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Some Maritime Terms Explained — Part 2

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This second part of a multi-part series continues the review of some words and phrases commonly found in maritime contracts and marine insurance policies but perhaps not in other contexts.

Force Majeure

Force majeure is a French phrase meaning "superior force". A *force majeure* clause is commonly found in maritime contracts. It relieves the parties to the contract of their obligations and liabilities when circumstances beyond their control prevent them from performing under the contract. Examples of circumstances that might constitute a force majeure are war, strike, riot and Act of God. A *force majeure* clause does not, however, excuse a party from its negligence or failure to perform under conditions that are ordinary or expected, such as a storm that is forecast.

General Average

General average is an equitable principle by which a voluntary loss suffered by one party to a maritime venture is shared proportionately by all parties to the venture, the venture most commonly being the transportation of goods.

In the early days of shipping, merchants or guards would travel with the goods to assure they would not be stolen or thrown overboard. If the vessel encountered a peril requiring the jettison of cargo, the master would designate the shipment(s) to be sacrificed to enable the vessel and the cargo to be saved from the peril. Disputes arose between the masters and shippers who did not want to lose their goods for the benefit of others. A system was developed to compensate the owner of goods that were sacrificed. Those who benefited from the sacrifice contributed proportionately to the party whose goods had been sacrificed. That system is called general average and can be traced to the sixth century. It pre-dates marine insurance.

In more modern times, there are two types of "sacrifices" that give rise to a declaration of general average: 1) the physical loss of a part of the vessel or her cargo to stabilize the vessel during the peril; and 2) an extraordinary expense incurred for the joint benefit of the vessel and cargo such as charges for towing a disabled vessel. When the sacrifice is made or an extraordinary expense is incurred, a general average may be declared triggering the obligations of those who benefited to make a contribution toward the amount of the sacrifice or expense.

Not all sacrifices or extraordinary expenses are a proper basis for the declaration of general average. A vessel that is required to make a sacrifice or incur an extraordinary expense because of unseaworthiness is not entitled to recover from the other parties in general average.

A general average adjuster determines the amount of the contribution to be made by each party benefiting from the sacrifice. The general average adjuster prepares a general average adjustment and bases the contribution amount for each party on the saved value of that party's property, including the vessel itself and cargo.

When preparing the general average adjustment, the general average adjuster is guided by certain rules. In 1864, an international maritime conference was held in York, England to codify the rules that would apply to general average adjustments. A second conference was held in 1877 in Antwerp, Belgium, after which the first set of York-Antwerp Rules was adopted. The rules have been revised several times since then, most recently in 2004. The preparation of a general average adjustment can take several years depending on the circumstances and number of parties involved. A declaration of general average by the owner of a large cargo vessel can involve hundreds, if not thousands, of interests.

Often cargo owners who must make a contribution in general average are asked to provide financial security for their contributions before they can take delivery of their cargo, pending the final general average adjustment. That security can take the form of a bond or guarantee from an insurance company.

Himalaya Clause
A Himalaya clause is customarily found in bills of lading but can be found in other maritime contracts. It is a clause by which the benefit of the defenses and limitations of liability in the contract are given to third parties who are not parties to the contract, but may play a role in the performance of the contract.

The clause came from a 1950's British case, *Adler v. Dickson*, involving a vessel named ***SS Himalaya***. In that case, a passenger was injured when a gangway fell and she was thrown to the dock below. Her ticket contained a provision exonerating the carrier from liability. The passenger sued the master and boatswain instead, arguing they could not benefit from the exculpatory provision in the passenger ticket because they were not parties to it. While the court agreed that a carrier of goods or passengers could provide for the exoneration of third parties from liability, it held the injured passenger's ticket did not expressly or even impliedly allow the carrier's employees to benefit from its terms. Since Adler v. Dickson, Himalaya clauses have become commonplace in bills of lading to extend the defenses and limitations of liability to stevedores, terminal operators, and other parties who participate in the handling and transportation of cargo.

Himalaya clauses may vary in their terms. When there is a dispute over whether a particular party may benefit from a Himalaya clause, the court will interpret the Himalaya clause like other contractual terms. That is, the court will consider what it actually says. For example, if the language of the Himalaya clause in a bill of lading requires a direct contractual relationship between the carrier and the party seeking to be a beneficiary of the bill of lading, the court will not extend the benefits of the bill of lading to a party not in a direct contractual relationship with the carrier. In that situation, if a stevedore who damaged a shipment were hired by the terminal operator and not by the carrier, the stevedore likely will not be allowed to benefit from the defenses and limitations of liability in the bill of lading issued by the carrier. On the other hand, if the Himalaya clause extends the benefits of the bill of lading to "any person who participates in the transportation of the cargo", direct contractual privity between the carrier and the third party beneficiary is not required for the extension of the bill of lading benefits to the third party and the stevedore hired by the terminal operator likely could enjoy the benefits of the bill of lading.

Inchmaree Clause
An Inchmaree clause is commonly found in named perils marine insurance policies. Like the Himalaya clause, it originated with a British case. *Thames & Mersey Marine Ins. Co. Ltd. v. Hamilton, Fraser & Co*., an 1887 case, involved the ***SS Inchmaree***, which suffered a rupture of the air chamber in a donkey pump due to the closure of a valve that should have been left open.

The Inchmaree's hull policy covered certain named perils of the seas and "other like perils." The vessel owner argued the closure of the valve was covered because it was due to "other like perils". The court disagreed, holding the covered "other like perils" must be related to the perils of the seas and what caused the rupture, likely crew negligence in failing to open the valve, was not so related. As a result of that case, underwriters voluntarily expanded the coverage available to insureds under named perils hull policies.

The covered perils added to a hull policy in the Inchmaree clause include, among others, accidents in loading or discharging cargo; bursting of boilers; negligence of the masters, officers, crew or pilots; negligence of charterers and repairers if they are not insured under the policy; breakdown of machinery; breakage of shafts or latent defects in the hull and machinery. Coverage under the Inchmaree Clause has a condition. There is no coverage for the added perils if the loss or damage was caused by the lack of due diligence by the insured or the owners and managers of the insured vessel. And, the masters, officers, crew and pilots are not considered owners of the vessel for the purpose of determining whether due diligence was exercised, even if they own shares in the vessel.

Part 3 of this series will continue the review of some frequently used terms in maritime and marine insurance contracts.

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