Marine Insurance and the Vancouver Local Agent

By MR. B. G. D. PHILLIPS

Second Instalment and Conclusion—Adjustment of General Average—Total Loss—Particular Average—F. P. A. Clause—Hull Policies—Cargo Policies.

The next point to consider is as to how an adjustment of general average sacrifices and expenditures is made, and on what basis the various parties contribute thereto. Mr. Richard Lowndes, in his well-known work on general average, lays down the principle:— "that the owner of the goods jettisoned is to be so compensated that he shall be in the same position at the time and place of adjustment as though not his goods, but those of some other person, had been sacrificed." As a result of this principle two points arise: First, that the party, whose property has been sacrificed, whether it be ship or cargo, shall receive back the value of his sacrifice; and secondly, that on the value so made good he shall pay the same proportion of general average as is paid by the other parties interested. For example, supposing that A and B have both cargo on board to the value of $100, A's cargo being thrown overboard in the general interest. A receives back the value of his cargo, namely $100, but he must also pay the same proportion of general average as is paid by the other interests. If this were not the case he would be in a better position than the man whose cargo arrived at destination.

Now, as to the basis of contribution. The ship contributes on her market (not insured) value in her damaged condition at the port of destination, to which must be added any amount made good for sacrifices. The value of the cargo for contribution is computed on the same principle as it is for allowance in case of loss by jettison, i. e., the value which the cargo has in the market at the completion of the discharge, less all charges which the merchant would have avoided in the event of total loss, including freight, duty, discount, and all other landing and sale charges. When the freight has been absolutely prepaid, it merges into the value of the cargo and forms part of the cargo's contributory value.

No special mention has been made of freight, by which is meant the hire which the shipowner receives for carrying the goods, but the same principles apply to this interest also. If the shipowner, by jettison of cargo, is deprived of the freight on that cargo, it is made good to him in general average, and he also contributes to general average on the freight at risk. The value of this is arrived at by taking the amount of freight which he is to receive on the completion of the voyage, and deducting therefrom such port charges as the shipowner shall incur after the date of the general average act, together with such wages of crew as he shall become liable for after that date.

Having thus ascertained on what basis the various parties are to contribute, the question now resolves itself into a proportion sum. The expense for tugs, hire of lighters, etc., which as a rule are paid in the first instance by the shipowner, are charged to general average, and all sacrifices of ship and cargo to be made good, are treated in the same way, the total of these being apportioned over the values of the various interests. Payment is then made to those parties entitled to receive it.

Such is a brief outline of the simplest form of general average adjustment. It must not, however, be thought that all cases are as simple, far from it. The subject becomes much more involved when such questions arise as complex salvage operations, forwarding charges and substituted expenses, and ulterior chartered freight, and other contingencies have to be dealt with. Time. however, does not permit any consideration of these this evening.

Up to this point, we have been considering the question of average purely as a maritime liability. A word may now be said regarding its application to marine insurance. Practically all policies, whether on hull or cargo provide for the payment of general average. But an interesting point of difference may be noted as between English law and American law in this connection. The steamer "Balmoral" was insured on a value of £33,000; a general average occurred and her value for contribution was ascertained to be £40,000, her share of general average being based on this value. The question then arose as to the amount payable by underwriters. The shipowners contended that as the underwriters had accepted a value of £33,000 this was conclusive and that they were not entitled to take into consideration the fact that her value for general average purposes had been assessed at £40,000. It was held, however, by the Court that the underwriters were only liable for thirty-three fortieths of the amount assessed. This established the principle which is always acted upon in English law, that if the insured value is equal to, or greater than, the contributory value, the underwriter pays the whole of the general average. If, however, the contributory value exceeds the insured value the underwriter only pays in proportion.

Such, however, is not the case according to the law of the United States. A cargo of kopak was insured for $48,000, and valued at that amount. General average expenses were incurred and the contributory value of the cargo, which, as pointed out above, was the market value at destination, was found to be $66,000, general average being assessed on this value. It was held by the courts that the underwriters were liable for the whole amount of the general average, irrespective of the fact that the valuation in their policies was less by practically $20,000 than the contributory value.

General average is adjusted according to the law of the port of destination, and in this connection it may be well to mention what is known as the York-Antwerp Rules.

The laws of all maritime nations, whilst in agreement upon the fundamental principles of general average, differ to a considerable extent in some of the details. For example, according to English law the wages of a crew when detained in a port of refuge are not allowable in general average, whilst according to the law of the United States, they are. In an endeavour to obtain uniformity of practice, a meeting of representatives of various nations was held in York in 1877, and drew up a code of rules. These were ratified at Antwerp in 1890, and again with some slight alterations in Liverpool in 1892, and are known as the York-Antwerp Rules. Practically all bills-of-lading issued today by any maritime country provide that adjustment should be made in accordance with these rules, and all policies also contain the clause, "General average payable as per York-Antwerp Rules, 1890, if in accordance with contract of affreightment."

Apart from General Average, the losses which may happen to a ship or cargo may be divided into three heads: (1) Total Loss. (2) Constructive Total Loss. (3) Particular Average.

Total Loss.

This calls for little in the way of explanation. To use the words of the Marine Insurance Act, an actual total loss occurs where the subject matter insured is destroyed or so damaged as to cease to be a thing of the kind insured, or when the assured is irretrievably deprived thereof. In addition to absolute destruction, goods are deemed to be totally lost where they no longer exist in specie, as for example, the case of hides so dameged by salt water as to be absolutely rotten and unfit for the purpose for which they were intended.

Constructive Total Loss.

The word "constructive" in this connection is sometimes misunderstood. It does not, of course, refer in any way to the construction of a ship, but means that the loss is one which may be construed as a total loss or is one actually by construction of law.

Under English law there is a constructive total loss when a vessel is so badly damaged that a prudent uninsured owner would not repair her; in other words, when the cost of repairs would exceed the value of the vessel when repaired.

The question as to what constitutes a constructive total loss has been the subject of considerable litigation, and it may be noted that the laws of most of the maritime nations differ from English law on this point. In the United States in order to constitute a constructive total loss there must be a damage of over 50 per cent. of the value of the vessel when repaired. By the law of France and Italy it must amount to 75 per cent. the law of Germany being the same as that of France. But the laws of all these countries have one remarkable point of agreement in that they take the actual value, and not the insured value in determining whether there is a constructive total loss or not. This was brought out in a case in the English courts in which a vessel was insured for £17,500, the cost of repairs being £10,500, and her value when repaired £9,000. She was held to be a constructive total loss and the underwriters were called upon to pay the full amount insured, namely £17,500. This led to the insertion of a clause in the policies whereby it is agreed that in ascertaining whether there is a constructive total loss under the policy, the insured value is to be taken as the repaired value.

Another point which came up for decision was the question as to whether the break-up value of a ship should be taken into account as part of the cost of repairs. This point had been in doubt for some time, but it was finally decided in 1908 that the break-up value was a factor which any uninsured owner would take into consideration in estimating whether he would repair his ship or not. This led to the insertion of a further clause in hull policies to the effect that the break-up value should not be taken into consideration as between the underwriter and the assured.

The result of these decisions is that, at the present time, in order to ascertain whether under the policy the assured is entitled to collect as for a constructive total loss, it must be shown that the cost of repairs is more than the insured value.

One further point to be noted in this connection is that notice of abandonment is always necessary before the assured can recover. As a rule abandonment is not accepted by the underwriter immediately, as he wishes to ascertain whether a constructive total loss has in effect arisen. If he does accept it and pays a total loss, the possession of what remains of the wreck passes over to him as from the time of the tender of abandonment. In the event of abandonment not being accepted, either the assured or the underwriter are at liberty to take any measures they may see fit for the preservation of the property, it being provided in