

StopLoss

Demystifying General Average



TT CLUB
IS MANAGED
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GLOBAL
SHIPPERS
FORUM



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StopLoss series

StopLoss briefings are developed on a broad range of topics that give rise to recurring problems. They seek to provide a straightforward summary of an issue, essential good practice advice and, where applicable, sources of further information. The complete series and further information is available at www.ttclub.com/lossprevention and printed copies are available from the TT Club's Regional Centres.

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Abstract

General Average (GA) is a global legal principle of maritime law under which all interested parties to a 'maritime adventure' proportionally share any losses or expenses resulting from a voluntary and intentional act on the part of the ship or cargo in order to save the remainder in an emergency. The concept of 'maritime adventure' sounds quaint but describes the total group of stakeholders involved in the voyage.

GA is the system whereby a party to the adventure (most often the ship owner) can recover the extraordinary expenses/sacrifices that are necessarily incurred following some maritime incident, in protecting the cargo and/or preserving the ship. The costs are apportioned between the ship, its bunkers (sometimes owned by time charterers) and stores and the cargo (including containers) in proportion to their arrived values.

Who is this for?

- Freight forwarders
- Non vessel operating carriers (NVO's)
- Beneficial cargo owners (BCO's)

1

Introduction

In this section:

- Introduction to General Average
- Definition of a General Average act
- Salvage

GA is widely recognised in all maritime jurisdictions and is as old as maritime transport itself. Modern standards and technology make it a comparatively rare event; conversely, containerised trading, compounded by growing capacity of ships, have made the operation of GA far more complex. As a result, freight forwarders, NVOC's, logistics operators and BCO's need to be acquainted with the dynamics and associated risks presented by a declaration of GA.

The York Antwerp Rules (YAR's) govern GA events and are typically incorporated into contracts of carriage. Their objective is to promote international consistency in handling GA cases and to ensure that the process is commercially effective.

It should be noted that the YAR's are updated periodically to ensure that they remain relevant and fit for purpose. While York-Antwerp Rules 2016 is the latest version, parties are at liberty to incorporate earlier versions of the rules such as 1994 and 2004 into the contract of carriage. It is prudent therefore to understand which version applies in any given contract.

A GA event is defined in the YAR as "when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure".



An example of a GA sacrifice would be jettisoning cargo to help the ship refloat following a grounding incident. An example of GA expenditure would be the employment of tugs if the ship suffers an engine breakdown.

Following an incident, the Master of the ship will make an initial assessment and inform ship owners. Provided the incident meets all the required attributes, GA may be declared.

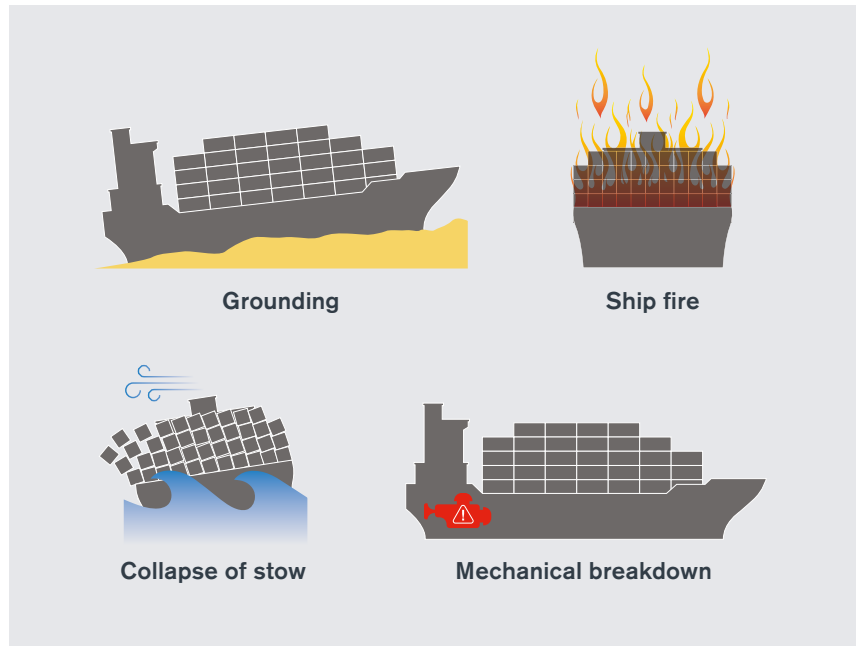
Where applicable, contribution to salvage operates on similar principles and frequently any award due to a tug owner for his tug's assistance in saving a ship can eventually form part of the GA expenditure (subject to the contracted version of YAR and the terms on which salvors are engaged).

However, in many cases where salvage services are rendered the salvor will also demand separate salvage security. In this information sheet, "General Average" is used to cover both GA and Salvage.

Common scenarios

While the definition of a GA incident has been broadly outlined, in the modern container supply chain, the following scenarios commonly give rise to GA declarations:

- Grounding
- Ship fire (cargo/engine room)
- Collapse of container stow/
Heavy weather damage
- Mechanical breakdown



2

Process

In this section:

- Recognising a General Average loss
- Who declares General Average
- Process of declaration
- Appointment of the General Average adjuster

GA losses arise whenever property involved in a voyage is voluntarily sacrificed or extraordinary expenditure is incurred to enable the ship to recover from a casualty and thereby complete the voyage.

While the combined cargo value (rather than the ship) will often proportionally hold the greatest value, it is the Master, via owners/charterers who will generally “declare” GA (although, under English law at least, there is no requirement for GA to be formally “declared” as such); owners/charterers are usually the party directly handling the “event” that is threatening the “maritime adventure”. In such circumstances it is the owners that therefore appoint an average adjuster, who thereafter operates independently and in the interests of all parties.

The average adjuster will compile the total value of the sacrifice and expenditure that are allowable, and establish the total value of the assets of all the interested parties that has been rescued or saved. The assets will include not just the ship and cargo, but also bunkers and stores, as well as containers and related equipment. Contributory values are calculated against the net arrived value of all these assets at the termination of the voyage – this is known as the contributory value. The various parties will then contribute proportionally based on these contributory values. Owing to the

amount of documentary information from a large number of interested parties, this process can take some time to complete.

The circumstances surrounding a declaration of GA are often dynamic, insofar that in many cases GA will be “declared” before the incident has reached conclusion. A declaration could be reviewed by the ship owner and retracted as circumstances develop.

Similarly, a party with an interest on board, might contest a GA claim if they feel that the circumstances do not merit a GA event. While each incident has to be assessed on its own merits, BCOs often argue that the ship owner had failed to exercise due diligence in making the ship seaworthy before and after the commencement of the voyage, as required by the contract of carriage and Articles III r.1 [3] and IV r.1 [4] of the Hague-Visby Rules, such that they do not have to contribute in GA.

In practice, however, the party contesting the GA would ordinarily still need to deposit the required bond/guarantee (or provide a cash deposit) and then wait for the GA adjustment to be issued. In doing so the BCO/asset owner would avoid unnecessary delay in the release of the cargo/asset. The time between lodging the bond/guarantee and the issuance of the final adjustment could be several years.



The assets will include not just the ship and cargo, but also bunkers and stores, as well as containers and related equipment

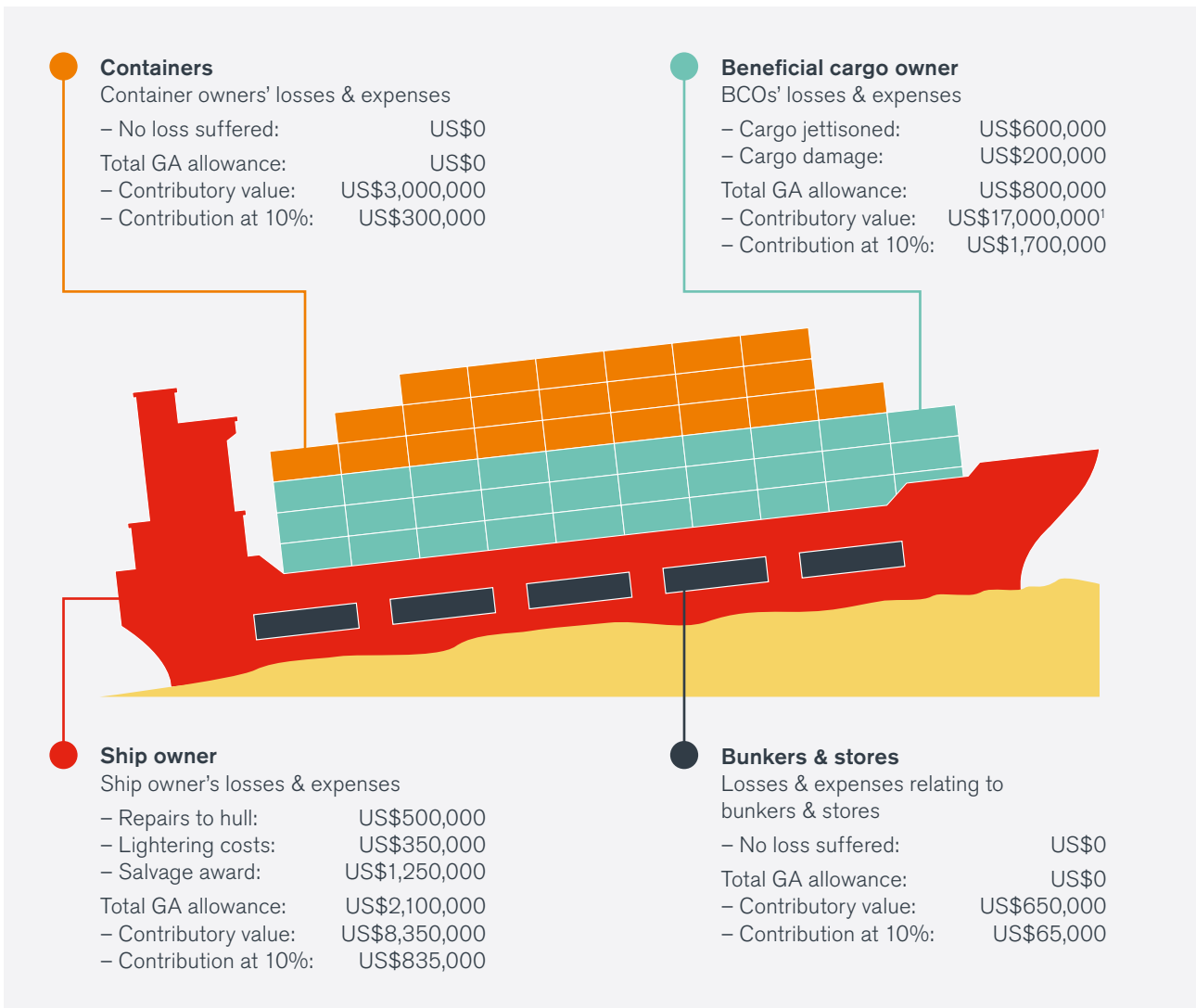


GA cases are generally very complex. The circumstances in some incidents dictate that the resolution to the immediate situation and consequently the release of the cargo can take several months, even where satisfactory GA security has been duly lodged. While such delays can give rise to frustration, provided that the prospect of saving the voyage remains, then GA will remain relevant. Time and delay do not, based on historic cases, add any relevance to the GA declaration and required contributions.

This simplified infographic illustrates the practical application of GA, highlighting the key interested parties alongside a calculation of the total allowances.

In this scenario, a container ship has grounded and costs are incurred to refloat the ship including lightening efforts jettisoning cargo.

The sum of **GA expenditure** to refloat the ship of US\$2,900,000 (incurred only by the ship and BCOs in this scenario) is apportioned in relation to the **contributory values** for each interested party. As the total contributory value is US\$29,000,000, each interested party must make a **GA contribution** of 10%.



¹ Comprised of US\$16,000,000 representing commercial invoice value arrived cargo, allowing for loss/damage, and value of jettisoned/damaged cargo

3

The role of the General Average adjuster

In this section:

- Bonds and guarantees
- Non-separation agreements
- Uninsured cargoes
- LCL shipments

As highlighted, GA is a complex topic. While numerous actors are inevitably involved in such cases, it is the General Average adjuster who arguably maintains the greatest levels of expertise in this field of maritime law.

As noted above, it is usually the owners and/or charterers that appoint the GA adjuster. However, any party with a claim for sacrifice/expenditure can submit this directly to the adjuster. The adjuster will then collate all of this information to prepare an average adjustment, identify any loss or expenditure and assess whether the same would be allowable in GA. Ultimately, the average adjuster will calculate the amounts due from all contributing interests.

To ensure that payment will be received, the average adjuster will require each party interested in the voyage to provide a GA bond as security, prior to release of anything from the voyage. Along with this, the average adjuster will request arrived values of carrying equipment, bills of lading and commercial invoices detailing CIF (cost, insurance, freight) values for cargo in order to work out the contributions for all interested parties. Since this is done at the outset of the calculation, before the full value of the sacrifice and expenditure is known, the average adjuster will estimate the amounts. A GA bond is effectively a promise to pay whatever contribution is assessed, backed up by a GA guarantee from a bank or insurance company.

The average adjuster will distribute GA bond and guarantee documentation to all known interested parties identified through the issued bills of lading. It is not uncommon that such documentation will be sent to the freight forwarder, where the freight forwarder is identified on the ocean bill of lading, even though the BCO interests are intended to be addressed. Such documentation should be forwarded to the BCO interests at the earliest opportunity. It is recommended to secure a proof of postage/email receipt in case of a future dispute. Commercially, it can prove beneficial to follow up with the BCO interests to ensure they have understood the requirements, completed the necessary documentation and returned it to the average adjuster.

Of course, the freight forwarder's client may no longer be the BCO, under the terms of the sale contract, and therefore the documents will need passing on to their customer – the buyer or consignee. The correct BCO will be determined by the incorporated INCOTERMS, which might not be accurately reflected on the bill of lading. Where the cargo is insured, standard marine policies cover the costs of GA contributions, and the insurer will take over dealing with the average adjuster.

In the event that a consignment is uninsured, or the average adjuster is uncertain about the security of the insurance company, a contributory cash deposit will be requested. Such cash deposits are held in a first class, interest earning bank account – no disbursements can be made from the account without the written consent of the average adjuster. If a cargo is found to be under insured, the cargo insurer will only reimburse the proportion of the guarantee applicable to the insured value.

This serves as a reminder of the importance from a BCO's perspective to ensure adequate cargo insurance is in place to cover any given shipment.

In some cases it is considered more expedient to forward the cargo to the final discharge port onboard another vessel. In these cases a 'non-separation agreement' will be incorporated within the GA documentation. This provides for the cargo to be forwarded to the original port of destination, in return for payment of their contribution, as if the cargo had remained aboard the original ship.



The importance from a BCO's perspective to ensure that adequate cargo insurance is in place



Upon arrival at the destination port, only cargo and equipment for which GA bonds and guarantees have been received will be released. Bills of lading will contain GA and lien clauses, under which the carrier will hold a lien over all cargo; where bonds and guarantees have not been submitted, the shipowner will continue to hold a lien over the goods and assets.

A potential issue for the freight forwarder or NVOCC may arise in connection with "less than container load" (LCL) shipments, where several BCO interests are required to submit documentation. Until all have been submitted, the container and cargo will not be released. In such circumstances, it is recommended that the freight forwarder follow up with all BCO interests to ensure they have fulfilled their obligations. The average adjuster can be contacted to identify outstanding guarantees. Being proactive can assist in alleviating unnecessary delays and subsequent damage to commercial relationships. Some NVOCC insurers may be willing to provide guarantees in these circumstances, on an undertaking by the NVOCC that such cargo is similarly held under lien within the terms of the NVOCC bill of lading. This can facilitate the movement of the remainder of the LCL cargo.

Each case is calculated on its own merits, however GA contributions can be significant and should not be an underestimated risk. Demands may exceed 60% of contributory values, which emphasises this point.

If during the GA adjustment, it is identified that a sacrificed cargo has been undeclared or wrongly declared, its value will not be allowed. Conversely, if saved, such cargo will remain subject to the prescribed contributions. This further highlights the importance of accurate declaration of cargo.

Time bar provisions exist in relation to GA and are prescribed in the YARs. It should be highlighted however that the actual time bar in any given incident will be determined by which version of YARs apply to the voyage (1994, 2004 or 2016). Limitations might also be imposed by virtue of the law of the GA security (often English law which provides for six years from the issuing of adjustment).

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It is prudent to ensure that all correspondence is retained

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The average adjuster will ultimately conclude their calculations and formally issue the General Average statement to all interested parties against their respective GA bonds and guarantees. Calculations are complex and can take a number of years to conclude. Subject to any contractual defences all parties are obliged under the GA bond to pay the GA adjustment accordingly, thus concluding the process.

The GA adjuster only quantifies the GA and does not assess rights and liabilities under the various applicable contracts of carriage.

In the initial stages of the incident, ship owners, their lawyers and appointed average adjusters will send regular updates about the status of the voyage. Later in the process, especially once the final adjustment has been issued this information can be important, especially if an interested party wishes to contest the GA declaration. Because the time between GA declaration and final adjustment can be considerable, it is prudent to ensure retention of all correspondence.



4

Required action

In this section:

- What to do if you are an NVOC/freight forwarder
- What to do if you are a container owner
- What to do if you are a beneficial cargo owner (BCO)
- Abandoned goods

NVOC/freight forwarder

The general position is that GA claims will not be made against a freight forwarder because a freight forwarder will not typically own property in the venture. Only those who have a property interest are ordinarily required to contribute in GA. Therefore the situation should not arise where GA demands are being made of a freight forwarder.

That said, if such demands are received, or made because of the peculiarities of the legal system within a foreign jurisdiction, then it would be prudent to verify whether industry recognised standard trading conditions, such as those of FIATA or other national forwarding associations have been duly incorporated into the contract with your customer. These standard trading conditions should enable you to seek an indemnification for any such liabilities.

If you appear on the ocean bill of lading as the shipper, don't panic, you are not liable for the GA contributions in respect of the cargo: that is a matter for your clients, the BCO, and their insurers. Similarly, if you are using the shipping line's equipment (containers), you have no responsibility for GA contributions assessed on the value of the containers themselves.

Occasionally, an average adjuster will demand a GA bond in respect of any freight that was payable at destination. If this happens you may be liable to sign the GA bond yourself, but before doing so you should consult your liability insurer.

Despite not having any direct liability for GA contributions, it would be prudent to inform your liability insurer of your involvement in the incident if something unexpected occurs.

- Do not sign the GA bond or GA guarantee forms.
- Let your clients know what has happened and send each of them a copy of the letters from the adjuster.
- Explain that they have responsibility for the GA contributions. If due to the terms of sale they are no longer the legal owner of the cargo, they should pass the letters onto the BCO.
- Make clear to your client that cargo will not be released by the shipping line until the guarantee has been returned and accepted. Your agent at destination may be able to assist in obtaining the declarations and guarantees.
- You may request that a copy of the signed guarantee be returned to you for your records.

Where LCL consignments are concerned, if you find that one or more clients have not signed the guarantees (or are refusing to sign), it would be prudent to notify your liability insurer. Your liability insurer may be able to help get the container released so that other parties can collect their cargo. Any guarantee provided by your liability insurer in respect of cargo is likely to be given strictly on your undertaking not to release the specific consignment until an acceptable guarantee has been provided - ensure that your agent does not release any cargo for which signed guarantees from cargo interests have not been obtained.

If there is any indication that cargo may have been damaged in the incident leading to GA and/or salvage, contact your liability insurer immediately. Arrangements can be made for the cargo to be surveyed, possibly at the port of refuge or on arrival at destination.

Container/equipment owner

If you own or lease equipment that was on board you will have a liability for the contributions on the value. The calculation for carrying equipment is based on a predetermined and agreed "arrived" value for each type of container.

- Notify your insurer of the incident immediately and forward any GA guarantee request received.
- Your insurer should thereafter take steps on your behalf to complete the required paperwork and send to the average adjuster.
- Once the guarantee has been placed by the insurer, the container(s) can be collected once discharged from the ship (subject to security having been provided by any BCOs).

Beneficial cargo owner (BCO)

If cargo insurance is in place.

Standard marine cargo policies cover the costs of GA contributions and the insurers will take over the detailed work of providing the guarantee and dealing with the average adjuster. The required GA contribution will be calculated against the CIF value of the goods being shipped.

- Notify your cargo insurer immediately and forward any GA guarantee request received.
- Your insurer should thereafter take steps on your behalf to complete the required paperwork and send to the average adjuster.
- Once the guarantee has been placed by the cargo insurer, the cargo can be collected once discharged from the ship (provided any applicable container/equipment contributions have been lodged).

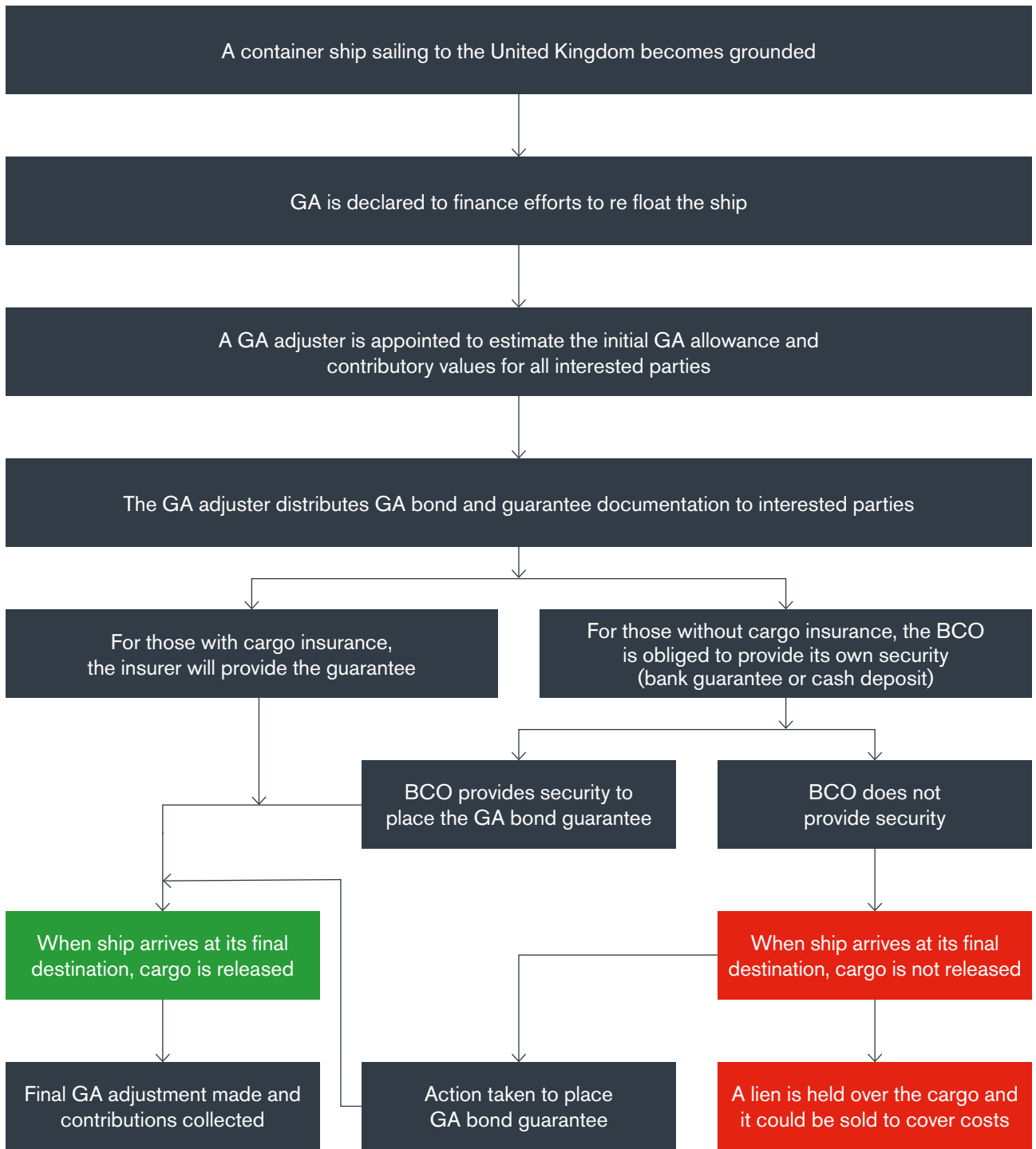
If the cargo is found to be under insured, there is a risk that the cargo insurer will not place the full value of the guarantee sought, in which case the cargo owner will be required to place a guarantee for the difference in value.

If cargo insurance is not in place

Do not simply ignore the request from the average adjuster. Your cargo will not be released without a suitable guarantee being in place. Taking no action may result in the shipping line holding a lien over your goods and ultimately exercising the right to selling them to cover outstanding costs.

- Engage with your freight forwarder who may be able to assist you in understanding your obligations.
- Where the cargo is uninsured, the evidence of the value and guarantee will need to be signed by an appropriate guarantor, such as a bank.
- A bank guarantee may satisfy the average adjuster's requirements; alternatively, you may be requested to place a cash equivalent deposit with the average adjuster to secure the release of the cargo at destination.

One unintended consequence of GA cases can be that the goods being shipped are abandoned by the BCO. Circumstances will influence this - the cargo may have missed its intended market, lost significant value or the costs of regaining control become unviable. Abandoned cargo is a continuous challenge for supply chain stakeholders, resulting not only in considerable costs on container demurrage, detention, storage and disposal costs, but also increased safety and regulatory risks. Aside from these identified risks, incidents of abandoned cargo demand a significant management resource to resolve and have the potential to impact commercial relationships.



5

Summary & checklist

In this section:

- Summary
- Practical checklist

In summary, GA is the mechanism by which extraordinary additional expenditure incurred during a voyage because of a defined incident can be recovered from all parties involved in the maritime adventure on a pro rata basis against the 'arrived' value of goods and other property aboard.

While in practice GA has been an effective mechanism to resolve such issues, there are those who argue that over the last 20 years, particularly as the size of container ships has increased rapidly, that GA is no longer fit for purpose or that an alternative solution should be developed. That said, experience shows that the system does work and remains an effective means of dealing with large and complex casualties.

In the 21st century, where cargo ships are capable of carrying in excess of 23,000 TEU and continue to grow, a GA adjustment is likely to be an extremely complex calculation and the administrative burden placed on the interested parties is significant. It is essential that all freight forwarders understand GA to efficiently manage matters and set realistic expectations towards their respective clients and BCO interests following such an event. Equally, BCOs need to understand their obligations, particularly where they have chosen not to purchase cargo insurance.



Checklist

-
- Develop an understanding of the GA process
-
- In the event of a GA declaration, notify your liability/cargo insurer
-
- It is prudent to notify your customers of a declaration affecting them
-
- Seek evidence that the required bonds and guarantees have been placed
-
- For LCL shipments, ensure all BCO interests have placed the necessary guarantees
-
- Where cargo is uninsured – advise BCOs of their obligations and actions required
-
- Keep records of all correspondence from ship owners/average adjusters and their lawyers, as well as from clients
-

For more information

Please contact us at riskmanagement@ttclub.com
or visit us at ttclub.com

FIATA

FIATA, the International Federation of Freight Forwarders Associations, is a non-governmental, membership-based organisation representing freight forwarders in some 150 countries, overall representing an industry of 40,000 freight forwarding and logistics firms worldwide. FIATA's objectives include standardising and improving the quality of services rendered by freight forwarders, such as promoting uniform forwarding documents and digitisation, and assisting with vocational training for the freight forwarding industry worldwide. Based in Geneva, FIATA is 'the global voice of freight logistics' and participated in the development of the CTU Code.

fiata.org

Global Shippers Forum

Global Shippers Forum (GSF) is the international business organisation representing the views of exporters and importers as cargo owners in global supply chains. Our members are national shippers' organisations in over 20 countries across five continents seeking safe, competitively efficient and environmentally sustainable global trade. GSF works to ensure the customer's voice is heard in the development of international transport policy and regulation, and participated actively in the drafting of the CTU Code.

globalshippersforum.com

TT Club

TT Club is the established market-leading independent provider of mutual insurance and related risk management services to the international transport and logistics industry. TT Club's primary objective is to help make the industry safer and more secure. Founded in 1968, the Club has more than 1100 Members, spanning container owners and operators, ports and terminals, and logistics companies, working across maritime, road, rail, and air. TT Club is renowned for its high-quality service, in-depth industry knowledge and enduring Member loyalty. It retains more than 93% of its Members with a third of its entire membership having chosen to insure with the Club for 20 years or more.

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