Richard Sarll, *barrister and arbitrator at 7 King's Bench Walk*, ***asks what type of loss and expense might attract a contribution in general average and how might those contributions be enforced given the latest development in the Red Sea***

More trouble in the Red Sea? GA's following Houthi Strikes

More trouble is in store for marine insurers at the time of writing, with reports in early August that Houthi rebels sank an Indian-flagged vessel, *MSV Faize Noore Oliya*, forming the latest in a spate of attacks in the Red Sea, a waterway that emerged as an important alternative route for oil exportation after Iran blocked the Strait of Hormuz in February.

The incident followed an announcement by Iranian-backed Houthis on 20 July that it was calling a blockade on Saudia Arabia's Red Sea ports.

With more Houthi strikes in prospect, it is worth reflecting on the Red Sea Crisis of 2024-2025, when numerous general average (GA) declarations were made after attacks on vessels perceived as having links to Israel.

What type of loss and expense might attract a contribution in GA and how might those contributions be enforced?

GA ALLOWANCES

In a typical situation, the stricken vessel would be attended by professional salvors, who would tow the ship to a port of refuge. There, work would be undertaken to stabilise the vessel. Cargo would likely be discharged in order so that the vessel might shift to a second port of refuge for the carrying out of repairs necessary for the safe prosecution of the voyage.

However, instead of the ship returning to the first port to reload and carry on with the original voyage, the cargo would very often be transshipped and forwarded to destination aboard a substitute vessel.

In that situation, the allowances in general average (GA), to which the cargo interests would be required to contribute in average, are diverse.

They could include the cost of engaging salvors to tow the ship into port (YAR Rules A & VI), as well as the detention expenses at that port (Rules X & XI).

Contribution towards the detention expenses at the second port (ie the repair yard) could also be due from cargo, up to the amount which it would have cost the cargo owners to forward the cargo to destination at their own expense (Rule G(3) & (4)).

As for the freight costs of the substitute vessel, these might also be allowed in GA, insofar as they avoided the storage costs that would otherwise have resulted, if the original ship had instead been programmed to reload the cargo and carry on with her contractual voyage (Rule F).

Interest on general average expenses (Rule XXI) and the respective fees of the average adjuster would also be allowable.

Once the admissible sacrifices and expenditures are added up, they fall to be shared as between ship, cargo, bunkers and freight (if at risk), pro rata, according to their respective contributory values.

AVERAGE SECURITY

A declaration of GA would typically be made by the shipowner's appointed average adjuster, notifying the other interests of the need to provide reasonable security, often before the transshipment of cargo aboard the vessel. As for the forms of security acceptable to the shipowner, cargo receivers would usually be required

Reports in early August that Houthi rebels sank an Indian-flagged vessel, *MSV Faize Noore Oliya*, (below pic) forming the latest in a spate of attacks in the Red Sea.

to provide an average bond, together with either an average guarantee from the cargo insurers, or else a deposit if the cargo is uninsured.

Standard forms of average security have been formulated by the Comité Maritime International, although house forms preferred by individual average adjusters are still commonly used.

These typically commit the counterparty to pay whatever contribution in general average should subsequently be ascertained to be legally due.

They will also contain a choice of forum, often in favour of the English High Court, although arbitration agreements are also frequently encountered.

ENFORCEMENT

Once the adjustment has been issued, requests will be made for payment in the amounts stated by the average adjuster.

Since the adjustment will ordinarily have the status in law only of a non-binding opinion, it will usually be open to the net contributing party to challenge the request. This may be done by withholding payment and raising defences in legal filings, once the shipowner has commenced proceedings in the chosen forum. In so doing, the cargo interests will, however, be at risk of legal costs.

Since the decisions of the English courts in The *CMA CGM Libra*, it has been possible for cargo interests to defend claims for GA contribution on grounds that the need to incur the respective sacrifices and expenses only arose because of the initial unseaworthiness of the vessel on account of some deficiency in the passage plan – and perhaps even in the risk assessment – prepared before the beginning of the voyage.

If there was a failure by the shipowner to exercise due diligence in this regard, it could potentially provide the cargo interests with a defence and avoid the need for contribution. Such 'unrecoverable general average' would instead fall to be indemnified under standard P&I Club rules of entry.

The consequences for incidents of Houthi attacks should be obvious. In case vessels should be struck while on passage via the Red Sea with resulting loss and expense allowable in GA, shipowners and their insurers must be prepared for the initial passage plan and risk assessment, together with the systems and policies of the shipowner/operator, to come under forensic scrutiny.

It is crucial for the passage plan and risk assessment to be carefully prepared and documented. A full record will need to be kept, showing why the passage plan and risk assessment were objectively reasonable.

The record should show, among other things, what decisions were in fact made, as well as on what basis they were made. All underlying data informing the decision-making - such as notices to mariners, routing advice and published industry guidance - will need to be carefully collated and retained.

It may subsequently form the basis of expert evidence at trial. The persons who made the decisions may also need to explain them.

Relatively few declarations of GA result in legal proceedings, with 17 claims reportedly commenced in the English High Court in the year 2024-2025. More Houthi strikes could produce an uptick. ⚓

"Since the decisions of the English courts in The *CMA CGM Libra*, it has been possible for cargo interests to defend claims for GA contribution on grounds that the need to incur the respective sacrifices and expenses only arose because of the initial unseaworthiness of the vessel on account of some deficiency in the passage plan – and perhaps even in the risk assessment – prepared before the beginning of the voyage."