

## GA BOND AND GUARANTEE WORDINGS (MAERSK NEUCHATEL)

General Average security wordings (Average Bonds and General Average Guarantees) are not a gripping topic of conversation in general but it may be worth paying attention. The wordings of the documents are not set in stone and whilst cargo insurers often adapt and amend the wording of their guarantees, very little attention is usually paid to the wording of the Average Bond which is signed by the cargo receiver (usually your insured).

By way of background, when there is a General Average, the cargo interests are usually asked for general average security prior to the delivery of the cargo at destination. This usually has two parts. An Average Bond to be signed by the owners of the cargo (usually the receivers) and an Average Guarantee to be signed by the cargo insurers. Given that the contract of affreightment is between the ship and the cargo owners, the Bond is required as the cargo owners are the entity with whom the shipowners have a legal relationship. It is also their cargo. The Average Guarantee is merely a financial guarantee (albeit likely to be more useful than a Bond) to say that someone with money will pay when the time comes. The alternative to an average guarantee is a bank guarantee or a cash deposit.

In the case of the “Maersk Neuchatel” (which is a couple of years old now) an agreement between a bareboat charterer and the time charterers (Maersk) following a casualty included the following wording:-

*“..... we hereby undertake and agree as follows:-*

*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 16<sup>th</sup> August 2004, and / or the Bills of Lading issued by us or SCL.....”*

In the decision by the court the words “**proper proportion**” were deemed to only mean “correct percentage” and not that everything claimed was rightfully GA or that the cargo may have a legitimate defence to the GA. I.e. the guarantor had to pay on demand and if they wanted to dispute the amount which was claimed or whether the vessel was unseaworthy etc., then they would have to start a claim to get their money back – the so called “Pay now, argue later” way of doing things.

The wording of that particular clause is based on the wording of the standard Lloyd’s Average Bond which states:-

*In consideration of the delivery to us or to our order, on payment of the freight due, of the goods noted above we agree to pay **the proper proportion** of any salvage and/or general average and/or special charges which may hereafter be ascertained to be due from the goods or the shippers or owners thereof under an adjustment prepared in accordance with the provisions of the contract of affreightment governing the carriage of the goods or, failing any such provision, in accordance with the law and practice of the place where the common maritime adventure ended and which is payable in respect of the goods by the shippers or owners thereof.*

The Average Guarantees usually have a wording along the lines of:-

*In consideration of the delivery in due course of the goods specified below to the consignees thereof without collection of a deposit, we, the undersigned insurers, hereby undertake to pay to the shipowners or to the Average Adjusters on behalf of the various parties to the adventure as their*

*interests may appear, any contribution to General Average and/or Salvage and/or Special Charges which may hereafter **be ascertained to be legally due** in respect of the said goods.*

This wording means that cargo insurers can maintain their right to defend the contribution to GA as they are only obliged to pay what is “legally due”.

What would happen if the Bond only said “proper proportion” and the Guarantee “legally due” – good question – not sure. Very possibly a nice one for the lawyers to argue. Your cargo insured would possibly be obliged to pay up front although you (as their insurer) would not. I would suggest it would not be a comfortable situation necessarily.

In response to the “Maersk Neuchatel” some average adjusters have amending their standard Average Bond wordings to include the requirement that the contribution be legally due (or a similar wording) which makes it consistent with the Average Guarantee and preserves cargo’s ability to dispute a GA before making payment. However, I have also recently heard of shipowners (and their lawyers) requiring that the Average Bond and Average Guarantee have only the “proper proportion” wording with a view to being able to enforce the “Pay now, argue later” principal. It would therefore be worthwhile to be aware of the issue and make sure that you read the wording of not only the Average Guarantee which you may sign but also the Average Bond signed by your insured and make any amendments which you consider necessary.

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