2013 CHAIRMAN'S ADDRESS
"Feeling frustrated and abandoned? Consider the York- Antwerp Rules"

One of the major challenges facing a Chairman of the Association of Average Adjusters (AAA) is the topic of this address, unless of course the Chairman happens to be a Judge who no doubt encounters potential subjects on an almost daily basis. The anxiety lasts for almost a year with ever increasing intensity the closer one gets to the approaching May date. That was very much the same for me, until the decision of the High Court in *Bunge S.A. v. Kyla Shipping Co. Ltd*,[1] was brought to my attention. This case started the seedling of an idea as regards the question or concept of frustration and abandonment in general average, and how the natural course of action, appeared to have been almost violated by a clause in the charter party which prevented an owner from being able to claim what otherwise appeared to be a 'slam dunk' abandonment of the voyage.

General average came to mind again in mid-March this year when I received an email from the Comité Maritime International (CMI) together with a questionnaire which rather helpfully included the relevant biblical extracts from Lowdnes & Rudolf. CMI are the custodians of the York-Antwerp Rules which are to be reviewed once again in 2016. To that end, the questionnaire has been sent around the world to appropriate bodies and individuals to canvass thoughts as to any changes that may be considered necessary or desirable.

Frustration and general average yet again. The frustration this time being that the CMI presided over a missed opportunity in Vancouver in 2004 for any constructive review by allowing the discussions to be hijacked by self-serving interests rather than ensuring that they proceeded for the common benefit. To compound this, the Rules were again discussed in 2012 in Beijing with yet another impasse.

Changes to previous York-Antwerp Rules in 1974 and 1994, for instance, had been incorporated into contracts of carriage soon after they came into being, and I think the general feeling has been that the Rules, prior to 2004, reflected a consensus of the industry and an improvement from the previous wording. Ship-owners, who after all are the ones who incorporate such provisions in their contracts, and usually pay general average costs in the first instance, were willing to accept these changes as being for the benefit of all parties. To the obvious embarrassment of the CMI, the 2004 Rules, together with the attempt in 2012, have not been universally accepted and appear to have been used only by those with sufficient corporate muscle to insist on their inclusion. So, frustration, I had it, in more ways than one really, and indeed it comes in all shapes and sizes and in many different forms. Of late it has been increasingly frustrating being an Arsenal supporter; seeing the economy nose dive with no end in sight, at a time when, in one's twilight years, one is contemplating the purchase of ever increasing annuities whilst watching one's pension fund gradually disappear; and wondering – will my golf ever improve?

However, the frustration that average adjusters are most likely to be concerned with in their everyday lives, besides being called an average adjuster in the first place, of course, is the frustration of contracts of carriage, which occurs after an unforeseen event renders it physically or commercially impossible to fulfil the contract, or transforms the obligation to perform into a radically different obligation from that undertaken when the contract was entered into.

Frustration of a contract is a slight misnomer, as it is the performance of the contract which is frustrated, with the consequence that the contract itself comes to an end. It is the main exception to the basic rule that contracts are absolute. Contracts generally have to be performed however onerous, inconvenient or expensive performance may subsequently become. English courts are reluctant to allow a party to escape from what has possibly turned into a bad business decision by way of the doctrine of frustration. Courts would rarely, if ever, adopt a liberal approach when it comes to this doctrine.

In cases where a common maritime adventure is brought to an end due to the frustration of the contract of carriage, the allowances in general average and the general average itself are invariably affected. Where a voyage is justifiably abandoned, the ship-owner can, if he so wishes, take steps to tranship, thereby possibly earning the voyage freight, or he can invite the cargo interests to come and collect their cargo, and to arrange for it to be carried to destination themselves. A ship-owner may also elect to tow his damaged vessel to the destination port, but he is under no obligation to do so. However, the proximity of the disabled vessel to the eventual port of destination could impact upon this decision.

In broad terms, there are four types of event which may prevent performance and allow the contracts of carriage to be considered frustrated;

. Agreement - where, after an unforeseen event has occurred, there has been an express agreement between the carrier and cargo interests that the contract(s) should be considered frustrated;

. Illegality - a contract which is expressly or impliedly prohibited by statute is generally unenforceable, as is one where the contract is not able to be performed without violation of English law, as it stands or perhaps as subsequently amended;

. Destruction of the ship or cargo – this may seem straightforward, especially when it comes to damage sustained by the vessel, but I will refer later in more detail to the decision in *Bunge v. Kyla Shipping* (2012);

. Inordinate delay – which is perhaps the most common cause for claiming frustration, but of course then the argument becomes what is an inordinate delay and does it go to the root of the contract – in this regard, what may apply for a cargo of perishable goods may not apply to a cargo of iron ore. Frustration of contract, especially as a result of delay, is an incredibly difficult area of the law, and one which has been frustrating over the years, in that admiralty lawyers and barristers have been reluctant to give categorical answers as to whether a contract has been frustrated or not. No one is disputing that the doctrine of frustration is well established in English Law, but what is uncertain is the legal rationale underlying it. I am also well aware that each case needs to be determined on its own merits and facts, which in turn makes the conclusion as to whether a contract has been, or can be considered frustrated even more difficult.

The first cases involving frustration that came before the English courts were in respect of the destruction of the physical subject matter of the contract. *Taylor v. Caldwell*[2] in 1863 is generally regarded as being the foundation of the modern law of frustration. The case involved a music hall which the defendants had agreed to rent for concerts, which was subsequently destroyed in a fire

before the opening night. The court held that the defendants were not liable in damages as contracts applied only to a promise which was positive and absolute and not subject to any condition which was express or implied. Both parties must have realised that the subsequent non-existence of the music hall, without fault of either party, would have meant that the concerts could never have taken place, and so the court used the concept of an implied condition to introduce the doctrine of frustration into English Law.

It quickly extended to other cases where, although there was no physical destruction of property, the commercial adventure envisaged by the parties was frustrated. In 1874 in the case of *Jackson v. Union Marine Insurance Co. Ltd.*[3] a ship entered into a charter party to proceed from Liverpool to Newport, Wales to load a cargo for San Francisco. Unfortunately, on leaving Liverpool she ran aground and it took six weeks to refloat her, and another six months to carry out permanent repairs. The court held that the charter party ended on the date of the grounding, as the time required to refloat and repair the vessel effectively put an end to the commercial venture that had been entered into.

It goes without saying that the cause of frustration must be some *"outside event or extraneous change of situation"* (*Paal Wilson & Co. A/S v. Partenreederei Hannah Bluementhal* 1983)[4] and must take place *"without blame or fault on the side of the party seeking to rely on it"* (*Bank Line Ltd v. Arthur Capel & Co.* 1919).[5]

In *Moss v. Smith*[6] (1850) a vessel was damaged by heavy weather and had to put back to the port of loading where the costs of repair to continue the voyage were found to be more than the voyage freight at risk, but less than the value of the vessel. The court held that there was not a total loss of the vessel or the freight, so that the claim under the freight policies failed and considered that the owner *"has not been prevented from earning freight by a peril of the sea, when at an expense which it was reasonable for him to incur, he might have earned the freight."*

However it is not necessary to wait until the facts are known with absolute certainty. In *Bank Line v. Capel* (1919) Lord Sumner explained the correct approach saying that:

> *"The probabilities as to the length of the deprivation and not the certainty arrived at after the event are also material. The question must be considered at the trial as it had been considered by the parties, when they came to know of the cause and the probabilities of the delay and had to decide what to do. Rights ought not to be left in suspense or to hang on the chances of subsequent events. The contract binds or it does not bind, and the law ought to be that the parties can gather their fate then and there".*

The implied term test adopted in *Taylor v. Caldwell* and subsequent cases came under considerable later criticism and a much broader based so called multi-factorial approach is now applied, which was favoured in *Davis Contractors v. Fareham UDC* (1956).[7] A single-factored approach, or the implied term test, was considered too blunt an instrument. The multi-factorial approach, as applied in the *'Kyla'*, takes into consideration items such as the terms of the contract itself, its matrix or context, the knowledge of the parties, their expectations, assumptions and contemplations, in particular as to risk, as at the time of the contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the reasonable and ascertainable calculations as to the possibilities of future performance in the new

circumstances. Little wonder admiralty lawyers and barristers have been reluctant to give categorical answers as to whether a contract has been justifiably frustrated or not.

It will be seen that the length of the delay is a starting point in considering whether the contract has been frustrated, but it is not sufficient by itself, and as will have been gathered from the approach adopted in the 'Kyla', many other factors need to be taken into consideration. To illustrate this point further, the finding of frustration of a charter of no longer than a year based on acquisition during the First World War, or seizure as in *'Tatem v. Gamboa'* (1939)[8], neither of which could be rectified by the parties concerned, should be contrasted with the *'The Sea Angel'* (2006).[9] In that case, only three days of a 20 day charter for a shuttle-tanker remained. Despite the vessel being detained by Pakistani Authorities for some 108 days as security for the costs of pollution caused by another vessel, this was not considered to have been sufficient grounds for frustration. I must admit that I was surprised by this decision, as one would have thought that the interruption of the last 3 days of a 20 day charter as a result of a 108 day detention would be sufficient to bring an end to the contract. Especially after the vessel had trans-shipped its last shuttle cargo and notice of redelivery had been given. By contrast, in the case of the *'Fjord Wind'* (1999),[10] a delay of 90 days was considered sufficient to frustrate the contract, partly because the cargo of soya beans was seriously thought to have been in danger of deterioration.

Putting a specific limit on the length of the delay is not therefore a satisfactory approach, as it cannot possibly be applicable or appropriate to all contracts and every situation likely to be encountered. It is, as has already been said, too blunt an instrument.

To complicate matters further, parties may include clauses in their contracts which may have the unintended consequence that they are unable to claim that the contract is frustrated. In the container industry, for instance, many bills of lading and some charter parties may contain an express right of transhipment, or substitution, at any time before or during the voyage. The result maybe that a ship-owner is unable to claim that the adventure is frustrated if performance by the carrying ship becomes impossible, and the rights provided under the clause can then be enforced. In the *'Super Servant Two' (1990)*[11] the contract gave the carrier the ability to choose one of two units to complete the transportation of a drilling rig. The *'Super Servant Two'* sank, but the contract was held not to be frustrated as the transportation could have been performed by the other unit, although this would have breached contracts already in place. The overriding consideration for insertion of such a clause might have been the commercial freedom of being able to utilise whichever of the two available vessels was in the best and no doubt most economically viable position to transport the rig.

Lord Simon of Glaisdale advised in *National Carriers v. Panalpina*[12] (1981) that frustration of a contract only takes place where there supervenes an event *"for which the contract makes no sufficient provision"*. Where the contract either specifically deals with the supervening event or, though it does not precisely refer to or cover the event, nevertheless it evidences that *"the parties contemplated that event and made provision for it or allocated the risk in respect of it, frustration will be excluded"*. Perhaps I should now consider the clause that was inserted into the charter party in the *'Kyla'* case.

The *'Kyla'* was described as being an elderly Capesize bulk carrier built in 1982, and was berthed alongside at Santos, Brazil loading a cargo of soya beans. Through no fault of her own, she was

struck by another vessel driven along the quay where she struck another berthed vessel. It was eventually estimated that the cost of repairs to the *'Kyla'* would have been in the region of US$9 million, taking an estimated 5 ½ months to carry out. The vessel had a sound market value of US$5.75 million, and to all intents and purposes it would have appeared that the contracts of carriage had been frustrated – since the cost of repair far exceeded the market value of the vessel, she was a commercial total loss. The case was first heard before a single arbitrator who found in the owners' favour, but leave was given to appeal to the High Court in respect of the effect on the doctrine of frustration of a clause in a time charter party which required the owners to maintain hull & machinery insurance at a stipulated level.

In this clause, it was warranted that the vessel *"shall be fully covered by leading insurance companies/International P&I Clubs acceptable to the Charterers against Hull and Machinery, War and Protection and Indemnity Risk"*. The insured value of the vessel was stated as US$16 million. In previous cases where frustration had been established there had been no such clause or wording in the relevant contracts. The clause makes no mention of the prospects of making a claim on the hull policies, the individual underwriters involved or the effect should any claim be subsequently denied by hull and machinery underwriters. As regards the seemingly large difference between the market and insured value of the vessel it should be noted that, in a falling shipping market, where mortgage liabilities are still outstanding, many vessels are likely to be over insured.

The High Court found that the insertion of such a clause created an assumption of risk and responsibility on the part of owners to repair the hull damage up to the insured figure of US$16 million and the case was decided in favour of the charterers. In other words, with this clause in the charter party the cost of repairs would have to exceed US$16 million for the contract to have been considered frustrated i.e. some US$10.25 million more than the vessel was actually worth. The owners no doubt considered that the insurance details had been inserted into the contract for information purposes only and they obviously did not foresee that it could have had such an effect or impact as already mentioned in the *'Super Servant Two'* or container bills of lading. I suspect little if any thought was given to the possible effects as regards frustration of the contract, let alone the application or effect of general average. If general average had been a consideration in the *'Kyla'*, one would have also expected the size of the absorption clause to have been specifically included. The owners are now seeking leave to appeal the decision of the High Court, and I for one will be interested to follow the progress of this case as it makes its way through the English court system.

Not surprisingly the York-Antwerp Rules make no mention of what would constitute a frustration or abandonment of a voyage, relying on the application and potential due process of applicable laws, but Rules X and XI, provide that general average allowances continue only until the date of the ship's condemnation or the abandonment of the voyage or up to the date of completion of discharge of cargo if the condemnation or abandonment takes place before that date. Although frustration does not negate the obligation to contribution in general average, it will generally result in the end of the common adventure before the intended destination, which may affect contributory values and the length of the detention and port of refuge expenses that are, or would have been allowable.

In the *'Kyla'* case the vessel was at her loading port when the casualty occurred. In many cases the vessel resorts, or is towed, to a port of refuge, and in major casualties, the extent of damage repairs and the likely repair costs alone can take some time to ascertain, possibly involving a further period to arrange discharge of cargo and removal to a second port or place, together with time required for repairs. In such cases, general average detention allowances for wages and maintenance, fuel and stores, port costs etc. are likely to amount to considerable sums.

Cargo interests do, of course, have some respite as regards lengthy detention cases, where the 1994 York-Antwerp Rules apply or where the security documents include the provisions of the so called Bigham clause. Under such provisions, cargo interests will not be asked to pay a contribution in excess of what it would have cost them had any outstanding voyage freight been settled, and had they transhipped the cargo at their own expense to destination, as opposed to waiting for the completion of repairs and the eventual resumption of the voyage.

As a result there may be a shortfall from the contribution due from cargo as opposed to the amount actually calculated in the general average adjustment. As we have seen from the *ABT Rasha*[13] (2001), under English law, ship-owners can claim the shortfall as being *'in respect of the proportion of the loss that falls upon him'* from hull and machinery underwriters. Hull underwriters would then pay not only the proportion that attaches to the ship, but also the amount not collectable from cargo interests by reason of the Bigham provisions, subject of course to the amount insured. The decision in the *ABT Rasha* was taken from the wording of section 66 (4) of the Marine Insurance Act (1906). No doubt a tribute to the brilliant drafting of this Act by Sir Mackenzie Dalzell Chalmers in that he obviously had in mind the effect of the Bigham Clause when crafting the finer points of section 66.

Does the decision in the *'Kyla'* require that the York-Antwerp Rules be amended in any way? I do not think that this should invoke any knee-jerk reactions. If anything, the complexities in the decisions that I have considered above surely point to the fact that the York-Antwerp Rules should be kept as simple as possible and should only deal with the certainty of the situation in hand. General average should continue to be a flexible safety net that holds everything together when a shipping casualty occurs.

A one size fits all approach, whilst increasingly common these days in all walks of life, certainly does not apply to general average or the shipping industry. The general average concept applies equally to a tug and tow as it does to an 18,000 TEU container vessel, although both are involved in vastly different operations with vastly different interests and consequences. Once it has been established that a general average exists the interpretation of the York-Antwerp Rules is very much left to the appointed general average adjuster and he will prepare his adjustment accordingly. Previous thinking has been that the lack of definition or terms within the Rules gave the adjuster more flexibility when dealing with different types of vessels or trade in a commercially effective way.

Adjusters deal not only with general average cases where security is collected from cargo interests, but also cases where owners make claims under the absorption covers in their hull and machinery polices, which are for ever-increasing amounts. Once again, it will be left to the appointed adjuster to determine the size and scale of the allowances up to the policy absorption limit.

General average has come under increasing pressure over the years, possibly because cargo interests consider that they are paying for owners' costs during the prolongation of the voyage. This is especially so in times when the value of cargo far exceeds that of the ship. However I think that general average has stood the test of time relatively well, and has recently made a comeback, particularly in the way in which the treatment of ransoms paid to pirates and detention at a port of refuge after release of the vessel have been dealt with. The common maritime adventure and benefit derived is surely still sound, and such costs incurred should be rateably borne by all.

Sweeping generalisation though it may be, general average works in the majority of casualties, and the inclusion of absorption clauses in most hull covers nowadays has, I believe, eradicated many of the smaller cases. Whilst the York-Antwerp Rules should respond to the needs of the shipping industry, I am not sure that Rhodian Law would have had in mind a vessel that could carry 18,000 20 foot containers when the concept of general average first evolved.

Before adjusters are accused of having a vested interest in the outcome of any amendments to the York-Antwerp Rules, I should stress that the AAA has always taken an impartial, independent and consultative approach. In rugby parlance, very much Barry John like. By way of explanation, Barry John was a famous Welsh rugby fly-half and Gareth Edwards, who was a scrum half, asked, when meeting him for the first time, if there was any particular way he would like the ball to be thrown to him – *"you just throw it boyo and I will catch it"* came the reply.

The Fellows of the AAA are very much the same. They will adjust general average in whatever way it is thrown at them in accordance with the terms and conditions agreed within the relevant York-Antwerp Rules.

In major container casualties where even multi-million US$ absorption covers are insufficient, the ship-owner will be forced to declare general average with the resultant security collections. Collecting salvage and general average security from so many interests is a major task, even with the World Wide Web and Excel spreadsheets, let alone formulating payments, damage done, sacrifices made, calculating contributory values and collections of contributions due etc. etc. In such cases it may take time for the general average adjustment to be issued and it has been questioned by some whether the process or application of general average is 'fit for purpose' in such circumstances in this day and age.

Large scale security collections and the enforcement of contribution from cargo interests are not exactly new problems and over the years many underwriters have put together various general average contribution covers. The take up or interest from the container community, presently appears somewhat muted, short of owners increasing the absorption cover amounts in their own hull & machinery policies which as noted in major casualties are generally not sufficient.

With such multi-interest cargoes the answers probably lie within the particular section of the shipping industry most affected i.e. the container market needs to resolve any perceived shortcomings as opposed to the York-Antwerp Rules being adapted to suit one section of the industry.

As to potential changes of the York-Antwerp Rules in 2016 rather tellingly the piece of advice I saw in a publication recently from the Director-General of the British International Freight Association, perhaps borne out of frustration following the meetings in 2004 and 2012 was…*"The adage is 'if it ain't broke, don't fix it'*. On that note ladies and gentlemen, I would thank you all for your kind attention and trust that my address this morning has left you feeling neither frustrated nor abandoned.

1 [2012] EWHC 3522 (Comm)
2 (1863) 3 B. & S. 826
3 (1874) L.R. 10 C.P. 125
4 [1983] 1 A.C. 854
5 [1919] A.C. 435
6 (1850) 9 C.B. 94
7 [1956] A.C. 696
8 [1939] 1 K.B. 132
9 *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547, [2007] 2 Lloyd's Rep. 517
10 *Eridania SpA v Rudolf A. Oetker (The Fjord Wind)* [1998] C.L.C 1187
11 *J. Lauritzen AS v Wijsmuller B.V. (The Super Servant Two)* [1990] 1 Lloyd's Rep. 1
12 *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675
13 *Comatra Ltd & Anor v Lloyd's Underwriters (The Abt Rasha)* [2001] C.L.C. 11