shipowner is exempt from liability, then the shipowner has the full right to demand

contributions to the GA from cargo interest, and conversely, if the shipowner is not exempt from liability, then they have no right to demand contributions to the GA from cargo interest.

Additionally, faults leading to GA may arise from cargo owners. For example, a ship catches fire while underway due to a chemical leak from an ISO Tank Containerⁱ. This incident was determined to be caused by the fault of the container owner. The extinguishing of the fire resulted in salvage costs and other expenses. In cases where the shipowner declares a GA, only expenses such as salvage costs and damage to cargo due to water ingress during firefighting are considered GA. Expenses related to damaged cargo due to the fire and damage to ISO Tank Containers are not considered GA. Damaged cargo due to the fire constitutes separate losses, as it is not incurred for the purpose of ensuring common safety for the vessel or damages resulting from actions to ensure common safety. In particular, not only shall the container owner not receive any contribution to general average from other interested parties for the general average act caused by their fault, but they shall also contribute to other general average losses.⁸

Recommendation

Regulations on Supplementary Costs

The definition of GA is outlined in Article 292(1) of the Vietnam Maritime Code 2015 and sacrifices or expenses must satisfy the criteria specified in this article to qualify as GA. Article 292(2) also provides "Only losses, damages and expenses which are the direct consequence of the act causing the general average shall be included in the general average."⁵⁰ Nevertheless, the Vietnam Maritime Code presently lacks a provision equivalent to Rule F of the YAR regarding supplementary costs. In the Longchamp case referred to in section 4.4 of Piracy and Kidnap and Ransom Insurance, when considered under Rule F, the operating costs of the vessel incurred during the negotiation period are not required to satisfy the exclusion principle of "indirect loss" of Rule C of the York-Antwerp Rules or Article 292(2) of the Vietnam Maritime Code 2015. In addition, we do not need to consider the "intentional" criterion of the owner when considering an amount under Rule F. Hence, supplementary costs substituting for another expense that would otherwise qualify as GA are prone to be disregarded in the assessment of which sacrifice, or expense qualifies as GA, as

ⁱISO Tank Container is a specialised container designed to transport powdered products, gases, and hazardous and non-hazardous liquids in maritime, road, or air transport. ISO tank containers are constructed based on ISO standards (International Organization for Standardization).

they may not meet the criteria and principles outlined in Clauses 1 and 2 of Article 292 of this Code. This flaw renders the process of ascertaining and distributing the GA. Typically, these expenses are substantial, and if treated as individual average, they would impose a financial strain on shipowners or cargo owners. Based on the aforementioned reason, the authors contend that supplementary costs should be classified as a “distinct” form of GA in the Vietnam Maritime Code. This would enable justice agencies, average adjusters, and other interested parties to assess sacrifices and GA costs more comprehensively. This provision can be incorporated as a clause within Article 292, with the content drawing inspiration from Rule F of the YAR. The stipulations are as follows: *“Any supplementary costs assumed in place of another expense that would typically be acknowledged as general average shall be regarded as general average and granted up to the maximum extent of avoidable general average, without considering any other potential savings.”*

Criteria for sacrifices “and” extraordinary expenditure to determine general average

Article 292(1) of Vietnam Maritime Code 2015 is built as the same as Rule A of YAR, however, there exists a discrepancy in how Rule A defines one of the criteria for extending GA, including “sacrifice or extraordinary expenditure”, whereas Article 292(1) specifies “sacrifice and extraordinary expenditure”.

From a comparative law perspective, there are virtually no countries that require the criteria for determining general average losses to include both sacrifice and expenditure simultaneously. For instance, the UK Marine Insurance Act of 1963, Thailand’s General Average Act in maritime voyages, and the Maritime Code of the People’s Republic of China 1992, all stipulate this criterion as either “sacrifice” or “extraordinary expenditure”, similar to the YAR. Besides, in the case of *Star of Hope*⁵¹, Supreme Court of the United States has defined GA as: “The contribution of all parties on common maritime adventure to indemnify for the losses incurred by one of their members either due to the relinquishment of a portion of the vessel or cargo to preserve the remaining assets and protect the lives of the crew or individuals from imminent peril; or on account of specific essential expenditures that one or more parties must shoulder for the mutual advantage of all rights holders in the enterprise”.⁵²

Thus, the losses determined in GA will include:

(i) Losses arising from the deliberate sacrifice of a portion of the vessel or the jettisoning of part of the cargo, carried out to rescue the ship from peril; or

(ii) Amounts arising from special charges for the general benefit of the vessel and cargo.⁵³

Sacrifice and extraordinary expenditure are two different concepts and scopes of determination. If the cargo heats up to a degree that jeopardizes the vessel’s safety and is accordingly abandoned, it will be considered sacrificed without incurring any additional extraordinary expenditure. Similarly, the expenditure accrued during the entry and departure from a port of refuge, related to unloading and reloading cargo, will not warrant any additional sacrifices. It means, when determining the GA, it is not necessary to have “sacrifice” and “extraordinary expenditure” at the same time according to the provisions of the Vietnam Maritime Code, which just rely on (i) there are unusual sacrifices; or (ii) there is extraordinary expenditure.

Based on the aforementioned analysis, the authors suggest that Vietnam Maritime Code 2015 revise the provisions in Article 292(1) to read as follows: *“General average comprises sacrifices or extraordinary expenditure made deliberately and reasonably for the collective safety aimed at rescuing the vessel, cargo, luggage, freight services, and passengers from common peril.”*

CONCLUSION

In the context of Vietnam today, the development of clear legal regulations governing the GA is absolutely necessary and has important implications for international trade activities. This is because parties will be more confident when they have a basis for determining their rights and obligations from the outset of a marine carriage contract. Therefore, the authors conducted this study with the aim of proposing solutions to improve Vietnamese legal regulations on the GA. The research study has clarified the following issues: *Firstly*, through the analysis and evaluation of the views of scholars around the world as well as commenting on related cases, the authors clarify the practice of GA in maritime operations.

Secondly, proposing a number of solutions to improve the legal regulations on the GA in the Vietnam Maritime Code.

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ABBREVIATIONS

GA: General average

YAR: York-Antwerp Rules

Port of refuge: Port of refuge or any other place for ensuring common safety
K&R: Kidnap and Ransom

CONFLICT OF INTEREST

The authors declare that they have no conflicts of interest.

AUTHORS' CONTRIBUTION

- Author Vu Kim Hanh Dung is responsible for structuring the paper and providing general comments.
- Author Bui Doan Minh Tri is responsible for the content: Introduction, Overview of the General Average theory, Repair and expenses at the port of refuge, GA loss caused by the fault of a party in the common maritime adventure.
- Author Nguyen Thanh Mai is responsible for the content: Abstract, Keywords, Recommendation, Conclusion.
- Author Tran Thi Nguyet Quy is responsible for the content: Introduction, Abstract, Recommendation.
- Author Vu Thi Ngoc Chi is responsible for the content: Salvage cost, Piracy and Kidnap and Ra son Insurance, Recommendation for Criteria for sacrifices "and" extraordinary expenditure to determine general average.
- Author Pham Tran Thien Huong is responsible for the content: Conditions for determining General Average, Jettisoned cargo.

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Phân bổ tổn thất chung trong bộ luật hàng hải: Kinh nghiệm quốc tế và bài học gợi mở cho Việt Nam

Vũ Kim Hạnh Dung*, Bùi Đoàn Minh Trí, Nguyễn Thanh Mai, Trần Thị Nguyệt Quý, Phạm Trần Thiên Hương, Vũ Thị Ngọc Chi

TÓM TẮT

Vận chuyển hàng hóa bằng đường biển được thực hiện dựa trên các hợp đồng vận chuyển, trong đó quy định quyền và nghĩa vụ của các bên liên quan, trách nhiệm của người chuyên chở, cũng như các điều khoản về giải quyết tranh chấp, bồi thường thiệt hại, và phân bổ tổn thất trong trường hợp xảy ra rủi ro, ... Đây là một quá trình phức tạp, đòi hỏi sự hiểu biết kỹ lưỡng về pháp luật hàng hải và các nguyên tắc quốc tế liên quan đến vận tải biển. Trong quá trình vận chuyển, một trong những khía cạnh quan trọng nhất là việc xác định tổn thất chung – một khái niệm pháp lý đã tồn tại từ lâu trong luật hàng hải quốc tế. Tổn thất chung liên quan đến những quyết định khó khăn mà thuyền trưởng hoặc chủ tàu phải đưa ra trong trường hợp khẩn cấp, chẳng hạn như hy sinh hàng hóa hoặc chi phí bất thường để cứu tàu và hàng hóa khỏi nguy hiểm chung.

Vấn đề phát sinh từ việc xác định thể nào là "hy sinh" hoặc "chi phí bất thường" để phù hợp với khái niệm tổn thất chung. Đây không chỉ là việc xác định về mặt pháp lý mà còn liên quan đến quyền và nghĩa vụ của các bên tham gia vào quá trình vận chuyển hàng hóa, đặc biệt là trách nhiệm của chủ tàu và người vận chuyển đối với xác định chính xác các tổn thất chung cụ thể. Hiện nay, các quy định pháp luật của Việt Nam, đặc biệt là Bộ luật Hàng hải 2015, vẫn chưa đưa ra hướng dẫn cụ thể và rõ ràng về việc xử lý các trường hợp tổn thất chung. Điều này tạo ra khó khăn trong việc áp dụng pháp luật, giải quyết tranh chấp và bồi thường tổn thất khi xảy ra sự cố trong quá trình vận chuyển hàng hóa.

Trong bối cảnh quốc tế, nhiều quốc gia đã áp dụng các quy định và tiêu chuẩn cụ thể hơn về tổn thất chung, dựa trên các nguyên tắc chung được đề cập trong Quy tắc York-Antwerp - một bộ quy tắc quốc tế nổi tiếng trong lĩnh vực hàng hải. Những quy tắc này không chỉ cung cấp khung pháp lý rõ ràng cho việc xác định các chi phí và hy sinh hợp lý, mà còn giúp các bên liên quan dự đoán trước được trách nhiệm của mình trong các tình huống khẩn cấp. Đối với Việt Nam, việc học hỏi kinh nghiệm quốc tế để cải thiện quy định pháp luật trong lĩnh vực này là một vấn đề cần thiết và cấp bách.

Từ khoá: Phân bổ tổn thất chung, hợp đồng vận chuyển hàng hóa bằng đường biển, Quy tắc York-Antwerp

Trường Đại học Kinh tế - Luật,
ĐHQG-HCM, Việt Nam

Liên hệ

Vũ Kim Hạnh Dung, Trường Đại học Kinh tế
- Luật, ĐHQG-HCM, Việt Nam
Email: dungvkh@uel.edu.vn

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