Shipping

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# GA SECURITY: "PAY NOW, ARGUE LATER"

**The recent case of *St Maximus Shipping Co. Ltd v A.P. Moller-Maersk A/S*[1] is the latest in a run of judgments regarding the effect of guarantee instruments. In the context of general average (GA), the decision will be of particular interest to adjusters, owners, insurers and admiralty practitioners alike, and should be borne in mind when negotiating the wording of GA security.**

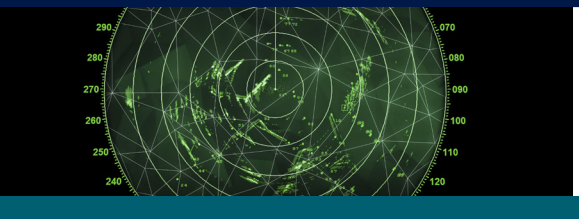
The case arose out of the grounding of the *MAERSK NEUCHATEL* off Tema in 2007. At the time, the claimant was the bareboat charterer and the defendants, Maersk, the time charterers.

In addition to initial bottom damage suffered on grounding, the vessel was subjected to further bottom damage during numerous refloating attempts. GA was declared. In GA, the cost of repairs for the latter is recoverable, but not the former.

The appointed average adjusters sought GA security in favour of the claimant, in the usual way. For commercial reasons, Maersk provided a blanket GA security on behalf of all cargo interests, in the form of a letter of undertaking (LOU). The obvious advantage of this was to avoid delays to the onward carriage of the cargo which would otherwise have occurred if the adjusters had to collect separate securities from each of the numerous cargo interests directly.

The GA adjustment was issued some time later, following which the claimant sought payment from Maersk, under the LOU, of cargo interests' GA contribution as ascertained by the adjusters. Maersk refused to pay, on the basis that they did not agree with the adjusters' conclusions on the proportion of damage caused by refloating attempts. The claimant was therefore forced to bring High Court proceedings to enforce the terms of the LOU.

1 [2014] EWHC 1643 (Comm)




The critical provision in the LOU provided by Maersk read as follows:

*"…. we hereby undertake and agree as follows:-*

1. *To pay the proper proportion of any General Average and / or Special Charges which may hereafter be ascertained to be due from the Cargo or the Shippers or Owners thereof under an Adjustment prepared by the appointed Average Adjusters in accordance with the Charterparty, dated 16th August 2004, and / or the Bills of Lading issued by us or SCL……."*

The claimant's position was that the LOU was in effect a demand guarantee and the wording of the LOU obliged Maersk to pay up once the triggering events specified in the LOU occurred. Maersk's obligation to pay was regardless of the rights and wrongs arising under the adjustment, but the LOU did not affect cargo interests' right to challenge the adjustment if they wished to do so. In other words, this was a "pay now, argue later" guarantee.

Maersk's position, on the other hand, was that they were only bound to pay what was properly and legally due from the cargo interests. The underlying basis of their argument was that as GA adjustments are not binding on the parties to the maritime adventure, they were entitled to challenge the adjustment.

In his judgment, Hamblen J agreed with the claimant's construction of the LOU, concluding that the claimant's construction reflected not only the natural and ordinary meaning of the LOU, but also the legal authorities.

The judge went on to say as to the LOU:

"The parties' agreement reflects a bargain made between two parties in good commercial relations, with benefits and drawbacks for both sides. ...It is similar to an on-demand guarantee dependent on certification, a far from unusual contractual arrangement."

*"The parties' agreement reflects a bargain made between two parties in good commercial relations, with benefits and drawbacks for both sides. Further, there are reported examples of like agreements being made in the General Average context – see, for instance, the General Average Guarantee in Tharsis Sulphur & Copper Co. Ltd. v Loftus (1872-73) LR8 CP1 and the insurance policy guarantee in Attaleia Marine Co Ltd v Bimeh Iran (Iran Insurance Co), The "Zeus" [1993] 2 Lloyd's Law Rep. 497. It is similar to an on-demand guarantee dependent on certification, a far from unusual contractual arrangement."*

In coming to his decision, the judge found that the words "proper proportion", when used in the context of GA is to be understood as a reference to cargo interests' pro-rated general average liability, i.e. its appropriate proportion of the overall liability.

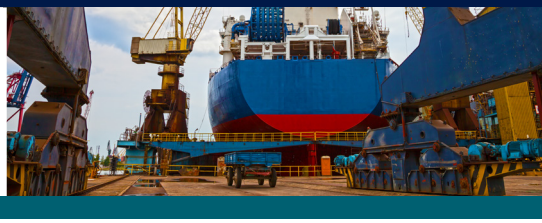
He also observed that the sum ascertained to be due in the adjustment might in fact be an overpayment or an underpayment by Maersk. If it was an overpayment, then Maersk might have means of recourse against the claimant; if it was an underpayment, then they were free of any further liability and the claimant was left with unsecured claims against the various cargo interests for the balance.

This case demonstrates the Court's eagerness to hold parties to their contractual bargain and for commercial sense to prevail. It is also a lesson for those drafting security instruments. The form of GA security wording, whether or not standard forms are used, should be reviewed carefully in each case to ensure that it properly reflects the intentions of the beneficiary and the guarantor. Indeed, the judge commented that there is a clear and well established precedent as to how to achieve the effect contended for by Maersk in a GA security - by the addition of specific phrases/words – but such wording had not been used in the LOU.

Thus, if the security is not intended to be a "pay now, argue later" instrument like the Maersk LOU, then changes may need to be made to ensure this is clear. Equally, if a guarantor wishes to preserve the entitlement to challenge the underlying contract/adjustment, then specific wording will need to be included. As this case shows, it will be the security wording itself that will be put to the test should a dispute arise, and background circumstances are unlikely to come to the parties' assistance to argue for a different meaning.

The claimant was represented by Andrew Chamberlain, Jean Koh, Laura Wright and Jamie Robinson of HFW.





For more information, please contact the authors of this Briefing:


**Andrew Chamberlain**
Partner, London
T: +44 (0)20 7264 8170
E: andrew.chamberlain@hfw.com

**Jean Koh**
Partner, London
T: +44 (0)20 7264 8227
E: jean.koh@hfw.com

**Laura Wright**
Senior Associate, London
T: +44 (0)20 7264 8791
E: laura.wright@hfw.com


For further information, please also contact:


**Guillaume Brajeux**
Partner, Paris
T: +33 1 44 94 40 50
E: guillaume.brajeux@hfw.com

**Konstantinos Adamantopoulos**
Partner, Brussels
T: +32 2 643 3401
E: konstantinos.adamantopoulos@hfw.com

**Jeremy Davies**
Partner, Geneva
T: +41 (0)22 322 4810
E: jeremy.davies@hfw.com

**Dimitri Vassos**
Partner, Piraeus
T: +30 210 429 3978
E: dimitri.vassos@hfw.com

**Simon Cartwright**
Partner, Dubai
T: +971 4 423 0520
E: simon.cartwright@hfw.com

**Paul Aston**
Partner, Singapore
T: +65 6411 5338
E: paul.aston@hfw.com

**Paul Hatzer**
Partner, Hong Kong
T: +852 3983 7666
E: paul.hatzer@hfw.com

**Henry Fung**
Partner, Shanghai
T: +86 21 2080 1000
E: henry.fung@hfw.com

**Gavin Vallely**
Partner, Melbourne
T: +61 (0)3 8601 4523
E: gavin.vallely@hfw.com

**Nic van der Reyden**
Partner, Sydney
T: +61 (0)2 9320 4618
E: nic.vanderreyden@hfw.com

**Hazel Brewer**
Partner, Perth
T: +61 (0)8 9422 4702
E: hazel.brewer@hfw.com

**Jeremy Shebson**
Partner, São Paulo
T: +55 11 3179 2900
E: jeremy.shebson@hfw.com

Lawyers for international commerce

hfw.com



São Paulo London Paris Brussels Geneva Piraeus Dubai Shanghai Hong Kong Singapore Melbourne Sydney Perth