STOWAWAYS

The Legal Perspective of the Problem

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1 Introduction

1.1 Stowaways: the practical problem.

A stowaway is a person who enters onto a ship secretly or by way of its cargo which is subsequently loaded on the ship without the consent of the ship owner or the person responsible of the vessel.¹

Stowaways are desperate people who are driven by economic and social degradation to risk their lives by hiding inside cargo containers or in the most remote parts of a ship. What makes the topic attractive is the fact that stowaways have been and are a current issue and even more nowadays due to the global crisis which in most countries contributed to amplify poverty.²

Even though control and security at ports has been tightened with the incorporation of the International Port Security Code (IPSC), security handling is still not rigorous enough in some parts of the world.³ These circumstances give an ideal chance for stowaways to board and hide on ships and appear later while the ship is in open sea and it is too costly to return to the port where they embarked.⁴

Therefore stowaways may have to remain on board and at this point the master and crew must give them a humane treatment. This duty is remarkably present in the attempts of legislation for the stowaway problem.⁵ Furthermore, the master is responsible not only for detention on board but also for the sheltering, welfare and good health of the being while on board.⁶

¹IMO, Guidelines on Allocation of Responsibilities to seek the Successful Resolution of Stowaway Cases, IMO Res. A. 871 (20) (Nov. 27, 1997), § 2.
³Ibid.
⁵FAL Convention, § 4.4, IMO Id. §4.2.
⁶IMO Id. § 5.1.7. and § 5.4.4
Stowaways can become a burden on the commercial shipping business, mainly due to the expense they cause. As desirable as it may be, the ship owner’s responsibility for such persons does not cease once the vessel reaches port. It continues during the usual long process of removal but mainly for other losses and expenses incurred in connection with their repatriation.7

Furthermore, stowaways represent a risk to the operational safety of the ship. To “stow away” is an unsafe practice due to the facts that commercial ships are not manned, equipped or certified for carrying passengers on international voyages.8 Merchant ships don’t usually have extra accommodations for the purpose of confining stowaways. Moreover, crew members may have to share their food, move quarters and keep an eye on them. Under these circumstances it is likely that the crew will be distracted from the duties for which they actually have been trained.9

In addition to this, there may even be situations where major incidents may result in violence threatening not only the crew and master but also the cargo.10 Stowaways may also hide among the cargo transported on the ship or even inside containers causing damages.11 Under these circumstances not only the ship owner will be suffering losses but also the owner of the cargo.

When the time for repatriation and removal of the stowaways comes ship masters are faced with a complex situation and plenty of responsibilities: Firstly, due to the fact that there is no agreement that treats all aspects of the stowaways issue at an international level; Secondly, because countries are enacting more and more legislation to restrict easy

11 Ibid p.38.
immigration which becomes more political and costly. In some countries this results in the penalization of the ship owner for arriving with stowaways. Therefore he will be subject to pay immigration fines which are discretionary of every country’s immigration system.

On many occasions when requesting disembarkation of the stowaway to the immigration authorities, the master is persuaded to keep them on board. In other cases fearing to be accused of security breaches the master and port authorities may keep their presence secreted. All in all, the subject matter concerning the stowaways and its removal cannot be solved in an expedite way. Meanwhile, ship operators continue to be faced with more bureaucratic procedures, increased charges which results in obstruction, delay and the consequential financial losses.

Thus, it is evident that stowaways represent a hazard for the commercial and safety operation of the ship. That is why it is compelling to take necessary measures to prevent them getting on board. No matter what, stowaways can be extremely inventive when stowing away so under these circumstances what the ship must achieve is their prompt disembarkation.

1.2 The legal problem

The purpose of this work will be to illustrate how problematic stowaways are from the shipping industry’s point of view. Stowaways are troublesome and imply high costs and expenses for the ship owner. However, the ship owner is not only faced with financial liability but also with contractual liability. Stowaways interfere with the ship owner’s duty

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16 Parrit, B.A.H. loc. cit.
17 The Nautical Institute North East Branch, op. cit. p. 39.
to fulfill the obligations arising out of shipping contracts such as charter parties, bills of lading, etc.\textsuperscript{18}

The disrupting presence of stowaways may result on the one hand, in the ship’s deviation to an intermediate port of call or to the port where the stowaway embarked in order to land them. This will entail not only extra expenses for the ship owner, but also delay of the ship and its cargo on board.\textsuperscript{19} Moreover, deviating can imply a departure from a scheduled voyage exposing the ship and its cargo to new risks with the consequential liability falling upon the ship owner if any casualty or damage occurs meanwhile.

On the other hand, the stowaways’ removal itself can entail lengthy negotiations resulting in the ship’s delay. Delay will certainly bring about new losses and liabilities many of which may have to be borne by the ship owner.

From the legal point of view there is no one to blame other than the stowaway. However, his financial position is such that whatever the loss is it is unlikely that compensation will be obtained from that source.\textsuperscript{20}

All things considered, the aim of this paper is to discuss the issue concerning the liabilities that will be placed on the ship owner’s account: whether he can be made liable by the presence of the stowaway and for the further damages that they cause. When considering the ship owner’s liability the scope of the discussion will be limited to the context of the contract of carriage of goods by sea. Generally speaking, this contract links the ship owner who is to perform the carriage of the goods by sea and the cargo owner who will have to pay freight. That is why the ship owner can be called carrier as well. Both terms will be used as synonyms assuming that the ship owner is transporting the cargo on his own ship.

In Norwegian law, which is the law that will be used as a source, the trigger for the liability for damages is negligence. Both negligence and causation have to be present.\textsuperscript{21} Therefore,

\textsuperscript{18} Ibid, p. 76.
\textsuperscript{20} The Nautical Institute North East Branch. op. cit. p.75
if we depart from the basis that the stowaway’s presence on board a vessel is a result of negligence, it will have to be analyzed whose negligence. Moreover, negligence presupposes a previous duty which is to prevent stowaways. Assuming the carrier has part of this security responsibility, the next question we would have to answer is to which of the carrier’s duties does the prevention of stowaways relates to.

For the mentioned purpose it will be necessary to discuss the concepts of management of the ship and initial unseaworthiness. The outcome of this discussion will be crucial since the owner could be exempted from liability for an error incurred when managing the ship but not for initial unseaworthiness.

In case the ship owner is held liable, it will be interesting to mention that the exemptions of nautical fault and fire as well as the limitation rights could leave the cargo owner with very little to claim.22

In the context of the financial liability imposed on the carrier by the Immigration authorities upon disembarkation of stowaways, it will be interesting to discuss whether the carrier is to recover costs from third parties for the payments linked with the stowaway’s lodging and removal.

Finally, it will be worthwhile to refer to the insurance aspect and whether the carrier is covered for the liabilities and for the costs and expenses connected to stowaways among the different insurance options.

2. Losses and Liabilities from the ship owner’s perspective.

In this chapter I will attempt to illustrate some of the possible consequences of stowaways entering onto a ship.

2.1 Claims in damages against the ship owner.

In this section I will focus on the liabilities the ship owner may be exposed to when the stowaways damage the cargo on board the vessel or when the ship geographically deviates and is consequentially delayed. The latter liability may be imposed on the basis of the delay itself but also for the damage resulting from delay. For the purpose of my reasoning I will use the Hague-Visby Rules which are incorporated in chapter 13 of the Norwegian Maritime Code.23

2.2 Cargo owner’s claim.

2.2.1 Introduction

Liability of the ship owner is most likely to arise in the context of a contract of carriage of goods by sea. This contract links the owner of the vessel with the owner of the cargo for the latter’s cargo transportation by ship.

We assume that the owner is transporting the cargo on his own ship and that the ship operates in the liner trade. This means that the vessel will be habitually working on a regular schedule and loading and discharging at specified ports under the control of the ship owner.24 Therefore, the ship owner’s line will be in charge of loading and discharging operations as well as of the performance of the carriage. In this contract the cargo owner may be a transport customer requiring the carrier’s services so as to get the goods transported. The cargo owner will first have to deliver the goods at the port of shipment and at this point in time he will receive a bill of lading or a booking note stating his rights

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23 See § 251 of the NMC
and obligations related to the carriage of goods. Once the goods arrive at the port of destination the cargo owner or his representative will take delivery of the goods and pay freight compensation unless it has been paid beforehand.

Alternatively, the cargo owner has two other possibilities to get the goods transported. He can fix the vessel under a voyage charter party for a single voyage from the port of loading to an agreed delivery port. Generally speaking, the voyage charterer is to arrange for loading and discharging operations which will be included in his obligation to pay freight and they have to take place during a certain period of days called laytime. If the charterer exceeds that period he will be liable for the ship’s delay and subject to payment of demurrage. The other possibility is to charter the vessel for a period of time under a time charter party. In this contract the ship owner will provide the charterer with the services of the ship and its crew for the agreed period of time. While the ship owner is in charge of running the ship and hiring the crew the charterer has to find commercial engagements for the ship and pay hire. However, these contracts have their own regulation in the NMC under a separate chapter from the general carriage of goods.

N ormally the contract of carriage is linked to an underlying sales contract where the carrier acts as an intermediary between the seller and the buyer. Under these circumstances, the transport customer entering into a contract of carriage may be the seller or the buyer. I will not discuss here how the risks are distributed between the transport customer and the carrier when there is an underlying sale contracts. In any case, nowadays these transport risks are normally transferred to parties which are outside the contract of carriage, i.e. insurers.

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26 Ibid.
28 Ibid.
29 See chapter 14 of the NMC.
30 Johansson S., op. cit., p. 82-83.
Less common are the situations where the transport is not necessarily linked to a sales contract. For example, companies may have factories or subdivisions in different locations to which they need to send machines, commodities, etc. Or a manufacturer can be located in a different place from the storage facilities to which he provides goods.  

All in all, the carriers transport services will be needed in order to transport the goods from one place to another. Ships will follow a predetermined schedule in terms of time and geographically speaking. So at any point in time the ship owner will be engaged in contractual relationships with the carrier.  

In this context, it is a fact that the cargo owner may suffer consequential losses as a result of stowaways boarding a ship and that he will try seeking cover for the damages.  

On the one hand, the cargo owner may suffer losses which can materialize in physical damage to the goods caused by the stowaways. It may not be the usual problem with the stowaways since they only use the ship as means of transportation being that their main aim and not necessarily to endanger the cargo. However, case law has shown situations were cargo can in fact be damaged by the stowaways. In addition, damage can be caused indirectly during searches for stowaways inside trailers and containers and this can be a potential basis of a claim from the receiver of the goods if the seals are removed and the goods damaged.

On the other hand, the cargo interests will also be affected by the delay that a stowaway may cause to the ship. Loss in these circumstances may occur in two ways: either because the goods are damaged owing to the transport taking extremely long or the goods may arrive in a good condition but too late so as to make profit out of them if market conditions have changed.

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32 Falkanger, Bull, Brautaset, op. cit., p. 539.
33 Ibid, p. 239.
36 Falkanger, Bull, Brautaset, op. cit., p. 292.
As a starting point, the cargo owner has two options when he experiments a loss or damage: He can claim against the carrier for loss or damage. However, he should take into consideration the three obstacles that can make his claim fail. Firstly, the carrier is not strictly liable unless he incurred fault or neglect. Secondly, the carrier can exempt himself from liability for nautical fault and fire. Finally, the carrier might be entitled to limit his or her liability and this can result in the cargo owner not being able to cover the entire value of the loss.  

The other option is to claim against the cargo insurer which will cover physical loss of and damages to goods as long as they had been caused by perils covered within insurance policy having occurred during the period of insurance. The aspect of coverage will be further discussed under chapter 3.

2.2.2 Claims for damage.

If the cargo owner aims to have a successful claim against the carrier he will have to first determine the carrier’s liability in the concrete case where the stowaway damaged the cargo while on board the vessel in charge of performing the carriage.

As a starting point, it will be the rules concerning liability for damage during transport that will determine when and to what extent the carrier is liable for the damage and the consequential economic loss suffered by the cargo side. Thus, if the cargo is lost, damaged or delayed, the carrier may be held liable according to the rules on transport liability established in the Norwegian Maritime Code (NMC).

The main rule concerning the carrier’s liability is found in section 275, 1st paragraph of the NMC which establishes the carrier’s liability for lost or damaged goods on the basis of a culpable conduct of the carrier himself or of anyone for whom he is responsible. Therefore,

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37 Johansson S., op. cit., p. 82-83.
38 Ibid. Also see CICG, § 7.
the carrier is presumed negligent and consequently liable, unless he can prove something to the contrary.\textsuperscript{39}

Before the cargo owner can claim damages caused by stowaways against the ship owner it will have to be analyzed first whether the carrier can be held liable for the presence of stowaways on the ship. An analysis will have to be done to determine what steps the carrier took to prevent such event and whether he fulfilled his duties directly linked with the prevention of stowaways.\textsuperscript{40}

Therefore, if the principle is that the carrier is presumed negligent and consequently liable, he will have to prove that the damages to the cargo caused by the stowaways were not caused by his or his servant’s negligence when fulfilling preventive security measures to avoid the stowaway’s access to the vessel; or else, that the duty of taking proper care procedures to make the ship seaworthy at the commencement of the voyage was not breached.\textsuperscript{41} This will be discussed below.

Therefore, the cargo owner is in principle entitled to a claim for losses due to the goods being lost or damaged while under the carrier’s custody when the latter fails to prove that neither he nor his servant’s incurred in a faulty act. However, the former retains the burden of proving that the goods have been damaged while in the carrier’s custody and that he has suffered economic loss.\textsuperscript{42}

Finally, it must be borne in mind whether the exemptions of liability established in NMC section 276, 1st paragraph 1) and 2) apply to the subject matter or whether the presence of stowaways is a question of unseaworthiness. It should be noted that the presence of a stowaway on board the vessel is an act of negligence. What we will try to determine below is whose negligence.

2.2.1.1 Unseaworthiness.

\textsuperscript{39} Falkanger, Bull, Brautaset, op.cit., p. 266-267.
\textsuperscript{40} The Nautical Institute North East Branch, op. cit., p.84.
\textsuperscript{41} NMC 276, 2nd paragraph.
\textsuperscript{42} Falkanger, Bull, Brautaset, op. cit., p. 267.
The content of the duty of seaworthiness is established in §262, 2nd paragraph of the NMC. According to this section, the ship will be seaworthy for the voyage when it has been properly manned, equipped making the vessel stable for the future voyage. The first part of the section seems to refer to the ship’s seaworthiness from a technical angle. The ship has to be in proper condition so as to perform the voyage without endangering human life. Therefore, the technical functioning of the ship such as machinery and other equipment has to be in sound condition at the beginning of the voyage. In addition, the concept of seaworthiness imposes that the crew on board has the competence and skills which are to be expected from an ordinary seaman.43

Furthermore, the ship’s seaworthiness will also be considered from the cargo interest’s point of view.44 Cargo-worthiness refers to the carrier’s duty to make the holds refrigerated and provide for cooling chambers as well as to make all parts in which goods are carried, fit and safe for the reception, carriage and preservation of the goods.45

Even though unseaworthiness applies to the voyage in all its stages, the responsibility of the carrier contemplated in § 276, 2nd paragraph is limited to the initial unseaworthiness of the ship. Therefore, from the moment the loading commences the carrier will only be held liable for those defects that can be reasonably discovered at that point in time. Subsequent unseaworthiness will be subject to the ordinary rules of transport liability (§275 of the NMC) since it will be considered a breach of the duty of care for the goods.46

Initial unseaworthiness can be determined in relation to the individual cargo. This was discussed in a well-known English case law when chocolate was loaded at a subsequent port in the same hold where gorgonzola cheese was stowed before. The owner of the chocolate claimed that there had been a breach of the duty to make the ship seaworthy since the ship was not fit to carry chocolate in a place where it was likely to get tainted by

44 Falkanger, Bull, Brautaset, op.cit., p. 275.
45 NMC section 262, 2nd paragraph.
46 See §262, 1st paragraph of the NMC.
gorgonzola cheese. Under Norwegian law, the ship would be unseaworthy at the commencement of the voyage in relation to the chocolate. However, if the chocolate would have been loaded first the ship would have been seaworthy in relation to the chocolate and even if it got tainted by the subsequent loading of gorgonzola, the carrier’s liability would be imposed on the basis of bad stowage under the general rules of transport liability.

This issue is related to the doctrine of stages proper of English and American Law according to which the ship must be seaworthy at departure of each port. Therefore, under the stages doctrine the ship would have been seaworthy to carry chocolate if laded first but after loading cheese in a subsequent port it would have turned unseaworthy.

If we apply the discussion to our case, if the stowaways are present on board the ship from the beginning of a voyage and they damage the cargo, the cause could be initial unseaworthiness in relation to the cargo. However, if cargo is loaded at a subsequent port already damaged, stowaways may still be a cause of unseaworthiness but not from the commencement of the voyage. Therefore, the latter situation would be regulated by the general rule in §275 of the NMC.

Finally, the fact that the defect exists at the commencement of the voyage does not trigger automatic unseaworthiness if it is reasonable to expect that it will be corrected throughout the voyage.

If the stowaways get on board the vessel during loading and discharging operations it seems that this would be a situation of a defect existing at the commencement of the voyage. However, the question to be answered here is whether the stowaway is a type of defect that would constitute initial unseaworthiness. This is likely if the stowaway’s presence can damage the cargo on board either directly or in view of the delay they cause to the ship. Their presence could imply a breach of the carrier’s duty to have the ship

47 The Thorsa Court of Apeal [1926] P. 257
48 Falkanger, Bull and Brautaset, op. cit., p. 276
49 Ibid.
50 Ibid.
51 The Nautical Institute North East Branch, op. cit., p. 81-84.
ready and in proper condition to receive, preserve and carry the goods as stated in §262, 2nd paragraph of the NMC.

Therefore, if the cargo owner proves that the stowaway’s presence on board the ship rendered the vessel unseaworthy the carrier will be liable. Although he can always try to prove that stowaways managed to get on board despite of taking all reasonable precautions to prevent the event.

If stowaways are seen as a defect existing at the commencement of the voyage it will be interesting to know whether this defect can be corrected so as not to trigger automatic unseaworthiness. It is doubtful that the “stowaways-defect” can be rectified before the risk of damage arises considering that the deviation and subsequent removal are the only remedies available and they already are a materialized damage.

Thus, the presence of stowaways due to the point in time in which they are likely to access the vessel seems to be more closely linked with the failing of the carrier or his servants to take proper care in making the ship seaworthy at the commencement of the voyage. However, the carrier will be allowed to prove that such due diligence has been exercised while searching the vessel and that the presence of stowaways could not show from the inspection before departure.

2.2.3 Claims for delay

Stowaways will most likely cause delay to the ship since they tend to disrupt the vessel’s schedule and this can imply significant losses for the cargo owner. In the hypothesis of the ship carrying a consignment of cargo in order to fulfill a sales contract, the cargo owner faces a loss when the goods are damaged or destroyed for not being able to survive the long journey. However the mentioned situation would fall under the section of carrier liability for damage to goods already discussed above.

The situation where the carrier is liable for delay without the goods being necessarily damaged, -i.e. when these arrive in a perfect state but too late and meanwhile the market
conditions have changed causing a loss to the cargo owner-, is expressly contemplated in section 278 which imposes liability on the carrier for losses resulting from delay. 52

Liability is imposed according to sections 275 to 277 of the NMC. This means that the carrier will be held liable on the basis of his culpable conduct or someone’ for whom he is responsible. Moreover, the same exemptions established in section 276 of the NMC apply and so do the unit limitation rules since no distinction is made between cargo damage and liability for delay.53

However, the liability for delay presupposes a duty that the carrier must fulfill. This duty is to perform the voyage with “due despatch” which arises from section 262 of the NMC. Due dispatch relates to “regularity and speed in the performance of the transport […] Delay will be deemed to have occurred where the voyage exceeds what would be a reasonable time in light of the planned carriage and the marketing thereof.”54

It will be the cargo owner’s task in order to succeed in his claim for delay, to prove that there has been delay and that the carrier breached this duty. In this matter the section 278, 2nd paragraph in the NMC gives a hint of what is considered delay. According to this section, delay will take place when the goods are not delivered in the agreed port of discharge established in the contract of carriage, within the agreed time or in default within the reasonable period that is correct to demand from a prudent carrier.

Furthermore, delay may also encompass the situation where the cargo is considered a total loss. This situation will arise when the delay exceeds 60 days from the expiration of the agreed time or the reasonable period established in section 278, 2nd paragraph of the NMC. As a final requirement, a written notice of delay is to be sent to the carrier within 60 days counting from the time of delivery in order to file the claim for delay.55

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52 Falkanger, Bull, Brautaset, op. cit., p. 292.
53 Ibid, p. 293.
54 Ibid. Also see NOU 1993:36 p.28.
55 §288, 3rd paragraph of the NMC.
Hence, if stowaways cause delay to the ship and the cargo owner decides to claim against the carrier he will have to prove that the carrier did not proceed with due despatch and therefore the goods arrived late causing him a loss.

In our hypothesis a stowaway has boarded the vessel and the vessel is delayed either because it deviated to a port in order to disembark stowaways, or because the disembarkation and repatriation itself takes long and meanwhile the ship cannot resume activity.

The cargo owner will want to claim for his losses irrespective of what the cause was. Even if the carrier adduces that delay was caused by the long-lasting process of removal and subsequent repatriation of stowaways, the question of why the stowaways are on board will arise once again. If their presence can be traced to the initial unseaworthiness this will then be the cause of delay and the carrier will be held liable for the losses incurred by the cargo owner due to delay.

2.2.4 Deviation

Liability of the ship owner may well arise out of deviation, when the ship departs from its scheduled voyage in order to disembark stowaways. Deviation is closely linked to delay since delay is the most common consequence. One could look at delay situations as deviations or vice versa. However, the NMC provides two different sets of rules for delay and deviation on which the cargo owner can base his claim.56

Deviation consists in an intentional change from a planned contractual route which may be considered an unlawful situation.57 The concept is not limited to the geographical deviation from the route to be performed from the agreed port of loading to the agreed port of discharge. There are other situations that may as well be considered contractual deviations such as transshipment, vessel substitution, or even the time factor i.e. when the ship is

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57 Falkanger, Bull and Brautaset, op. cit., p. 294.
compelled to slow down en route due to weather conditions or some other reasons.\textsuperscript{58} Also a delay which is of such length that it could amount to substitute an entire scheduled voyage is also a deviation.\textsuperscript{59}

Deviation may have serious consequences for the cargo interests because when the carrier deviates he subjects the cargo to new risks, many of which may not have been taken into account by the cargo owner when obtaining insurance cover. If those risks actually materialize in damage to the cargo the question of whether the carrier is liable or not is subject to the deviation being catalogued as “legitimate” or “illegitimate”.\textsuperscript{60}

Traditionally deviation was thought to be a serious contractual breach. Proof of that is section 98 of the old NMC which explicitly mentioned that “the ship must not deviate unless in an attempt to save human life or to salve any ship or goods, or due to any other reasonable grounds”.\textsuperscript{61} However, nowadays the provision related to deviation in the liner trade is not as strict as it used to be. The reason for this is that when performing the carriage the carrier needs a certain flexibility which corresponds to the trade custom or commercial needs. The only duty imposed on the carrier is the same duty of due care and due despatch while the goods are under his custody.\textsuperscript{62}

Therefore the carrier is not to stick so strictly to the contractual route. What will be evaluated instead is whether he has performed the voyage reasonably, i.e. whether he has chosen a reasonable route and showed a prudent behaviour towards the cargo owner’s interests.\textsuperscript{63}

Deviation in the liner trade is specifically contemplated when determining the carrier’s liability for losses or damage to goods while under his custody. It comes up as an

\textsuperscript{58} Honka, H., op. cit. p. 99.
\textsuperscript{60} Falkanger, Bull and Brautaset, op. cit. p. 295.
\textsuperscript{61} ibid.
\textsuperscript{62} See §262, 1st paragraph of the NMC.
\textsuperscript{63} Falkanger, Bull and Brautaset, loc. cit. Also see NOU 1993:36 p.28.
exemption to the general rule established in section 275, 1st paragraph: the carrier won’t be liable for losses resulting from “measures to rescue persons or reasonable measures to salvage ships or other property at sea”.  

Therefore, deviation will be considered illegitimate unless it fulfills the requirements established in the 2nd paragraph of section 275. If the cargo, in addition, is damaged during an illegitimate deviation the carrier won’t be able to exclude nor limit his liability once his behaviour is sufficiently culpable. This means that the carrier has to succeed in proving that loss, damage or delay -resulting from an unreasonable deviation- was not caused by fault on his part. Furthermore, liability will be subject to the causation link between deviation and the loss, i.e. the carrier will have to prove that damage will have occurred even if the normal course had been followed.

Therefore, the cargo owner can claim the carrier on the basis of the deviation rules if the cargo is damaged as a consequence of an illegitimate deviation. Thus, to make the ship depart from its course so as to land stowaways will have to be unreasonable and a direct cause of the cargo loss.

If the ship deviates and as a consequence the goods perish either because the trip takes longer or due to the time the ship is stuck in port while removing stowaways the carrier would only be exempted from liability if deviation is considered reasonable. If we stick to the law the hypothesis of diverting to land stowaways is not contemplated as a reasonable deviation. Therefore, the carrier would be liable.

It is interesting to note, however, that the criterion for analyzing deviation is much more lenient in liner trades and a deviation may be considered reasonable when it obeys to commercial necessities. From this point of view, it could be reasonable to divert the vessel with the purpose of landing stowaways since reasonability is linked with the duty of

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64 Section 275, 2nd paragraph.
65 Falkanger, Bull and Brautaset p. 294.
66 See §275, 1st p and §283 of the NMC.
67 Falkanger, Bull and Brautaset p. 360. Also see Honka, H., op. cit., p 103-5.
the carrier to protect the interests of the cargo during the period of time that goes between the reception and the delivery of the goods.⁶⁹

Therefore, when the master of a vessel deviates from the proper course in order to ensure the vessel and its cargo are safe, deviation should be justifiable. Stowaways can be a real threat to the ship’s safe operation not only from the technical but also from the commercial point of view.

2.3 Defenses and exemptions in favour of the ship owner

In this section I will discuss some of the defenses by means of which the ship owner can encounter the cargo owner claims for damages to goods. Furthermore, in case these exemptions fail the carrier may have the right limit his liability for cargo damage if he has not forfeited it. These aspects will be further discussed below, using as a legal source the rules mentioned in subsection 2.1.incorporated in the NMC.

2.3.1 Exemption for navigational error and error on the management of the ship.

The NMC section 276, 1st paragraph, nº1 exempts the carrier from liability for loss, damage or delay of the goods which is caused by “fault or neglect in the navigation or management of the ship by the master, crew, pilot, tug or others performing work on the service of the ship.” However, the carrier will still be liable when damage is caused by his own fault or the fault of senior management personnel.⁷⁰

The exemption of liability concerns mainly the negligence related to the navigation and management of the ship. Navigation of the vessel comprises the operations of conduction, steering and manoeuvring of the ship from one position to another and also the use of navigational equipment such as charts, radars, signals, etc. Whereas management of the

⁶⁹ See § 262, 1st paragraph of the NMC.
ship includes those acts that relate to the ship’s condition, manning and equipment and it differs from the management of the cargo.\textsuperscript{71}

The management of the ship could be directly linked to the stowaways matter, but mainly to the duty to maintain the safety and security of the ship.

“Error in the navigation and management of the ship is an erroneous act or omission, the original purpose of which was primarily directed towards the ship, her safety and well being and towards the common venture generally.”\textsuperscript{72}

The ship’s management could be directly linked to the duty of the ship owner to preserve the vessel’s secure and safe operation and therefore with the security procedures which aim to prevent stowaways.

The responsibility to address ship security and improve searching procedures in high risk ports before sailing falls upon many persons. But the main groups responsible are the national administrations, the port authorities and the ship owner.\textsuperscript{73} Although the security issue needs of cooperation from all parties involved, there actually is a portion of responsibility for maintaining the security that falls upon the master and crew from the moment they are engaged in the running of the ship.\textsuperscript{74} In some cases even the masters are given full responsibility for preventing unwanted passengers and therefore they cannot depend on the port’s own security system.\textsuperscript{75}

Therefore, it is fact that preventive measures are to be taken before the vessel puts to sea amongst other reasons, so as not to permit access of external people to the ship.\textsuperscript{76} Keeping

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\textsuperscript{73} FAL Convention § 4 B.
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\textsuperscript{74} Ibid § 4.3.2.
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\textsuperscript{75} Spencer, Ch. loc. cit.
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\textsuperscript{76} The Nautical Institute North East Branch. The Mariner and the Maritime Law, seminar 8 Stowaways, page 38.
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the hatches, doors and other means of access locked while they are not in use when the ship is staying in port, or a adequate deck watch or the checking of boarding and disembarkation by the ship’s crew as well as maintaining adequate lighting along the hull during the night are some examples of this duty to maintain the security of the vessel.77

If we consider these preventive measures as included within the concept of management of the ship, the negligent performance of the carrier’s servants will trigger the exemption established in 276 and whatever loss the stowaways cause, say damage to the goods or delay to the ship, will have to be borne by the cargo side.

It will be interesting to discuss the duty to implement preventive security measures in the context of a US case law. Even if the present case has not been solved according to the rules being discussed it will be referred to as an illustration of what was referred above.

The vessel M/V Isla Plaza was a reefer ship engaged in a contract of affreightment with United Brands. The former party was to pick up a cargo of bananas purchased by United Brands from a port called Turbo in Columbia and transport them to New Jersey. The vessel arrived at Turbo port already half full with bananas which had been loaded in two ports in Ecuador. While loading operations were being held in Turbo, two “would-be-stowaways” were found and detained by Colombian marines. As a consequence, an intensive search for stowaways commenced. However the hatches where cargo had been laden in Ecuador where not reopened since the crew had checked them before calling Turbo port and they were securely locked.78

Concerning the presence of the stowaways on the vessel, the Court said it could not be attributed to United Brands' (shipper) negligence as was claimed by the owners of the vessel because it had no duty, contractual or otherwise, to provide for security controlling access to the vessel at the loading dock. Secondly, because the ship owners could have taken certain steps providing security services to police the docks and the vessels during loading so as to prevent the stowaways from boarding the vessel. Thirdly, because the crew

77 FAL Convention, § 4.3.2.2.
of the Isla Plaza was negligent enough to consider it was not necessary to check all the
holds even after they learned that two other stowaways had boarded the vessel. A cautious
search of the holds and their locks at that time would have led to the apprehension of the
two stowaways who allegedly caused the fire.\(^79\)

It will be interesting to know how a Norwegian court would have solved the case.
However, if we strictly stick to what the law says, §276, 1\(^{st}\) paragraph 1) will exempt the
carrier for the faulty acts of the master and crew when performing acts related to the
management of the ship. However, what remains to be answered is whether the prevention
of stowaways is in fact an act of negligence in the management of the ship. I will try to
answer this question further below but before it will be interesting to refer to the difference
between the error in the management of the ship and the error in the management of the
cargo since the latter will not exempt the carrier from liability.\(^80\)

When negligence is incurred in the management of the cargo-carrying operations, i.e.
activities taken solely in relation of the cargo and its safety carriage, they will not exempt
the carrier from liability. A clear example is the negligent stowage and discharge of cargo.
These are not matters concerning the management of the ship therefore the exemption does
not apply.\(^81\)

If the negligent activity was undertaken for the treatment of the ship as a ship -for example
the act of caring for the safety of the ship, or preventing damage to the ship or part of it, or
managing operations linked with the movement or stability of the ship- it is likely to be
suited in the hypothesis of management of the ship.\(^82\) If this is the case it is irrelevant that
the cargo was damaged as a consequence.

However, an activity which is not related to the ship or the cargo in such an evident way
can result in problems to establish the discussed difference. Some activities can be taken

\(^80\) See section 262, 1\(^{st}\) paragraph of the NMC.
\(^81\) Falkanger, Bull and Brautaset, Op. cit. page 272. Also see Sze Ping-fat “Carriers Liability under the Hague
\(^82\) Section 262, 2 of the NMC. Also see Sze Ping-fat op. cit. p. 92.
for the sake of the cargo but also benefit the safety of the vessel and vice versa. Therefore, an approach could be to take into consideration the primary nature and purpose of the acts that cause the loss.  

Courts have dissimilar criteria when applying the abovementioned distinction. For example an English Court case imposed liability on the owner when a member of the crew closed the hatches to avoid the cargo being damaged by the rain. The purpose of the faulty act was to ensure the cargo’s safety even though the closing of the hatches could ultimately benefit the vessel’s safety too. Therefore, the exemption did not apply.  

In a Norwegian case law cargo was contaminated by water because of the inappropriate closing of hatches. Coverage for the hatches was deemed to be essential for the safety of the vessel and the fact that the cargo was benefited too was not taken into consideration. The exemption of error in management of the ship was applied.

If we refer to the above mentioned US case law, the failure of the crew to check the hatches where cargo has been laden to check the presence of stowaways on board could well be encompassed in the hypothesis of error in the management of the ship. The action was done in the context of an inspection triggered by the discovery of two “stowaways- to be”. Therefore, the purpose seems to be to ensure the ship’s safety i.e. to prevent the vessel from any obstacle that would hinder the ship’s safe operation from a technical and a commercial point of view. It would be a clear situation in which the faulty act taken for the ship’s sake consequentially damaged the cargo.

If on the contrary, the hatches were negligently checked in the context of a cargo inspection this may constitute negligence in the management of the cargo and under this circumstance the carrier could be held liable.

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83 Ibid p. 93
84 Ibid. Also see Gosse Millerd Ltd v Canadian Government Merchant Marine Ltd [1927] 2 KB 432 at 439 per Wright J.
85 Falkanger, Bull and Brautaset, op. cit., p. 272. Also see ND 1987.229 NCA ULLA DORTE.
It remains unclear whether the prevention of stowaways is in fact an act of negligence in the management of the ship. It is true on the one hand that ship owner have to take all possible preventive measures to avoid finding stowaways on board. These precautions should be tightened even more if the ship calls a port where the presence of these beings is notorious. Nevertheless, due to the point in time in which these preventive measures should be implemented i.e. before the vessel’s departure, I conclude again that these duties are more closely connected with the duty of the ship owner and servants to make the ship seaworthy at the beginning of the voyage. This would not allow the ship owner to exempt himself from liability towards the cargo owner.

2.3.2 Exemption due to fire.

The NMC section 276, 1st paragraph, nº2 exempts the carrier from liability for losses caused by fire, when the fire was not provoked by the fault or neglect of the carrier personally. Therefore, the exemption will be relevant in cases in which the fire is due to the fault or neglect of people for whom the carrier is responsible or when it arises as a consequence of defective equipment as long as the cause is not the initial unseaworthiness of the vessel. Otherwise, the exemption will fail. 86

In practice there is not a need of actual fire to apply the exemption which generally speaking, will cover damage caused directly and indirectly by fire. The latter possibility encompasses damage caused by smoke, heating and water or by other consequential attempts to put out fire. 87

It will be interesting to discuss what happens in the situation where the fire is caused by stowaways causing further losses to the ship and its cargo. If fire was started by the stowaways the carrier will be able to exempt himself from the cargo claims as long as he can prove that it was not due to his personal fault.

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86 Falkanger, Bull and Brautaset, op. cit., p. 274.
87 Ibid. See also Margetson op. cit. p. 122/123.
If we strictly attach to what the law says, the carrier is exempted from liability for the cargo damaged by fire, unless he caused it by his personal fault or neglect.\textsuperscript{88} However, the situation changes if the carrier can be held liable for the presence of the stowaways under initial unseaworthiness. Unseaworthiness can be a cause of fire, but if it exists from the commencement of the voyage the exemption won’t be applicable and the carrier would be held liable.

The hypothesis of stowaways causing fire and the related issues were discussed in the case law cited in the previous subsection:

A fire onboard the M.V. Isla Plaza (the "Isla Plaza") destroyed a shipment of bananas owned by United Brands. The defendant where the owners and managers of the Isla Plaza but the issue of our interest was discussed in the context of the counterclaim the defendant filed for damage to the vessel produced by the fires, attributing the fire losses to United Brands' negligence in permitting stowaways to board the ship at the loading port.

Concerning the fire it was established that there were two fires, the first fire was caused by the stowaways, while the second resulted from the negligence of the captain and his crew who ventilated the hold with fresh air before satisfactorily determining that the fire had been put out, and who did not proceed to the closest port of refuge. It was determined that the captain and his crew aggravated the damage to the vessel and the cargo caused by the first fire.

The Court solved that the acts of the stowaways in starting the first fire and the negligence of the crew in reigniting that fire contributed equally to the damage caused to both the cargo and the hold.\textsuperscript{89}

It would be interesting to know how the Norwegian Courts would approach this case. The fact that the fire was partly caused by the crew’s negligence is irrelevant for the ship owner. He would be exempted from liability since it is clear from the facts that the fire was

\textsuperscript{88} NMC 276, 1st paragraph 2)

\textsuperscript{89} United Brands Co., et el av M/V Isla Plaza, 1995 AMC 763, (S.D.N.Y 1994).
not due to his personal fault. However, this exemption ends to be applicable if the hypothesis of the stowaway’s presence is proved to be a cause of initial unseaworthiness.

2.3.3 Ship owner’s right to limit liability for cargo claims

When the carrier is held liable for damages to the goods two aspects of his liability have to be determined: Firstly, the scope of liability i.e. the quantum of damages for which the ship owner will be made responsible and secondly, the scope of limitation i.e. whether the claims for liability arising from the contract of carriage can be limited.\textsuperscript{90}

The first aspect is usually discussed in the contract of carriage, however the contract can be silent or its provisions can be set aside by the mandatory rules of the NMC.\textsuperscript{91} We already mentioned the possible losses that the cargo owner may experience when the stowaway boards the ship: if the cargo is damaged by the stowaway this will mean either that the goods cannot be sold or will be sold but at a lower price. However consequential losses can accrue too, the cargo owner’s business may be affected for what he could have earned with the goods if they had been available at the time needed.\textsuperscript{92}

The NMC starts from the premise that the loss is to be compensated and therefore provides for a system of standardized damages in §279. This section seems to cover only damages that are not too remote, that is to say the actual damage of the goods since the basis for calculation of the loss is the “value of the goods at the place and time when the goods where or should have been delivered […]”. Therefore, the loss of profit does not seem to be included within the standardized damage. However, when interpreting this section the Norwegian Supreme Court allowed consequential losses to be included within the scope of liability.\textsuperscript{93}

Therefore, if we strictly stick to the law the carrier can limit his liability scope in a claim for cargo damage to the damage based on the value of goods. However, he can further limit

\begin{itemize}
  \item \textsuperscript{90} Falkanger, Bull and Brautset op. cit., p. 183/287.
  \item \textsuperscript{91} See § 254, 1st paragraph.
  \item \textsuperscript{92} Falkanger, Bull and Brautset op. cit., p. 287.
  \item \textsuperscript{93} ND 1987.160 NSC NY DØLSOY.
\end{itemize}
his liability according to the unit limitation rules established in §280 and §281 of the NMC.  

The carrier can limit his liability for each lost or damaged unit of the goods or for each kilogram of the gross weight of the goods lost, damaged or delayed, the limit applicable will be the one that results in highest liability. Where the modern methods of cargo are used §281 of the NMC refers to the relevance of the transport documents statements regarding the number of units when calculating the limitation amount. The typical example is that of the containers therefore if the document states the units inside of them, an extra unit should be added for the container itself, unless it is owned by the carrier.  

As a final comment it is interesting to note that the right of the carrier to limit his liability is lost in cases where the loss was caused “willfully or through gross negligence and with knowledge that such loss would probably arise”.  

In our case this conclusion is not likely to apply since the presence of the stowaway which is the direct cause of the damage obeys only to ordinary negligence. 

Therefore, the limitation rules will reduce the carrier’s liability scope sometimes to the extent that the cargo owner won’t be able to cover the entire value of the loss. However, both carrier and cargo owner will usually be insured for this particular risk. 

2.4 General Average Contributions 

In this section it will be discussed whether the ship owner can claim general average contribution for the costs and expenses involved in a diversion aimed to disembark stowaways. Nonetheless, it will first be necessary to state whether the deviation to land stowaways could be encompassed within the concept of a general average act.

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94 Falkanger, Bull and Brautaset, op. cit., p. 289.  
95 See § 280 of the NMC.  
96 Falkanger, Bull and Brautaset, op. cit. p. 290.  
97 See § 283 of the NMC.  
98 Johansson S., op. cit., p. 82-83.
For the purpose of the present discussion the main legal source to be used is the York Antwerp-Rules (YAR) 2004 which are the main legal source for general average rules. These rules had been prepared and adopted by the Comité Maritime Intenational (CMI) which is a private organization. They work as a source of transnational law becoming binding upon their incorporation in contracts such as the bills of lading and charter parties. Nevertheless, the Scandinavian countries have incorporated them into their national legislation therefore they will become binding even if not mentioned in the contract of carriage.99

The YAR includes seven general rules known as “lettered” rules and twenty-two casuistic rules known as “numbered” rules. There is a rule on interpretation establishing the priority of the numbered rules over the lettered ones in case of conflict.100

2.4.1 General Average Act.

While the word average refers to a loss, the general average involves a loss which is shared by the parties to the common venture. It opposes to the concept of particular average loss which is the loss suffered by a particular interest.101 The general average act takes place in the context of a voyage during which the ship, the cargo and its freight are part of a common venture.102 The principle underlying the rules regulating general average is that when the interests of the maritime adventure are at risk, all the voluntary losses incurred in order to preserve those interests from that peril will be apportioned between each of them.103

The characteristics of a general average act are encompassed in Rule A of the YAR definition: “There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common

99 See § 461 of the NMC. Also see Falkanger, Bull and Brautaset, op. cit., p. 466.
100 Ibid.
101 Tetley, op. cit., p. 1751.
102 Falkanger, Bull and Brautaset, op. cit. p. 465.
safety for the purpose of preserving from peril the property involved in a common maritime adventure.”

Could the ship’s deviation done with the purpose of landing stowaways at a suitable port after they have been discovered on board be considered a general average act? The affirmative answer of this question is utterly necessary to allow the ship owner to count on the cargo to contribute to acts carried out by the ship.

As a starting point the deviation we are discussing could well fit within the concept of an extraordinary sacrifice for example if the cargo is of such nature that it could not survive a long delay. Moreover, deviation implies an intentionally depart from the ship’s course and it is against the stowaway who is endangering the ship and cargo’s safety. Therefore deviation is done for the common safety of the maritime adventure.

2.4.1.1 Principle of common safety and principle of common benefit.

Historically, the claims in general average used to be for jettison of cargo and acts carried to avoid imminent shipwreck caused by a peril of the sea the significant development of the YAR rules is that today, general average expenses may include extraordinary expenses necessary for the safe prosecution of the voyage even when they were not incurred for the avoidance of an imminent danger. This situation encompasses the common benefit allowances for the costs that the ship incurs while at a port of refuge. It opposes to the common safety principle that would refer to the sacrifice of property such as the jettison of cargo or expenditures such as salvage costs, incurred while the ship was at the grip of a peril.

Therefore, if the ship has to seek a port of refuge or either return to the port where the stowaways embarked, because of the danger they may entail for the ship and cargo’s safety, certain expenses may be allowed under a general average contribution.

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104 Lowndes and Rudolf, op. cit. p. 27.
105 Tetley, op. cit, p. 1799, cf. YAR Rules X (b) and XI (b). Falkanger, Bull and Brautaset, op. cit., p. 466.
106 Lowndes and Rudolf, loc. cit.
107 See Rule X (i) a) of the YAR.
Therefore, port of call fees, extra stores and fuel incurred when diverting to a port will be included as general average losses when they were necessary for the common safety, or to enable the damaged ship to be repaired to make the completion of the voyage possible. Also wages and maintenance of the master and crew will be allowed in general average for the period in which the ship is leaving or entering a port of refuge for the common safety.\(^{108}\)

Their inclusion obeys to the fact that in view of the ship owner’s duty to take care of the cargo interests and bring the cargo to its destination, expenses are necessary to make the completion of the voyage possible. Moreover, it would be unfair not to compensate the owner at least partially for the expenses incurred with the mentioned purpose.\(^{109}\)

2.4.2 Claims for general average contribution.

2.4.2.1 When is the claim due?

The carrier and the cargo owner could well be claimants of the contribution from the other parties to the common adventure.

Whether the requirements in Rule A must be fulfilled is a debatable question since nowadays due to the predominance of the numbered rules over the lettered rules, claims in general average may be done without the presence of a peril, as long as the common benefit principle is satisfied.

Nevertheless, the carrier will not be able to claim contribution from the cargo side if the general average act was provoked by his fault in law or that of his employees.\(^{110}\) This idea is expressed in NMC § 289 allowing the cargo owner to refuse to pay any general average contribution to the carrier, when the latter was at fault. Conversely, the carrier could use the exemptions established in §276 of the NMC and the limitation set out in §280 of the NMC when contribution is being claimed by the cargo owner.

\(^{108}\) Rule XI a) of the YAR.

\(^{109}\) Falkanger, Bull and Brautaset, op. cit. p. 468.

\(^{110}\) Tetley, op. cit., p. 1762.
However, and before the exemptions due to fault of one of the participants are used, Rule D of the YAR establishes that the right to general average contribution and the consequent general average adjustment should be carried out right away. This idea was expressed in a Norwegian case law, where it was established that the adjustment has to take place irrespective of whether there was seaworthiness. The aspect of seaworthiness will be taken into account in the claim of general average contribution.

2.4.2.2 What will be compensated under general average?

According to Rule C of the YAR only loss, damage and expenses that are a direct consequence of the general average act will be encompassed in the general average compensation. However, indirect losses such as loss of market, losses and expenses resulting from delay won’t be allowed under general average.

Therefore, in our concrete case the ship owner could well try to claim a general average contribution from the cargo owner for the losses and expenses incurred on the basis of the deviation to land stowaways. However, consequential losses due to delay will still remain uncovered and in our case they will have to be borne by the ship owner. The contribution of all interests involved will include the cargo, the ship and the freight’s contributory value to the general average act as long as the freight was not paid with final effect.

Whether this claim will be accepted or not will depend on what was the cause of the deviation in the first place and whether it could be attributed to the carrier’s fault. This brings us again to the same question regarding the presence of stowaways on board and whether the carrier could be made responsible for it. A claim in general average for the cargo side’s contribution may fail if the latter proves that the vessel was uncargoworthy before departure i.e. if stowaways are traced to the initial unseaworthiness of the vessel.

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111 Ibid p. 1782.
114 Falkanger, Bull and Brautaset, op. cit. p. 470.
115 Tetley, op. cit., p. 1777.
However, this is not conclusive and it still worthwhile to discuss the issue and its relevance on the marine insurance section.

A General average act arises in the context of the law of the carriage by sea although it may have repercussions in the marine insurance area. If the general average loss was incurred for the purpose of avoiding an insured peril, then the contributions of the ship and cargo will be recovered under the respective ship and cargo insurers. These aspects of cover of general average-related costs will be discussed in the next chapter.

2.5 Ship owner’s Cost Recovery

In this section it will be discussed whether the ship owner can obtain recovery for the costs incurred due to stowaways from someone other than from the insurer.

The financial liability imposed on the ship owner by the Immigration Authorities of the different countries at which the ship calls will be usually covered under the P&I insurance. However, from the ship owner’s position the costs and expenses were incurred due to the stowaway’s infringement considering that stowing away is considered an offence in many jurisdictions. The fairest solution would be that the stowaway should incur those expenses instead of the ship owner. However, it is unlikely that these beings have assets at all. Therefore, the ship owner’s recovery possibilities from the stowaways are usually out of the question.

Further, the ship owner could try claim recovery from a third party. It was mentioned above that the presence of stowaways may reveal a negligent act. The ship owner’s liability which was discussed above arises out of the contract of carriage towards the cargo owner. The question here is whether someone could be liable towards the ship owner for making the stowaway’s access to the vessel possible. The shipping industry embraces innumerous contracts in which each party’s duties are properly distributed. If for example,

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118 Ibid, p. 72.
the stowaway hides in a container, we would have to see if someone was responsible for the containers while onshore.\textsuperscript{119}

Following, when the ship is under a charter party the ship owner could have the possibility to claim indemnity from the charterer if this is agreed expressly in the contract. As an example, under the time charter parties the BIMCO indemnity clause imposes on the charterer the burden of preventing stowaways from gaining access to the vessel by “means of secreting away in the goods and /or containers shipped by the charterers”. Therefore, if stowaways manage to get on board the vessel, this will imply a breach of contract from the charterer and he will be liable.\textsuperscript{120}

Moreover, under the above mentioned contracts the charterer could be subject to the obligation of employing the vessel between safe ports. So if the charterer negligently nominates an unsafe port i.e. a port in which the existence of stowaways could threat the safety of the cargo and the ship, he could be held liable.\textsuperscript{121}

Finally, it is interesting to note that sometimes stowaways manage to access the vessel with the complicity of the crew or the people in charge of loading operations.\textsuperscript{122} The ship owner should be able to claim indemnity if he succeeds in proving that the people involved in those operations were corrupted.\textsuperscript{123} Contrary to the above mentioned cases, this would be a non-contractual claim.

All in all, there are few isolated cases in which the ship owner will manage to get recovery from a third party.\textsuperscript{124} However, under a default situation recovery can be obtained from the relevant insurer as we will see in the next chapter.

\textsuperscript{119} Ibid.

\textsuperscript{120} Cl. 41 of the NYPE 93.

\textsuperscript{121} See 2\textsuperscript{nd} paragraphs of § 321 and § 385 of the NMC.

\textsuperscript{122} Nourse, op. cit. p 437.

\textsuperscript{123} Parrit , B.A.H. op. cit. p. 73.

\textsuperscript{124} Ibid.
3. Losses and Liabilities from the Insurance Perspective

In this chapter it will be discussed whether the ship owner is likely to recover the costs and expenses directly linked to stowaways as well as other losses which are ultimately a consequence of the stowaway’s presence as for example the loss of time. For the purpose of the discussion the different type of insurances available in the Norwegian market will be referred to.

In order to make a clear presentation, when analyzing each type of insurance two questions will attempt to be answered: whether stowaways are an insured peril and in the case they were what losses are recoverable under the relevant insurance. The word peril refers to the cause of a casualty or an insured incident. The insurance contracted can be a “named peril” insurance in which only the perils expressly mentioned in the policy are covered (P&I or cargo clauses B and C), as opposed to an “all risks” insurance in which all perils are covered unless expressly excluded in the contract terms (Hull and the Loss of Hire insurance). Nevertheless, even all risks insurances cover only “named losses”.125

3.1 P&I Insurance

3.1.1 Introduction

Protection & Indemnity insurance is a liability insurance which will cover the liabilities and losses identified in P&I rules. It is for this reason that it will also be considered a

named risk insurance. P&I provides for an indemnity cover i.e. it will only be obliged to indemnify the ship owner for the liability he incurs towards third parties. However P&I may also cover losses, costs and expenses suffered by the member itself where the club permits such cover. As a rule the losses and liabilities have to be linked to an insured ship and its running and the liability has to arise on a legal basis irrespective of whether it is contractual or non-contractual.

Up to 1996 cover was unlimited except for oil spills for which liability was limited since 1970. After 1996 the P&I clubs in the International Group agreed on the principle of a limit on P&I cover and reached a compromise called “the 20 per cent compromise”. However, where the ship owner has the right to limit liability under a rule of law, this will be the ceiling of the P&I’s cover.

The P&I clubs are organized as mutual associations owned by the members and for the members. As a starting point they were born to cover the excess of one fourth of collision liability that was covered under the hull insurance, though the scope of cover has been expanded over the last years. In Norway the first Norwegian P&I Association Skuld was established in 1897 and was followed by Gard later. Nowadays, 90% of the world merchant’s fleet is covered under The International Group of P&I Clubs which also has extensive cooperation agreements between them. These “pooling agreements” provide amongst other for apportionment when a claim against one of the associations exceeds a certain amount as well as for collective purchase of market reinsurance.

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126 Gold, E. op. cit. p.114
127 See GR 31, 32, 40 etc.
128 Gold, E., op. cit., p.115
130 See GR 51.
131 Falkanger, Bull and Brautaset, op. cit., p. 532.
132 Cf. Chapter 13 of the NMIP
133 Brachel, Andreas. Introduction to P&I – The background, the rules and the wet stuff. Part One. Oslo, (Nordisk Institutt for Sjørett) 2009
134 Falkanger, Bull and Brautaset, op. cit., p. 532.
The Conditions and terms of the P&I insurance are very similar even though no official standardization has taken place. For the purpose of the discussion below both the Gard and Skuld’s Statutes and Rules 2009 (GR and SR) will be referred to.

3.1.2 P&I’s cover for Stowaways costs and expenses.

P&I clubs are the only insurers who provide cover for the costs and expenses related to stowaways. Therefore, they are an insured peril.

All international Group clubs have similar rules concerning stowaways and the general principle is that cover is provided for costs and expenses reasonable and directly incurred as a consequence of the ship having stowaways on board. The rules emphasize the fact that the owner has to be legally liable for those expenses or they have to be incurred with the approval of the association.

The P&I covers liability of the ship owner towards the immigration authorities of each State where the ship calls. This liability includes:

- Repatriation costs when entry of the stowaway is denied.
- Fines levied by immigration authorities against the ship owner for having stowaways or for cases where they escape custody and cannot be deported.

Moreover, P&I covers “fuel, insurance, wages, stores, provisions and port charges in diverting the vessel for the purpose of landing stowaways”. These costs have to be a direct consequence of the diversion and among others, they encompass: any additional insurance contracted or any additional premium payable because of the diversion. For

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135 Ibid.
136 GR 32. Also see SR 11
138 GR 32. Also see SR 11.
139 Gold E. op. cit. p. 304
140 Ibid.
141 SR 11.1.2 c).
example: war insurance will have to be taken if as a consequence of the diversion the ship has to enter a war risk zone; extra wages for crew’s overtime; extra stores such as lubricating oil; extra provisions of food needed due to the diversion; port charges payable as a consequence of calling in non-planned ports including pilotage, harbor towage and other port fees.\textsuperscript{142}

Diversion to a nearby port en route may be cost-effective if the ship when the ship is not scheduled to return to the port of embarkation in the immediate future. However, the ship should be within a reasonable distance of somewhere suitable. In the liner trades, the loss of market credibility resulting from a major delay may certainly be significant and this is why some companies arrange ship-to-ship transfers if a sister ship is nearby and going in the right direction.\textsuperscript{143}

At present, it is current to see the idea of deterrence towards deviation to the port of embarkation with the purpose of landing stowaways.\textsuperscript{144} In liner trades it may be more important for the ship to continue its intended voyage and if the circumstances so permits it, to retain the stowaways on board and repatriate them when calling the next port en route. P&I’s do not seem to be so deterrent towards diversion however they urge the assured carrier to consult its club before deciding to depart from its scheduled route.\textsuperscript{145}

All in all, even though the ship owner will recover most expenses linked with a stowaway incident, consequential losses as a general rule are excluded. Thus, loss of freight, loss of hire in a time charter party, delay of the vessel, damage to ship or cargo, liabilities or losses arising out of a cancellation of commercial engagements of the ship, etc will remain uncovered under the P&I.\textsuperscript{146}

It is interesting to note however that the mentioned excluded losses will be covered under P&I when they are suffered by a third party towards whom the ship owner is liable and

\textsuperscript{142} Gold E. op. cit. p. 307.
\textsuperscript{143} Røsæg E., op. cit., p. 46. Also see Spencer, C. loc cit.
\textsuperscript{144} See § 4.8 of the FAL Convention.
\textsuperscript{145} Skuld Publications. \textit{Safely with Skuld. How to prevent losses on board}. 2009, p. 15. Also see Spencer, C. loc. cit.
\textsuperscript{146} See SR 11.2.2 a) and b). Also see GR 63 d), g) and h) and paragraph 2.
such liability is covered by the P&I rules. This links as directly to the next subsection concerning the ship owner’s liability towards the cargo owner.

3.1.3 Cover for the ship owner’s liability towards the cargo owner.

Cover for cargo liability is contemplated in GR 34. Rule 34.1 a) Will provide cover for the ship owner’s liability towards the cargo owner for damage to goods arising out of breaches incurred by the ship owner or anyone he is responsible for, of the obligations to “…, stow, carry, keep… the cargo or out of unseaworthiness or unfitness” of the ship.

Carrier’s liability for losses due to late delivery of the cargo is contemplated in subsection 2 of the above discussed rule. The Association covers liability to the extent they relate to cargo carried on ship arising out of the breach of the ship owner of his obligation to deliver the cargo on time. However, cover is subject to this liability being imposed by compulsory applicable law. This means that cover will not be available when liability arises out of the carrier’s contractual breach of his commitment to deliver on a specific date.

Another type of liability connected with delay is the late or non-arrival of the vessel at the agreed loading port. The rule being discussed expressly excludes cover for liability arising out of this type of breach.

Therefore, the liabilities discussed in chapter two above will be included in the P&I cover. However, in the great majority of cases the carrier may not be held liable if it is apparent that damages arose due to navigational error and error in the management of the ship, or when the limitation liability rules make the cargo owner’s claim empty. Under these circumstances the cargo owner will have to turn to his cargo underwriter. We will discuss this type of cover below.

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147 GR 63, paragraph 2.
148 See § 278 and 274 of the NMC
149 Gold E., op. cit. p. 400.
150 Falkanger, Bull and Brautaset, op. cit. p. 297.
3.1.4 Deviation

The Gard Rules contemplate the deviation issue when analyzing the club’s liability coverage towards the cargo interests. Rule 34 b) xi does not cover liability arising out of “deviation or departure from the contractually agreed voyage or adventure which deprives the member of the right to rely on defenses or rights of limitation which would otherwise have been available to him.”

However, cover won’t be automatically excluded where there has been a deviation of carriage but will be examined in a case-by-case basis. It will be considered in each circumstance if the member’s liability has changed and therefore whether he lost his defenses or rights or limitations due to the deviation. In the affirmative case, cover won’t be provided.\(^{151}\)

Nevertheless, Rule 34 b) xi mentions the possible availability of cover for deviation as an additional risk pursuant to Rule 2.2 which at the same time leads us to Appendix I paragraph 4 of the Gard rules.\(^{152}\)

Therefore, P&I insurers will usually exclude cover for liabilities, costs and expenses arising out of deviation. However, they will cover certain additional risks, including deviation upon payment of an additional premium.\(^{153}\) Nonetheless, this cover will be subject to the deviation being for the safety of the vessel and cargo as common adventure as well as reasonable and prudent.\(^{154}\)

The case being discussed however has been expressly contemplated in Skuld’s P&I rules as a diversion and not a deviation. According to this, all the extra costs due to the departure

\(^{151}\) Gold, E. op. cit. p. 399.

\(^{152}\) See Appendix 7 paragraph 4 subsection 4.1.

\(^{153}\) Girvin, S., op. cit., p. 310.

\(^{154}\) Gold, E. op. cit. p. 398.
of the scheduled route in order to land stowaways safely will be covered under these P&I rules.\textsuperscript{155}

Nevertheless, compensation to the ship owner for the time lost due to deviation remains excluded.\textsuperscript{156} This is a serious problem due to the financial consequences for the ship owner that a stowaway and the consequential need of diversion imply: delayed sailings, deviation to off-schedule ports, off-hire, etc.\textsuperscript{157} It is likely that the ship owner will have to bear these costs himself since it is doubtful that the loss of hire insurer will cover the time lost under these circumstances.

3.2 Cargo Insurance.

3.2.1 Introduction

Cargo insurance is linked to the carriage of goods by sea or other means of transport. This type of insurance is usually contracted to safeguard the cargo while it is being transported and is of an extreme relevance since the cargo can be exposed to dangers which can sometimes end up causing an accident and as a result the carriers is not liable.\textsuperscript{158}

The cargo insurance is a property damage insurance which covers situations such as when the goods become a total loss, or suffer a physical damage or there is a shortage of them during the carriage.\textsuperscript{159}

In this section it will be discussed whether the cargo owner can obtain cover for the losses caused by stowaways under the Norwegian Cargo Clauses: Conditions relating to insurance for the carriage of goods of 1995 version 2004 (CICG). These clauses will apply to those cases where the goods are in transit from one place to another and when the means

\textsuperscript{155} See supra n 120.

\textsuperscript{156} See Gard Rule 63 d), g) and h). Also see Skuld rule 11.2.


\textsuperscript{158} Johansson, S., op. cit., p. 81.

\textsuperscript{159} See S. 6, 1st paragraph of the CICG.
of transport is a ship, subject however to an agreement between the assured and insurer which will be expressed in the insurance policy.\textsuperscript{160}

3.2.2 Cover for damaged cargo.

There are many alternatives when obtaining cover for the property damage. Insurance can be effected “against all risk”, “against extended transport accidents” or simply “against transport accidents”.\textsuperscript{161} Under an all-risks policy or “A-Clauses” damage will be covered no matter what risk the insured goods are exposed to.\textsuperscript{162}

To know whether damage caused to the cargo by stowaways will be covered by the cargo owner’s insurer will require first determining whether stowaways are considered a usual risk to the cargo covered by the cargo insurer.\textsuperscript{163}

In general insurance law conditions loss or damage must be caused by a “sudden” and “unforeseen” event in order to be covered. The first term is not always strictly applied to the carriage of goods since multiple damages will be covered even if they do not obey to what the word “sudden” traditionally implies.\textsuperscript{164} Concerning the latter, stowaways are an unforeseen risk. What is more, loss or damage caused directly by the stowaways is an unforeseen risk because stowaways usually use the ship as a means of transport and not always have as a main aim to attack the cargo.

Furthermore, under an A-clause all risks which are not explicitly excluded in the insurance conditions are covered.\textsuperscript{165} Stowaways certainly represent a risk to the vessel and the cargo and they are not established explicitly as an excluded risk.\textsuperscript{166}


\textsuperscript{161} Falkanger, Bull and Brautaset., op.cit., p. 474.

\textsuperscript{162} See. § 3 of CICG.

\textsuperscript{163} Cf. Ss 2, 3, 4 and 5 of CICG.


\textsuperscript{165} Ibid, p. 252
Therefore, the cargo owner under an all-risks policy should be able to claim for the damage to the goods caused by stowaways.

Conversely, under the named perils clauses the cargo owner will only be entitled to compensation if the loss suffered has been caused by one or more of the risks listed in the policy. Section 4 and 5 of the CICG enumerate the perils included in the “extended transport accident” cover and the “transport accident” policy, respectively. Concerning our case, one of the hypotheses that can actually be contemplated is fire started by stowaways resulting in damage to the cargo. According to both sections, the risks of fire and explosion to which the goods are exposed to are covered and nothing is stated regarding the fires’ cause or where it should have begun. 167

Therefore, under the B- and C-clauses, fire caused by stowaways will certainly make the insurer liable if it results in damage to the goods.

Further, the damage caused by stowaways can amount to a total loss on the cargo side for example, when the entire consignment of goods is destroyed or is severely damaged. Yet, damage can severely be done only to part of the cargo and in this case the cargo side will experience a shortage. 168

Therefore, where A-Clause policy has been contracted it will be likely that the cargo owner will obtain cover in the event the stowaways have caused damage to the cargo and also if the damage accrues to a total loss or shortage. However, under the B and C-clauses the cover will become binding upon the occurrence of a named risk. Stowaways are not foreseen as a risk within those clauses, however the hypothesis of a fire started by stowaways resulting in damage to the cargo could well fit in the named risk policy. Thus, cargo owner would obtain cover in the case of fire resulting in damage, total loss or shortage of the cargo under the B and C policies.

166 Cf. Ss. 17,18 and 19 of CICG
167 Cf. CICG, s 4 (4), s 5 (4). Also see Norwegian Cargo Clauses 1995/2004 with Commentary, p. 258.
168 § 35, 1)-4) and § 36 of CICG.
3.2.2 Cover for delay

Stowaways will cause the ship a significant delay due to the lengthy negotiations that the process of removal entails and also as a consequence of the ship’s deviation to disembark stowaways.

In the context of the cargo insurance, delay will occur when “the goods or part of the goods do not arrive at the place of destination for the insured transit, within the specified time limit, expected date of delivery, shipment schedule, etc.,[…]” or when 30 days have elapsed from the stipulated day of arrival.169

Section 18 from the CICG establishes the risks which are excluded from the cargo insurance. In item 5) of the mentioned section it is established that the insurer is not liable for any loss or damage resulting from the delay. This type of losses can occur, for example, when fresh goods decay due to the delay or when the delay causes a loss of profit to whom is supposed to receive the goods on time. The exclusion applies regardless of the cause of delay and provided there is a causation link between the delay and the loss.170

Therefore, if the abovementioned requirements are fulfilled it is unlikely that under the standard cargo clauses the cargo owner will obtain cover for the delay due to stowaways. Therefore, he will have to bear the resulting losses. However, if the ship owner is liable as concluded above, recovery will be available from the ship owner’s P&I.

Exceptionally, §18, 5) of the CICG excludes two situations: Firstly, damage that the delay contributes to expand will be covered, though the damage has to be of the type covered by the CISG. Secondly, if a special agreement pursuant to the special clauses has been reached between the insurer and the assured, cover will be available.171

The first exception would be relevant to our case if for example stowaways caused damage to the goods on board the ship and deviation is a measure to avoid further damage. In the

171 Section 18(5) CICG.
case of perishable goods these may not survive a deviation and the consequential delay. Delay would contribute to cause further deterioration to a damage that has already occurred. Thus, there should be insurance cover available as long as it is a damage of the type covered in the insurance policy.\textsuperscript{172}

However, under the subsections below what will be discussed is whether cover is provided for losses directly linked to delay caused by stowaways.

3.2.2.1 Delay in the special cargo clauses

These clauses apply when the objects involved are characterized as “special objects”. They supplement or replace the standard cargo clauses which conversely refer to what is generally understood by ordinary goods, i.e. machines, goods for resale, farm animals such as cows, horses, etc.\textsuperscript{173}

Therefore, losses due to delay can be covered pursuant to the Special Clause for total loss as a result of delay (not resulting in the physical loss of or damage to the goods): The assured has the right to claim for total loss or shortage of the goods caused by delay. There will be total loss when goods have been totally destroyed, taken away from the assured or damaged in such a way that they must be regarded as a total loss and delay was the ultimate cause.\textsuperscript{174} The same definition applies for shortage but in this case loss would be partial.

Assuming our case takes place in the context of an international transit, section b) of the special clause regulates our hypothesis. The cargo owner has to postpone the claim for losses caused by the delay until a period of 30 days has expired though he may claim before that period if he has clear indications that he will never retrieve the goods.\textsuperscript{175}

\textsuperscript{172} See § 3, §4 and § 5 of the CICG.

\textsuperscript{173} Norwegian Cargo Clauses 1995/2004 with Commentary, p. 248.

\textsuperscript{174} See CISG special clause concerning total loss as a result of delay. Also see §35 and 36 of CISG.

\textsuperscript{175} Norwegian Cargo Clauses 1995/2004 with Commentary, p. 409.
Further, delay has to be a consequence of one of the categories enumerated in the 2\textsuperscript{nd} paragraph of the discussed special clause and fall within the scope of risks covered by the insurance.\textsuperscript{176}

Stowaways are not listed as a cause of delay in the special clause in question and even if they were it is not certain that they are contemplated as a usual risk to the cargo that is covered by the cargo insurance.\textsuperscript{177} However, if it is an all-risk cargo insurance policy it may well cover cases where the stowaways are a risk to the cargo.

Therefore, the cargo owner under an all-risks policy and having contracted the special clause for total loss as a result of delay should be able to claim for the losses he suffers due to the delay caused by stowaways. However, this is doubtful when the policy is not an all-risks one.\textsuperscript{178} Therefore, this situation should be covered under the ship owner’s P&I if and only if the carrier is liable.

3.2.3 Types of losses covered by the cargo insurer.

The present section will mention some of the losses which are relevant to the case being discussed. The range of losses covered under the cargo insurance is stated under §6 of the CICG. The insurer will only cover total loss, shortage and damage. Total loss would be the case where the entire consignment has been burned or contaminated for example. It also encompasses the situation in which goods are so severely damaged that they should be regarded as total loss. These conditions apply similarly to the shortage case but only when part of the consignment could be regarded as total loss.\textsuperscript{179}

However, the assured remains unprotected for the consequential losses: General capital losses which are the losses sustained by the cargo owner in his business because of the goods being lost or damaged are not covered. An example would be the assureds’ liability for not complying with delivery under a contract. Losses linked with delay of the ship are

\textsuperscript{176} Ibid, page 410. Cf. § 3, 4 and 5 of CICG.

\textsuperscript{177} Cf. §2, 3, 4 and 5 of CICG.

\textsuperscript{178} See ss. 4 and 5 of the CICG.

\textsuperscript{179} Norwegian Cargo Clauses 1995/2004 with Commentary, p. 347-352.
not covered and this are: “Loss of time” which the cargo owner suffers when for example he is compelled to pay for prolonged period of warehousing rent to keep the goods safe while the ship is stuck in port and cannot sail. “Loss due to economic fluctuations” would refer to the decrease in the goods’ value. “Loss of market” and “operating losses” encompasses lost of income and other charges that the cargo owner has to bear for not having the goods at his disposal at the agreed time. Therefore, even if the cargo owner is insured and has to seek cover from the cargo underwriter some losses will still remain uncovered.

The cargo insurance covers general average contributions subject to certain conditions. This will be discussed in detail in the section concerning cover for general average contributions (3.4.2).

3.3 Hull insurance.

In this section it will briefly be discussed whether the ship owner can obtain cover for damages incurred by the vessel due to the stowaway’s presence. The Norwegian Marine Insurance Plan (NMIP) will be the main legal source referred to in this section. The NMIP assembles the conditions used in the Norwegian Marine Insurance Market. The plan in use now is the 1996 version 2007.

The NMIP is a document reflecting an agreement of all the interested parties participating in the shipping business such as the ship owners, the insurers, and the average adjusters. It encompasses agreed standardised conditions which become applicable once direct reference to them has been made on the insurance contract.

The Hull insurer covers mainly the actual ship when it suffers a physical damage or total loss. As to the scope of cover the Hull insurance is based in an all risks principle

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180 Ibid, p. 263.
182 Falkanger, Bull and Brautaset., op.cit., p. 477.
183 See §10-1 ff §11-1 ff. and §12-1 ff of the NMIP.
meaning that all risks which are not explicitly excluded in the insurance conditions are covered.\textsuperscript{184}

Thus, the question to answer in our case is whether the stowaways are a peril insured against in the Hull insurance. The Hull insurance provisions are associated with perils of the sea i.e. the risks to which the vessel is exposed to while transiting a voyage. Therefore, cover is provided for accidental losses resulting from dangers inherent in the marine environment such as sinking and capsizing or stranding after a navigational error.\textsuperscript{185} However, cover could expressly be agreed for war perils.

Stowaways certainly represent a risk to the vessel even though they do not fit in the description of a peril of the sea. However, they are not established explicitly as an excluded risk in the section 2-8 a)-d) of the NMIP nor are they stated as a peril covered within the war insurance in section 2-9 of the NMIP.\textsuperscript{186}

Thus, we can assume that all risks which are not explicitly excluded in the hull insurance conditions should be covered.\textsuperscript{187} Thus, if damage or loss is caused by them to the vessel cover should be obtained under the present conditions.

3.4 Cover for General Average Contributions

We have discussed in chapter two the possibility of the ship owner to claim contribution in general average considering the deviation to land stowaways as a general average act. In this section it will be discussed whether the costs incurred and apportioned over the ship and cargo pursuant to general average rules will be compensated under the hull insurance and the cargo insurance, respectively.\textsuperscript{188}

\textsuperscript{184} See supra n. 121
\textsuperscript{185} Blancardi, C. loc. cit.
\textsuperscript{186} Cf. § 17,18 and 19 of CICG
\textsuperscript{187} See supra n 121.
For the purpose of the present discussion the Norwegian Marine Insurance Plan (NMIP) as well as the mentioned CICG will be used as a source.

3.4.1 Cover for the ship’s contribution in the General average Act.

The NMIP provides for special rules pertaining to the hulls insurer’s cover of general average-related costs i.e. it covers measures to avert or minimize loss taken on behalf of two interests insured: the ship and the cargo. As opposed to the particular measures to avert or minimize loss which are taken for the sake of one interest insured: the ship.

According to §4-8 of the NMIP the hull insurer will cover general average contribution apportioned on the ship which is the interest insured. However, this section is tied to § 4-7 which contains the general rule of cover for cost of measures to avert or minimize the loss. I will not discuss whether our hypothesis qualifies as a relevant measure eligible for cover under hull insurance since this discussion is closely connected to the “common safety” principle which was already presented above.

We have already discussed whether the stowaways are a peril insured against in the Hull insurance and we assumed that since they are not explicitly excluded in the hull insurance conditions, they should be covered. Under this hypothesis, the hull insurers will be liable for the ship’s contribution to the general average act and will cover losses that the deviation aimed to land stowaway averted. As a general principle the measures to avert or minimize loss encompassed in the general average act have to be aimed to avoid a loss which the insurer would have had to cover otherwise.

In our case the shipmaster will deviate in order to avert loss of time, delay, damage to cargo, damage to ship caused by the stowaway. Therefore, all these expenses will have to

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189 See § 4-8, § 4-11 of the NMIP.
190 See § 4-12 of the NMIP.
191 Wilkemsen, Bull, op. cit., p. 211.
be apportioned by the insurers who would have had to cover these losses otherwise: Loss of Hire insurer, vessel’s P&I, cargo insurance or hull insurance.

Nevertheless, it will not be necessary to examine whether each of the losses avoided where those for which the insurer would have been liable for, since the general average adjustment will be handled as a single unit to the insurer for the contribution apportioned on the ship.193

Therefore, the hull insurer will be liable for the contributing measures incurred by the insured ship for the “common safety”, and also for the “common benefit” expense even though they are not aimed to avert a loss covered under hull insurance.194

Furthermore, §4-8 of the NMIP extends cover to “general average contributions apportioned on freight, or charterparty hire”. This means that cover will be provided for interests other than the ship which under normal hull insurance conditions would be uninsured interests.195 Freight should have been covered by voyage freight insurance but this no longer exists and usually freight is pre-paid with final effect, meaning that is paid before departure and cannot be claimed even if the ship and cargo become lost. Therefore, freight is a cargo owner’s risk which will be included in the value of the cargo.196

The General Average contribution will be recovered in accordance with the general average adjustment drawn pursuant to the YAR rules or other conditions, even if the contributory value of the ship exceeds the value for which the ship was insured.197

The 2nd paragraph of the section being discussed refers to the hypothesis in which the ship owner loses his right to claim contribution. This occurs when the general average act is caused by the breach of the contract of affreightment.198 The misfortune in our case is the

193 Ibid p. 218. Also see Rule C and XI of the YAR.
194 Wilkelmsen and Bull, op. cit., 218.
196 Ibid. Also see Falkanger, Bull and Brautaset p. 470.
197 See §4-8 of the NMIP.
198 Wilkelmsen and Bull, loc. cit.
presence of the stowaway on board the vessel, which in time will be the peril that the general average act is aiming to avoid.199

We have discussed the ship owner’s liability for the stowaways and we linked it to the negligent duty of making the vessel seaworthy before departing a port, and the consequent loss of the claim in general average contribution against other contributing interests, mainly the cargo. However this preclusion does not seem to have effect on the assureds’ claim against the insurer. Therefore, the insurer will cover the amount apportioned on the ship contribution according to the adjustment if the assured has not forfeited his right of compensation from the insurer.200

3.4.2 Cover for the cargo’s contribution

The CICG provides cover for general average related costs in §40. The provision is very similar to the one discussed above in the NMIP.

The cargo insurer is liable for the general average contribution apportioned on the cargo interest when the act was undertaken with the purpose of avoiding a risk that is covered by the insurance. This brings no problems in the context of the A-clauses since all risks are covered, as long as they are not expressly excluded.201 However, the provision provides for an exemption when the cover is under the named B or C-clauses and therefore, the general average contributions will be covered even if the general average act was due to a risk not contemplated under those clauses.202

In our case the risk which is being avoided is the stowaway and the act undertaken is deviation in order to disembark them. In the case of perishable goods these may not survive a deviation and the consequential delay. Delay in this situation is an independent risk causing damage the cargo and is an excluded peril.203 So if the ship is delayed as a

199 Lowndes and Rudolf, op. cit., p. 650.
200 §4-8 of the NMIP. Wilkelmsen and Bull, op. cit., p. 220.
201 See §3 of the CICG.
202 See §6, 4th paragraph
203 Ibid. Also see §18, 5) of the CICG.
consequence of stowaways and the goods are damaged, cover for the general average contribution will not be provided.

Deviation is a measure to avoid further damage but if the goods are perishable they will not survive the consequential delay. However, if the delay would contribute to further deterioration of a damage that has already occurred (by stowaways) insurance cover should be available for the general average contribution.\textsuperscript{204}

Finally, expenses implemented under the common benefit principle to ensure that the ship and cargo can safely continue the trip may be covered under a general average contribution apportioned on the cargo.\textsuperscript{205}

3.5 Loss of hire insurance

It is a fact that stowaways are time consuming and this has numerous disadvantages in the shipping industry where time is so valuable and any loss of time compromises the ship’s earnings. That is why ship owners need insurance to cover any possible loss of time.

Within the Norwegian market the current conditions for the loss of hire insurance are contained in chapter 16 of the Norwegian Marine Insurance Plan of 1996 version 2007.

In a loss of hire insurance what is insured is the loss of income experienced by a ship owner when certain incidents cause their vessel to be demobilized. The loss of income will in principle be covered, if the loss of hire results from damage to the insured vessel.\textsuperscript{206} Damages will cause the ship to be repaired and during this time the vessel will be unable to operate and therefore unable to produce income for the ship owner.\textsuperscript{207}

However, the ship may be involved in man – made events such as strikes, riots, war or why not stowaways which may as well contribute to disturb the operation of the vessel. These incidents are as unexpected as damage, however the insurer may be able to weigh or

\textsuperscript{204} Ibid. Also see 3,4,5 of the CICG
\textsuperscript{205} Norwegian Cargo Clauses 1995/2004 with Commentary, p. 368
\textsuperscript{206} See §16-1 of the NMIP.
\textsuperscript{207} Lund H., op. cit., p. 23.
control the way in which these events can affect his operation of the vessel and consequently the loss of income.\textsuperscript{208}

Stowaways constitute a peril and most of the expenses they create are covered by the P&I insurers in the named perils policy. However, other types of these losses and mostly the loss of time are certainly not covered. Therefore it will be interesting to know if time would be recoverable from the loss of hire insurance.

This type of insurance is relatively new and most of its provisions are in some way dependent on the hull insurers provisions.\textsuperscript{209} We have seen the Hull insurance provisions are associated with perils of the sea mostly but also with war perils. The borderline between these type of risks is established in § 2-8 and § 2-9 of the NMIP. Since we are talking about an “all risks” insurance, all perils which are not expressly excluded in 2-8 a)-d) should be covered. Stowaways are not expressly established as an excluded peril nor are they stated as a peril covered within the war insurance in section 2-9 of the NMIP.\textsuperscript{210}

Nevertheless, they are a real peril to the safe and profitable conclusion of voyage.\textsuperscript{211} Thus, it will be interesting to discuss the possibility of the Loss of Hire insurer covering loss of time due to stowaways for the deviation the ship incurs in order to land them.

§16-1, 1st paragraph provides cover for loss of time arising of damage. If however loss of time arises from other causes and these are contemplated within the special rules provided in the 2\textsuperscript{nd} paragraph of the mentioned section loss of time will be covered as well.\textsuperscript{212} Letter d) of the mentioned section mentions loss of time “as a consequence of an event that is allowed in general average pursuant to the 1994 York Antwerp Rules.”

\textsuperscript{208} Ibid.
\textsuperscript{209} Ibid.
\textsuperscript{210} Lund H. op. cit. p. 34.
\textsuperscript{211} Blancardi C. loc. cit.
We have discussed that deviation to land stowaways could well be considered a general average act. Therefore, if this hypothesis is considered cover the ship owner should be able to recover loss of time. Nevertheless, if deviation is not necessary but the ship is delayed because of the long repatriation negotiations i.e. if there is no general average act it is doubtful that cover would be provided. Therefore, under these circumstances, the ship owner will have to bear the loss of time.
4. Conclusion

It is a fact that stowaways are a nuisance for the ship owner not only financially speaking but also from the contractual point of view. Stowaways entail high costs and expenses and can become a real impediment for the ship owner’s completion of his contractual obligations. We have seen the many issues that a simple deviation to land a stowaway brings about and also the fact that it can be a serious breach contractually speaking. Furthermore, stowaways will naturally cause delay to the ship when the time of disembarkation comes and this will result in new losses and liabilities for the ship owner.

It is unfair that the financial liability for all the costs related to the stowaway problems is borne by the carrier. This burden may have as a hidden purpose to provide incentives to the ship owners to take measures to prevent stowaways. However, they cannot always be blamed for not taking these measures. It should be considered that the crew’s ability to restrict the entry of stowaways is limited since they have their own duties to attend which go beyond watching over the vessel. Moreover, in ports where the International security measures are not fulfilled stowaways cannot be avoided even by exercising the duties of a good seamanship. It is astonishing how creative stowaways can be when finding where to hide.213

Thus, it certainly is unfair that the owner will incur contractual liabilities towards the cargo owner if the latter can prove that the vessel was unseaworthy at the commencement of the voyage due to the presence of stowaways on board. Responsibility is imposed on the basis of negligence and yes our case entails negligence. However, is it only the ship owner and his servants’ negligence or port authorities share some responsibility too? It is well known that security is an issue which has been handled internationally and much legislation has been enacted addressing the security measures. However, do these laws impose responsibility? Even if they did it is doubtful that the ship owner will recover from some entity other than his insurance.

213 The Nautical Institute North East branch., op. cit., p. 85.
We have discussed the possibility of encompassing the deviation in the context of a general average act. This would be a good opportunity to divide bearings between ship owner and cargo owner as the latter could also be affected by these sudden presences. Furthermore, under this hypothesis, even the time lost could be recovered from the relevant insurer.

However, if deviation is not necessary but the ship is delayed when dealing with the stowaway’s repatriation it is doubtful that the time lost will be recovered. Even though the ship owner is insured through his P&I for most of the costs and expenses as well as for the liabilities he incurs due to stowaways, it is a fact that he will certainly not receive a total recovery. All insurance have the same pattern which is the non-cover of consequential losses. The ship owner may recover payments related to the stowaway incident however who will cover his losses for the delay and the consequential time lost?

Time is a valuable within the shipping industry and its loss entails a financial damage for the ship owner since his earnings depend mostly on having the ship constantly running. The ship must always be engaged in activity, it is common in the trade that as soon as a voyage is completed and cargo is discharged the ship will be already engaged to perform a new voyage and this chain will continue to go on in the next port to where the ship navigates. Therefore, it is extremely important for the owner that the planned voyage is done on time without interruptions since these will imply loss of time and loss of revenue.

Time is too valuable for the shipping industry to be encompassed as a simple consequential loss among the different insurers. It is in practice doubtful that the time consumed by stowaways will be covered under the Loss of Hire insurance. Therefore it shall be covered somehow under a special insurance or as an extension of the P&I cover. Unfortunately, the P&I groups have similar conditions when regulating the problem and only some insurances are reservedly starting to expand their conditions to include delay and the consequential loss of time.\textsuperscript{214} If these conditions become habitual many problems will be solved for the shipping industry.

\textsuperscript{214} Strike Club, Class III. Cf. Denzil Stuart, \textit{Unwelcome visitors}. In: Maritime Risk International. 1\textsuperscript{st} June 2007.
Nonetheless, providing cover for the ship owner’s losses when stowaways access their vessel is not a solution but an alternative remedy to the problem. If we go to the roots of the present matter we will run into the fact that the international community is lacking an International Agreement on Stowaways and this highly contributes to the ship owner’s headaches when they discover a stowaway on board. The absence of international legislation would facilitate the tasks linked with stowaways. The ship owner will not be responsible towards the immigration authorities of each country and trapped by the lengthy and bureaucratic repatriation procedures imposed by these authorities in each port of call.

All in all, I thought it would be interesting to illustrate the large amounts of money that the stowaways imply for the shipping industry and insurance companies. We are facing a crisis era where everybody is conscious about expenditures. Therefore, I considered appropriate to detail some of these losses. However, it is on the relevant authorities’ hands to take the necessary steps to help avoiding stowaways but mostly to help solving the problem once it is installed. It is not only the ship owners or master’s duty but a cooperative duty of all sectors involved who actually are or will be affected by the situation.

I am aware that it may not be possible to eradicate the problem from one day to another. Moreover many cases of stowaways still arise even after the security provisions are put into practice. However, it is important to know that the international community is aware of the problem and putting effort in finding a final and good solution to the matter. However, it will be essential that the solution is international since this is the natural context in which the maritime affairs take place.
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