Environmental liabilities: a question of motive

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The liability for pollution-related costs traditionally falls within the ambit of P&I cover. However, there are some situations in which such costs can be recovered as either general average (GA) or particular average (PA) from property insurers.

This article considers the topic from a GA point of view.

Rule C (YAR 1950):

"Only such losses, damages or expenses which are the direct consequence of the general average act shall be allowed as general average.

Loss or damage sustained by the ship or cargo through delay, whether on the voyage or subsequently, such as demurrage, and any indirect loss whatsoever, such as loss of market, shall not be admitted as general average."

Historical development

The question of whether third-party liabilities could be considered as GA came before the English Courts in 1915. The case, *Austin Friars Steam Shipping Co. v. Spillers and Bakers*, concerned a steamer that ran aground and was then refloated. Tugs assisted her into nearby docks and during this manoeuvre, she twice made contact with the lock gates. This consequence was anticipated by both the master and pilot owing to the narrow entrance to the docks. The Court of Appeal confirmed that the liability to the lock/pier owners ($800,000 at current prices) could be allowed as GA, because it was foreseen as a natural consequence of the GA act performed for the common safety.

At the time, the York-Antwerp Rules (YAR) did not include any general principles concerning third-party liabilities. In *Australian Coastal Shipping Commission v. Green (1971),* the Court of Appeal considered whether third-party liabilities that arose out of engaging tugs were admissible in GA. The Court held that liabilities that might naturally have been contemplated as a direct consequence of the GA act (signing a towage contract) satisfied Rule C and could be allowed in GA. The fact that the GA loss was in the form of a liability rather than a sacrifice/expenditure was not in itself considered to prevent recovery in GA.

Applying the principles – a simple example

A loaded tanker has run aground. As part of the salvage operation, the tanks are pressurised. As would be reasonably anticipated, the operation results in an escape of oil. Under YAR 1974, the additional costs of clean-up and liabilities arising from the escape from the pressurisation are allowable in GA together with the value of the escaped oil itself.

However, the YAR 1994 (Rule C) explicitly excludes liabilities in respect of damage to the environment in consequence of the escape or release of pollutant substances. Therefore, only the cost of the quantity of sacrificed oil would be allowed under YAR 1994. Obviously, identifying such quantities is a challenge in itself.

Rule C (YAR 1994):

"Only such losses, damages or expenses which are the direct consequence of the general average act shall be allowed as general average.

In no case shall there be any allowance in general average for losses, damages or expenses incurred in respect of damage to the environment or in consequence of the escape or release of pollutant substances from the property involved in the common maritime adventure.[...]"

Rule XI (d) (YAR 1994): The cost of measures undertaken to prevent or minimise damage to the environment shall be allowed in general average when incurred in any or all of the following circumstances:

"(i) as part of an operation performed for the common safety which, had it been undertaken by a party outside the common maritime adventure, would have entitled such party to a salvage reward;
(ii) as a condition of entry into or departure from any port or place in the circumstances prescribed in Rule X(a);
(iii) as a condition of remaining at any port or place in the circumstances prescribed in Rule X(a), provided that when there is an actual escape or release of pollutant substances the cost of any additional measures required on that account to prevent or minimise pollution or environmental damage shall not be allowed as general average;
(iv) necessarily in connection with the discharging, storing or reloading of cargo whenever the cost of those operations is admissible as general average."

Taking refuge

Fortunately, the most common pollution-related costs encountered involve prevention rather than clean-up. Typically, these arise as a condition of entry into a port of refuge whereby owners must undertake measures to avoid oil pollution, such as the provision of booms. The costs associated with entering a port of refuge (when for the common safety) are broadly allowable as GA under Rule X(a). However, since there is a simultaneous risk of oil pollution, it could be argued that the cost of providing booms should fall solely on owners or their P&I club. Where the oil booms are purely precautionary, most average adjusters would be minded to charge the full costs to GA. However, where there is already a leak, the position is much less clear and will be dependent on the facts of each case.

Clearer waters

The position under the YAR 1994 rules is clarified through the inclusion of wording under Rule XI (d), which provides for (the extremely limited) circumstances where anti-pollution measures may be allowed as GA. These include those incurred as a condition of entering a port.

Littoral liabilities

As can be seen, including environmental liabilities themselves in GA is a controversial issue. As the *Exxon Valdez* demonstrated, such liabilities can exceed the property value by many times and litigation can last for years. Property insurers feel such allowances in GA mean that they are being exposed to pollution liabilities through a 'back door'. However, liability insurers (usually P&I clubs) are of the view that if something is benefiting property then property insurers should be paying. In most cases, a pragmatic compromise is required to balance the competing interests.

The advent of YAR 1994 helps to achieve this. It is therefore worth considering the incorporation of YAR 1994 (rather than earlier rules) into contracts of affreightment.