GENERAL AVERAGE NOW AND IN THE FUTURE

©Prof. William Tetley, Q.C.[*]

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Prof. William Tetley, Q.C.*

Preface

This paper is dedicated to Me Roger Roland, who admirably combines the two titles of gentleman and scholar, and who has served the maritime law community of Belgium and the world, with great dedication, competence and panache. Not the least of his achievements, as well, has been as Director and Editor of the maritime law review – *Jurisprudence du Port d'Anvers.* Hence this article from an admiring friend.

I. Definition and History of General Average

1) Definition

General average is an ancient form of spreading the risk of sea transport and existed long before marine insurance.[1] Now, however, that marine insurance is so

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[1] General average is an example of *lex maritima*, dating back to the unwritten Rhodian Law of c. 800-900 B.C. See Lowndes & Rudolf, *The Law of General Average and the York-Antwerp Rules* (D.J. Wilson & J.H.S. Cooke, eds), 12 Ed., Sweet & Maxwell Ltd., London, 1997 at paras. 00.01-00.03 (hereinafter cited as "**Lowndes & Rudolf, 12 Ed., 1997**"); W. Tetley, *Marine Cargo Claims*, 3 Ed., Les Éditions Yvon Blais, Inc., Montreal, 1988 at p. 714 (hereinafter cited as "**Tetley**, ***M.C.C.*, 3 Ed., 1988**"); W. Tetley, "The General Maritime Law: The *Lex Maritima*," (1994) 20 Syracuse J. Int'l L. & Comm. 107-145 at p. 129; W. Tetley, *Maritime Liens and Claims*, 2 Ed., Les Éditions Yvon Blais, Inc., Montreal, 1998 at p. 440 (hereinafter cited as "**Tetley**, ***M.L.C.*, 2 Ed., 1998**"). See also J.-M. Pardessus, *Collection de lois maritimes antérieures au XVIIIe siècle*, vol. 1, Paris, 1828 at p. xxix, who considered it probable that the Rhodians borrowed their maritime laws from the Phoenicians. See also *Simonds* v. *White* 2 B. & C. 805 at p. 811, 107 E.R. 582 at p. 584 (K.B.) (1824) (*per* Abbott, C.J.):

> "The principle of general average ... is of very ancient date, and of universal reception among commercial nations. The obligation to contribute, therefore, depends not so much upon the terms of any particular instrument as upon a general rule of maritime law."

prevalent, it can be asked if general average is still necessary, particularly as general average itself has become a risk insured against.[2] Why the double insurance?

General average means "general loss",[3] as opposed to a particular loss under marine insurance.[4] A general average act is succinctly defined in Rule A of the York Antwerp Rules 1994[5] as follows:

> "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 safety for the purpose of preserving from peril the property involved in a common maritime adventure."

The *Marine Insurance Act, 1906*[6] of the United Kingdom defines "general average act" in virtually identical terms at sect. 66(2):

See also *Lapierre* v. *Attorney-General of Québec* [1985] 1 S.C.R. 241 at pp. 252-254 and sources cited there; *Ultramar Canada* v. *Mutual Marine Office* [1995] 1 F.C. 341 at p. 357, 1994 AMC 2409 at p. 2418 (Fed. C. Can.); *Atlantic Richfield Co.* v. *United States* 640 F.2d 759 at p. 761 (5 Cir. 1981); *Orient Mid-East Lines, Inc.* v. *A Shipment of Rice* 496 F.2d 1032 at p. 1034, 1974 AMC 2593 at p. 2594 (5 Cir. 1974).

[2] See, for example, the United Kingdom's *Marine Insurance Act, 1906*, U.K. 6 Edw. 7, c. 41, sect. 66(4) and (5); Canada: *Marine Insurance Act*, S.C. 1993, c. 22, sect. 65(4) and (5). See also *Ultramar Canada* v. *Mutual Marine Office* [1995] 1 F.C. 341 at p. 358, 1994 AMC 2409 at p. 2419 (Fed. C. Can.).

[3] "Average" comes from the term "*avere*", used in the early Italian sea code of Pisa of 1160, which became "*averia*" (or "avaria") in the code of Genoa of 1341, whence the French term "*avarie*" (loss). See generally ***Tetley***, ***M.L.C.*****, 2 Ed., 1998** at p. 439; **Tetley, *M.C.C.*, 3 Ed., 1988** at pp. 713-714; **Lowndes & Rudolf, 12 Ed., 1997** at para. 00.12.

[4] A "particular average loss" is defined as follows in the United Kingdom's *Marine Insurance Act, 1906*, 6 Edw. 7, c. 41, sect. 64(1): "A particular average loss is a partial loss of the subject-matter insured, caused by a peril insured against, and which is not a general average loss." A very similar definition is to be found in Canada's *Marine Insurance Act*, S.C. 1993, c. 22, sect. 63(1), read with sect. 62. See also **Tetley, *M.L.C.*, 2 Ed., 1998** at p. 440.

[5] Adopted at Sydney, Australia in October 1994 by the Comité Maritime International (C.M.I.). For a French translation, see DMF 1996, 136-155. The Swedish Maritime Code 1994, c. 17, sect. 1, first para., provides that the "significance" (meaning) of general average is governed by the York/Antwerp Rules 1974, unless otherwise agreed.

[6] 6 Edw. 7, c. 41. A virtually identical definition of "general average act" may be found in Canada's *Marine Insurance Act*, S.C. 1993, c. 22, sect. 65(2) and in the Québec Civil Code 1994, art. 2599. See also the Italian Navigation Code 1942, art. 469; Spanish Commercial Code 1885, art. 811. One of the earliest definitions of general average may be found in the *Guidon de la Mer*, written at Rouen (1556-1584). See also *The Star of Hope* 76 U.S. (9 Wall.) 203 at pp. 229-230 (1869), which defined the constituent elements of general average under the general maritime law as: "an extraordinary sacrifice or expenditure, voluntarily made, for the purpose of preserving from peril the property (ship, cargo and crew) involved in a common maritime adventure." See also the French Commercial Code, 1807, art. 400, last para. (repealed); and *Loi no. 67-545 du 7 juillet 1967 relative aux événements de mer*, J.O. July 9, 1967 at p. 6867 (hereinafter cited as "Law no. 67-545 of July 7, 1967"), art. 24; R. Rodière & E. du Pontavice, *Droit Maritime*, 12 Ed., Dalloz, Paris, 1997 at para. 480 (hereinafter cited as "**Rodière & du Pontavice**, **12 Ed.,**

> "There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure."

The five component parts of a general average loss are therefore:[7]

a) an extraordinary sacrifice or expenditure,

b) which is intentionally

c) and reasonably made

d) against a peril,

e) in order to benefit the common venture.

2) History

General average is said to date from the Rhodian Law of approximately 800 B.C., which stipulated that if a ship was in danger and cargo was jettisoned to save the ship, then the ship and the remaining cargo were required to make a contribution to the owner of the lost cargo.[8] No record of the Rhodian law exists except as it is found in Roman

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1997"). For the United Kingdom, see *Birkley* v. *Presgrave* (1801) 1 East. 220 at p. 228, 102 E.R. 86 at p. 89 (K.B.); **Lowndes & Rudolf, 12 Ed., 1997** at paras. 00.18-00.30 and A.02-A.04 and jurisprudence cited there. See also Chinese Maritime Code 1993, art. 193, first para.

[7] **Lowndes & Rudolf, 12 Ed., 1997** at para. A.01. See also France: Law no. 67-545 of July 7, 1967, art. 24; Martine Rèmond-Gouilloud, *Droit Maritime*, 2 Ed., Éditions A. Pedone, Paris, 1993 at para. 703 (hereinafter cited as "**Rèmond-Gouilloud, 2 Ed., 1993**").

[8] See C. Abbott (Lord Tenterden), *A Treatise of the Law relative to Merchant Ships and Seamen*, 1 Ed., London, 1802 at p. 273:

> "The principle of this general contribution is known to be derived from the ancient laws of Rhodes, being adopted into the Digest of Justinian with an express recognition of it's [sic.] true origin. The wisdom and equity of the rule will do honor to the memory of the state, from whose code it has been derived, as long as maritime commerce shall endure."

See also *Columbian Insurance Co.* v. *Ashby and Stribling* 38 U.S. (13 Pet.) 331 at pp. 337-338 (1839) (*per* Story, J.); *Ralli* v. *Troop* 157 U.S. 386 at p. 393 (1895); *Burton* v. *English* (1883) 12 Q.B.D. 218 at pp. 220-221 (C.A.); *Anderson* v. *Ocean SS Co.* (1884-85) 10 App. Cas. 107 at p. 114 (H.L.); *Strang, Steel & Co.* v. *A. Scott & Co.* (1889) 14 App. Cas. 601 at p. 606 (P.C.); *Ultramar Canada* v. *Mutual Marine Office* [1995] 1 F.C. 341 at p. 358, 1994 AMC 2409 at p. 2417 (Fed. C. Can.). General average in the Rhodian law did not, however, "extend further than to cases of jettison, but its principle applies and it has been applied to all other cases of voluntary sacrifice for the benefit of all, that is, if properly made." See also **Lowndes &**

law,[9] which in turn was repeated and expanded in the *Rôles of Oléron*[10] and all the subsequent sea codes[11] until the present day.

The first recorded English decision referring to "general average" was in 1799[12] and the first recorded American decision was in 1798.[13] General average was a civil law/maritime law concept in origin and practice and was very restricted in its application. The civil law of general average was applied in England, because maritime law fell within the exclusive jurisdiction of the High Court of Admiralty sitting at "Doctors'

Rudolf, 12 Ed., 1997 at paras. 00.01-00.03; Leslie J. Buglass, *Marine Insurance and General Average in the United States*, 3 Ed., Cornell Maritime Press, Centreville, Md., 1991 at p. 194 (hereinafter cited as "**Buglass, 3 Ed., 1991**").

[9] *Digest of Justinian*, Book XIV, Title 2, Fr. 1: "The Rhodian law decrees that, if in order to lighten a ship, merchandise has been thrown overboard, that which has been given for all should be replaced by the contribution of all." This is sometimes called the "*lex Rhodia de jactu*". For the texts of Justinian's *Digest* and *Institutes* relevant to general average, in the original Latin with an English translation, see **Lowndes & Rudolf, 12 Ed., 1997** at paras. 60.01-60.17.

[10] The *Rôles of Oléron* contain three judgments, referring to general average, two of which gave cargo a right to contribution in cases of jettison and one, a right on cargo by the ship when a mast was cut away. The latter provision, art. IX, reads as follows:

> "If it happen, that by reason of much foul weather the master is like to be constrained to cut his masts... [or] cut their mooring cables, leaving behind them their cables and anchors to save the ship and her lading; all which things are reckoned and computed livre by livre, as the goods are that were cast overboard. And when the vessel arrives in safety at her port of discharge, the merchants ought to pay the master their shares or proportions without delay...."

See also art. VIII and XXXII.

[11] The Rules of Visby, of Venice, of Genoa, of Flanders, of the Hanseatic League and of Catalonia, the *Guidon de la Mer* (1556-1584), the *Ordonnance de la Marine* of 1681, and the Ordinances of Rotterdam (1721), Königsberg (1730), Hamburg (1731) and Stockholm (1750). See also **Lowndes & Rudolf, 12 Ed., 1997** at paras. 00.08 and 00.13-00.15; W. Tetley, "The General Maritime Law: The *Lex Maritima*," *supra*, note 1 at p. 129; **Tetley**, ***M.L.C.*, 2 Ed., 1998** at p. 440, note 6

[12] *The Copenhagen* (1799) 1 C. Rob. 289 at pp. 293-294, 165 E. R. 180 at p. 182 (*per* Lord Stowell). See **Lowndes & Rudolf, 12 Ed., 1997** at para. 00.18. Note, however, that the earliest recorded dispute involving a matter of general average (jettison, in the case concerned) dates from 1285. See **Lowndes & Rudolf, 12 Ed., 1997** at para. 00.17. The term "average" appears in decisions and charterparties as early as the sixteenth century. See **Lowndes & Rudolf, 12 Ed., 1997** at para. 00.18, note 43.

[13] *Campbell* v. *The Alknomac* 4 Fed. Cas. 1155 at p. 1156 (No. 2,350) (D. S.C. 1798). The civilian origin of general average was recognized by American courts from an early date, and civilian authorities were consulted frequently in regard to it. See *Case* v. *Reilly* 5 F. Cas. 332 at p. 335 (C.C.D. Pa. 1814) (No. 2538); *Columbian Ins. Co.* v. *Ashby and Stribling* 38 U.S. (13 Pet.) 331 at pp. 337-338 (1839); *Dupont* v. *Vance* 60 U.S. (19 How.) 162 at pp. 169-170 (1869); W. Tetley, "Maritime Law as a Mixed Legal System (with Particular Reference to the Distinctive Nature of American Maritime Law, Which Benefits from Both Its Civil and Common Law Heritages)" (1999) 23 Tul. Mar. L.J. 317-350 at pp. 336-337 and http://tetley.law.mcgill.ca/maritime/marlawmix.htm.

Commons" in London, a court whose judges were required to be doctors of civil law from either Oxford or Cambridge and in which, for many centuries, only advocates trained in the civil law were permitted to plead.[14]

In 1857, the monopoly of the civilians was broken and common lawyers were admitted to practise at Doctors' Commons.[15] In 1858, Doctors' Commons was abolished[16] and in 1859, the High Court of Admiralty Act was adopted, which, for the first time, permitted common lawyers to practise in Admiralty.[17]

As commerce evolved, general average emerged as a form of marine insurance, a sharing of the risk and of losses during the common maritime venture. Not only the cargo owner, but also the shipowner could claim for losses not attributable to his fault. The claims of the parties became so demanding and the principle and its application so varied, that the Glasgow Resolutions of 1860, the York Rules of 1864 and the York/Antwerp Rules of 1877 were adopted as a uniform method of calculating the contribution of the parties. The York/Antwerp Rules have been amended periodically, the latest changes being agreed upon at Hamburg in 1974, at Paris in 1990 and at Sydney in 1994, at general assemblies of the Comité Maritime International (CMI).

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[14] **Tetley**, ***M.L.C.*****, 2 Ed., 1998** at p. 33. The Admiralty lawyers practised out of Doctors' Commons from 1430. The court was located first near London Bridge and later next to St. Paul's Cathedral. The building has long since been demolished.

[15] The *Court of Probate Act, 1857*, U.K. 20 & 21 Vict., c. 77, permitted common lawyers to practise in probate. Civil lawyers were admitted to common law practice by the same statute. The *Matrimonial Causes Act, 1857*, U.K. 20 & 21 Vict., c. 85, ended the civilians' monopoly over matrimonial causes the same year. See generally F.L. Wiswall, Jr., *The Development of Admiralty Jurisdiction and Practice since 1800*, Cambridge University Press, 1970 at pp. 86-87.

[16] See **Tetley**, ***M.L.C.*****, 2 Ed., 1998** at p. 35. For a detailed account of the self-destruction of Doctors' Commons, see Wiswall*, supra*, note 15 at pp. 86-95. Note, however, that although Doctors' Commons was abolished, the High Court of Admiralty continued to exist, its jurisdiction even being expanded by the *Admiralty Court Act, 1861*, U.K. 24 &25 Vict., c. 10. After the consolidation of the judiciary, effected by the *Supreme Court of Judicature Acts, 1873*, 36 & 37 Vict., c. 66, *and 1875*, 38 & 39 Vict., c. 77, the Admiralty Court continued to sit as part of the Probate, Divorce and Admiralty Division of the High Court of Justice, where its civilian heritage was quite unexpectedly preserved by common law judges. See generally Wiswall, *supra*, note 15 at pp. 98-115.

[17] See also **Tetley, *M.L.C.*, 2 Ed., 1998,** *ibid*.

The York/Antwerp Rules, it should be particularly understood, are not the subject of national statutes or international conventions, but are imposed by special clauses in standard form contracts - principally bills of lading.[18] They thus owe their existence and authority to the agreement of merchants, and may therefore be seen as an example of a modern, international *lex mercatoria*, founded upon ancient sources, but still operative today.[19] For this reason, and contrary to what is often supposed, the abolition of general average could not be effected by the mere repeal of the York/Antwerp Rules, but would in fact require an international convention, supplemented by mandatory national statutes (at least in the case of common law jurisdictions such as the U.K., the U.S. and Canada).[20]

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[18] *Goulandris Brothers Ltd.* v. *B. Goldman & Sons Ltd.* [1957] 2 Lloyd's Rep. 207 at pp. 213-214, [1958] 1 Q.B. 74 at p. 91. A typical general average clause reads as follows:

> "General average shall be adjusted, stated and settled according to York/Antwerp Rules 1994 at the port of __or last port of discharge at Carrier's option and as to matters not provided for in these Rules, according to the laws and usage at the port of __or any other place at the option of the Carrier."

See **Buglass, 3 Ed., 1991** at p. 195, adapted to reflect 1994 version of the York/Antwerp Rules. In *Castle Insurance Co.* v. *Hong Kong Islands Shipping Co.* [1984] A.C. 226 at p. 233, [1983] 2 Lloyd's Rep. 376 at p. 378 (P.C.), it was reaffirmed that general average rights and obligations may arise independently of contract, but that in practice today, there is almost always a general average clause. See **Lowndes & Rudolf, 12 Ed., 1997** at para. 00.29.

[19] W. Tetley, "The General Maritime Law: The *Lex Maritima*," *supra*, note 1 at pp. 144-145. Another example of a modern, international *lex mercatoria* is to be found in the *UNIDROIT Principles of International Commercial Contracts*, published by UNIDROIT in 1994. For the English text with commentary, see J.M Perillo, "UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review" (1994) 63 Fordham L. Rev. 281-317. For an incisive study of the Principles and their effects in practice, see Michael J. Bonell, "The UNIDROIT Principles in Practice: The Experience of the First Two Years" (1997-2) Unif. L. Rev. 34-45. For another commentary, see K. Boele-Woelki, "The Unidroit Principles of International Commercial Contracts" (1996-4) Unif. L. Rev. 652-678. See also the quite similar *Principles of European Contract Law 1998*, drafted by the Commission on European Contract Law. See generally W. Tetley**,** "Uniformity of International Private Maritime Law – The Pros, Cons, and Alternatives to International Conventions – How to Adopt an International Convention" (2000) 24 Tul. Mar. L.J. 775-856 at pp. 793-796 and http://tetley.law.mcgill.ca/maritime/uniformarlaw.htm.

[20] On this point, see W. Tetley, "Maritime Law as a Mixed Legal System (with Particular Reference to the Distinctive Nature of American Maritime Law, Which Benefits from Both Its Civil and Common Law Heritages)" (1999) 23 Tul. Mar. L.J. 317-350 at pp. 337 and 349-350; W. Tetley, "Justice is Fairness – Is General Average Fair?", Fairplay Magazine, October 14, 1999 at p. 27 and at http://tetley.law.mcgill.ca/publications/fairplay.htm#GENERALC.

The Scandinavian countries and the People's Republic of China, however, have referred to the York/Antwerp Rules of 1974[21] in their respective maritime codes.[22]

II. Entitlement to General Average

1) Ordering the general average act

The general average act was usually ordered by the master or other crew-member in authority over the vessel. In the United Kingdom, however, the act may be considered of general average even where it is ordered by a stranger to the common adventure (e.g. a local port authority), provided that it is necessary for the common safety.[23] Originally, in the United States, only the shipowner, master or someone acting under his authority could order a general average act;[24] now, third parties are entitled to do so as well, provided that their orders are subsequently "endorsed" by the master.[25] In France, on the other hand, the master alone may order the act.[26] The York/Antwerp Rules do not, however, restrict the power to decide upon a general average act to the master alone.[27] It is the usual practice today that the shipowner orders the act, directly or through agents.[28]

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[21] See Swedish Maritime Code 1994, c. 17, sect. 1 and L. Li, The Maritime Code of the People's Republic of China: [1993] LMCLQ 204-216 at p. 214.

[22] For details of the common maritime code of the four Nordic countries (Denmark, Finland, Norway and Sweden), which came into force October 1, 1994, and of the Maritime Code of the People's Republic of China, which came into force July 1, 1993, see *infra*, notes 132 and 133.

[23] **Lowndes & Rudolf, 12 Ed., 1997** at para. A.12. See also *Papayanni* v. *Grampian S.S. Co.* (1896) 1 Com. Cas. 448 (scuttling of burning ship ordered by port captain).

[24] *Ralli* v. *Troop* 157 U.S. 386 at p. 419 (1895); **Buglass, 3 Ed., 1991** at p. 207; **Lowndes & Rudolf, 12 Ed., 1997** at para. A.13.

[25] *The Beatrice* 1924 AMC 914 at p. 919 (S.D. N.Y. 1924); **Buglass, 3 Ed., 1991** at p. 207.

[26] Law no. 67-545 of July 7, 1967, art. 25; **Rèmond-Gouilloud, 2 Ed., 1993** at para. 710; **Rodière & du Pontavice, 12 Ed., 1997**, at para. 481.

[27] **Lowndes & Rudolf, 12 Ed., 1997** at para. A.16, note that a proposed amendment, which contemplated the insertion of the words "by the master or his representative" after the word "incurred" in Rule A was withdrawn at the Stockholm Conference of the Comité Maritime International in 1924.

[28] *Australian Coastal Shipping Commission* v. *Green* [1971] 1 Q.B. 456 at p. 459, [1971] 1 Lloyd's Rep. 16 at p. 19 (C.A); **Lowndes & Rudolf, 12 Ed., 1997** at para. A.15.

2) Carrier's actionable fault precludes entitlement

A claimant (ship or cargo) is not entitled to obtain contribution from the other parties to the common venture (cargo or the ship) simply because his "sacrifice or expenditure" falls within the terms of Rule A of the York/Antwerp Rules, or simply because a voluntary and reasonable act successfully benefitted the common venture in the face of a common danger.

Something more is required - the carrier must not have been at fault in law. In other words, at common law a carrier is not entitled to obtain contribution in general average from cargo, if the peril which necessitates the extraordinary sacrifice or expenditure arises as a result of his actionable fault[29] or negligence in law, or of that of his employees.[30]

The Hague Rules[31] and the Hague/Visby Rules[32] are virtually silent with respect to general average, except for a short passage in art. 5: "Nothing in these rules shall be

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[29] On "actionable fault", see **Lowndes & Rudolf, 12 Ed., 1997** at para. D.03.

[30] *Strang, Steel & Co.* v. *A. Scott & Co.* (1889) 14 App. Cas. 601 at p. 608 (P.C.); *Louis Dreyfus & Co*. v. *Tempus Shipping Co*. [1931] A.C. 726 at pp. 738-739 and 747, (1931) 40 Ll.L. Rep. 217 at pp. 221 and 225 (H.L.); *Goulandris Brothers Ltd. v. B. Goldman & Sons, Ltd.* [1958] 1 Q.B. 74 at p. 104, [1957] 2 Lloyd's Rep. 207 at p. 221. See also **Tetley**, ***M.C.C.*, 3 Ed., 1988** at pp. 715-716. Under Rule D of the York/Antwerp Rules, as amended in 1974, although rights to contribution in general average are not affected if the sacrifice or expenditure was caused by the fault of one of the parties to the adventure, the parties nevertheless retain both remedies and defences open to or against them in respect of such fault. In consequence, if cargo has paid a contribution in respect of a general average act necessitated by the fault of the shipowner or master, cargo may sue to have the contribution refunded upon proving such fault. See also Finnish Maritime Code 1994, c. 13, sect. 39. See also *Orient Mid-East Lines, Inc.* v. *A Shipment of Rice* 496 F.2d 1032 at p. 1037, 1974 AMC 2593 at p. 2598 (5 Cir. 1974), cert. denied 420 U.S. 1005 (1975); *Louis Dreyfus Corp.* v. *27,964 Long Tons of Corn* 830 F.2d 1321 at p. 1330, 1988 AMC 1053 at p. 1066 (5 Cir. 1987); *Waterman S.S. Corp.* v. *Virginia Chemicals, Inc.* 651 F. Supp. 452 at p. 457, 1988 AMC 2681 at p. 2689 (S.D. Ala. 1987); *Deutsche Shell* v. *Placid Refining Co.* 993 F.2d 466 at p. 468, 1993 AMC 2141 at p. 2143 (5 Cir. 1993); *Usinas* v. *Scindia Steam Navigation Co., Ltd.* 118 F.3d 328 at p. 330, 1997 AMC 2762 at p. 2765 (5 Cir. 1997); France: Law no. 67-545 of July 7, 1967, art. 27; *Cour d'appel de Paris*, January 13, 1988, DMF 1988, 395 at pp. 398-401, note H. de Richemont, commentary by P. Bonassies, DMF 1989, 174.

[31] The term "Hague Rules" refers to the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, adopted at Brussels, August 25, 1924 and in force June 2, 1931 (120 LNTS 157). For the official French text, see **Tetley, *M.C.C.*, 3 Ed., 1988**, Appendix "A" at p. 1111 *et seq.*. For an English translation, see *ibid*. at p. 1121 *et seq*.

held to prevent the insertion in a bill of lading of any *lawful* provision regarding general average." (Emphasis added).

What does "lawful provision" mean? Lawful must necessarily mean any provision which is not prohibited by law and this would certainly include a prohibition of the Hague and Hague/Visby Rules. Art. 3(8) of the Rules outlines what is prohibited:

> "Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in this Convention, shall be null and void and of no effect...."

This provision invalidates any clause in a bill of lading which gives the carrier the right to contribution in general average from cargo, notwithstanding the carrier's liability under the Rules. This was the general finding in *Louis Dreyfus*,[33] although that was a pre-Hague Rules, charterparty case.

One may therefore conclude, that if the carrier's fault is not actionable under the Hague or Hague/Visby Rules, the carrier will be entitled to obtain contribution in general

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[32] The term "Hague/Visby Rules" refers to the Hague Rules 1924, *supra*, note 31, as amended by two protocols, being: 1) the "Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading", adopted at Brussels, February 23, 1968, and in force June 23, 1977 (commonly known as the "Visby Protocol 1968"; for the English text, see **Tetley, *M.C.C.*, 3 Ed., 1988**, Appendix "A" at p. 1132 *et seq.*); and 2) the "Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (August 25, 1924, as Amended by the Protocol of February 23, 1968)", adopted at Brussels, December 21, 1979, and in force February 14, 1984 (commonly known as the "SDR Visby Protocol 1979"; for English text, see **Tetley, *M.C.C.* 3 Ed., 1988**, Appendix "A" at p. 1139 *et seq.*).

[33] *Louis Dreyfus Corp.* v. *27,964 Long Tons of Corn* 830 F.2d 1321, 1988 AMC 1053 (5 Cir. 1987). See also *Orient Mid-East Lines, Inc.* v. *A Shipment of Rice* 496 F.2d 1032 at p. 1039, 1974 AMC 2593 at p. 2601 (5 Cir. 1974); *Hughes Drilling* v. *M/V Luo FuShan* 852 F.2d 840 at p. 842, 1988 AMC 2848 at p. 2851 (5 Cir. 1988), cert. denied 489 U.S. 1033 (1989); Grant Gilmore & Charles L. Black, *The Law of Admiralty*, 2 Ed., Foundation Press, Mineola, N.Y., 1975 at p. 268 (hereinafter cited as "**Gilmore and Black, 2 Ed., 1975**").

average from cargo.[34] Conversely, if the carrier's fault is actionable (e.g. if the carrier has failed to exercise due diligence to make the ship seaworthy before and at the beginning of the voyage, where the Hague or Hague/Visby Rules apply, and that actionable fault has caused the loss or damage), no contribution in general average may be collected from cargo.[35] Such is the law in the United Kingdom and British Commonwealth countries generally.

Under American law, however, contrary to English law, the mere fact that the negligent carrier is immunized from liability for the loss or damage sustained by cargo by one or more provisions of the *Carriage of Goods by Sea Act* (COGSA)[36] does not permit him to claim a general average contribution from cargo.[37] If the carrier at fault is to recover from cargo in general average,[38] the carrier's bill of lading must include a "Jason clause",[39] which has evolved into the "New Jason clause"[40] since the enactment of COGSA in 1936.

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[34] **Tetley**, ***M.C.C.*, 3 Ed., 1988** at p. 717. See, for example, *Western Canada Steamship Co. Ltd.* v. *Canadian Commercial Corp.* [1960] S.C.R. 632 at p. 648, [1960] 2 Lloyd's Rep. 313 at p. 322; *Containerschiffs* v. *Corp. of Lloyd's* 1981 AMC 60 at p. 69 (S.D. N.Y. 1980); *The Admiral Zmajevic* [1983] 2 Lloyd's Rep. 86 at p. 90.

[35] See *The Lendoudis Evangelos* [2001] 2 Lloyd's Rep. 304 at p. 306. The burden of proof of the exercise of due diligence rests with the shipowner seeking a G.A. contribution from the cargo interests. See also *The Danica* [1995] 2 Lloyd's Rep. 264.

[36] 46 U.S.C. Appx. 1300-1315. For text, see **Tetley, *M.C.C.*, 3 Ed., 1988**, Appendix "B" at p. 1199 *et seq*.

[37] **Lowndes & Rudolf, 12 Ed., 1997** at para. D-34.

[38] *J. Howard Smith, Inc.* v. *S.S. Maranon* 501 F.2d 1275 at p. 1279, 1974 AMC 1553 at p. 1556 (2 Cir. 1974), cert. denied 420 U.S. 975 (1975). See also **Buglass, 3 Ed., 1991** at pp. 314-315; **Lowndes & Rudolf, 12 Ed., 1997** at paras. 00.52-00.53.

[39] The "Jason clause" derives its name from *The Jason* 225 U.S. 32 (1912), decided by the United States Supreme Court under the *Harter Act*, 46 U.S.C. Appx. 190-196. The Court held that a shipowner (provided he had exercised due diligence to make the ship seaworthy and properly manned, equipped and supplied) could claim a general average contribution from cargo, even where the damage was caused by faulty navigation of the vessel, provided that the bill of lading excluded liability for such faults (as permitted by the *Harter Act*, sect. 3 (46 U.S.C. Appx. 192)). See *The Jason*, *supra* at pp. 55-56. See also T.J. Schoenbaum, *Admiralty and Maritime Law*, 3 Ed., West Publishing Co., St. Paul, Minn., 2001, vol. 2 at p. 393 (hereinafter cited as "**Schoenbaum, 3 Ed., 2001**"); **Tetley**, ***M.C.C.*, 3 Ed., 1988** at p. 722; **Lowndes & Rudolf, 12 Ed., 1997** at para. 00.52; **Buglass, 3 Ed., 1991** at pp. 306-308. The Jason clause was used to counteract the United States Supreme Court's earlier decision in *The Irrawaddy* 171 U.S. 187 at pp. 192-

In the United States, under a three-pronged burden of proof, the shipowner seeking a general average contribution from cargo must first prove that the general average act occurred, after which cargo, seeking to avoid the liability to contribute, must prove that the ship was unseaworthy and that the unseaworthiness caused the loss or damage. The shipowner may nevertheless succeed in claiming the G.A. contribution if it proves that it exercised due diligence to make the vessel seaworthy prior to the voyage.[41] Where the loss or damage results from some other cause that is not actionable under COGSA, notably an error in the management or navigation of the ship, cargo must contribute in general average, as the Jason or New Jason clause requires.

The Hamburg Rules,[42] at art. 24, are an improvement over the Hague and Hague/Visby Rules in respect of general average. Firstly, art. 24(1) confirms that the Rules do not prevent the adjustment of general average under the contract of carriage or national laws. Secondly, art. 24(2) makes clear that a general average adjustment does not affect the rights of the cargo owner to refuse contribution in general average or the

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196 (1898), holding that, while the shipowner was not responsible for damage to cargo under the *Harter Act*, it could not claim for general average contribution because of the master's negligence.

[40] A "New Jason clause" typically reads as follows:

> "In the event of accident, danger, damage, or disaster, before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequences of which, the Carrier is not responsible by statute, contract or otherwise, the goods, shippers, consignees, or owners of the goods shall contribute with the Carrier in general average to the payment of any sacrifices, losses, or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods."

See also **Buglass**, **3 Ed., 1991** at p. 308.

[41] *Deutsche Shell Tanker Gesellschaft* v. *Placid Refining Co.* 993 F.2d 466 at p. 468, 1993 AMC 2141 at p. 2143 (5 Cir. 1993); *Folger Coffee Company* v. *Olivebank* 201 F.3d 632 at p. 636, 2000 AMC 844 at p. 847 (5 Cir. 2000).

[42] The term "Hamburg Rules" refers to the "United Nations Convention on the Carriage of Goods by Sea", adopted at Hamburg, March 31, 1978, and in force November 1, 1992. For the English text, see **Tetley, *M.C.C.*, 3 Ed., 1988**, Appendix "A" at p. 1143 *et seq*. See also (1978) 17 I.L.M. 608.

liability of the carrier who is responsible for the cargo loss or damage under the Rules to indemnify the cargo owner in respect of any such contribution.[43]

A third major change in general average emerges from art. 5(1) of the Hamburg Rules. This article provides:

> "The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in art. 4, *unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences*." (emphasis added)

The effect of art. 5(1) of Hamburg is to abolish the defence of error in navigation and management of the ship, found in art. 4(2)(a) of the Hague and Hague/Visby Rules.[44] The elimination of that defence would greatly alter general average practice as it is known today. Since the end of the 19th century, general average sacrifices have included numerous claims of carriers, not merely for the cutting away of the mast or anchors as the result of a peril, but also where the carrier has been at fault. Exonerating ocean carriers for the fault of their servants is not an ancient phenomenon but emerged in the last 100 years.[45] This principle permits an ocean carrier to escape liability for the negligence of his servants in the navigation and management of the ship. No carrier in any other

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[43] This is the true meaning of Rule "D", as enunciated in the discussion re Rule D, and *Goulandris* and *Eisenerz*, *infra*, notes 51 and 53.

[44] Art. 4(2)(a) of the Hague and Hague/Visby Rules provides that neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.

[45] On the contrary, the pilot could lose his head for shipwreck under art. XXXIV of the *Rôles of Oléron*; see Sir Travers Twiss, *Black Book of the Admiralty*, vol. 1, London, 1871 at pp. 128-129. Note also the following comment appearing in the first edition (1802) of Abbott, *supra*, note 8 at p. 275 concerning jettison: "They [the goods] must be thrown overboard to **lighten the ship**; if they are cast overboard by the wanton caprice of the crew or the passengers, **they**, or the master and owners for them, must make good the loss." (emphasis given by author). See also A. Browne, *A Compendious View of the Civil Law and of the Law of the Admiralty*, vol. II, J. Butterworth, London, (also dating from 1802) at p. 200: "Other cases occur of more difficulty, e.g. if the necessity of throwing goods overboard arises from the mariners' misconduct in the manner of loading the ship; here the better opinion seems to be, that if the mariner be solvent, he shall pay the damages;...". Browne would allow contribution in this case only if the mariner was insolvent and the jettison benefitted all concerned.

modern mode of carriage (by truck, rail or air) is given this right, nor is any other profession given such relief for the faults of its servants (lawyers, doctors, taxi owners, or even average adjusters).

The adoption of art. 5(1) of the Hamburg Rules would put ocean carriers in step with the rest of the world's carriers and the law of responsibility in general. General average would apply to perils of the sea, fire, etc., as it did in the past, but no longer to the negligence of the carrier or his servants.[46] Cargo interests, incidentally, cannot claim general average when their servants are at fault.[47]

3) Success of the general average act – Rule A

Traditionally, at least in common law jurisdictions, no allowance was made in general average for sacrifices or expenditures, unless they actually succeeded in securing the safety of the property involved in the common maritime adventure.[48] Rule A of the York/Antwerp Rules, does not, however, specify that success is a criterion of general average. It refers merely to the extraordinary sacrifice or expenditure being intentionally and reasonably made or incurred "for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure". Such is also the position in France, where even if the act has no useful result, it is still held to be a general

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[46] Cargo interests are not protected from negligence under the Hague and Hague/Visby Rules and in consequence, the York/Antwerp Rules. For example, no general average claim by cargo will be valid if the loss arises because cargo is insufficiently packed as per art. 4(2)(n), or if cargo is afflicted with an "inherent defect" as per art. 4(2)(m), or if the claim arises from "any act or omission of the shipper or owner of the goods" as per art. 4(2)(i), or in the case of "insufficiency or inadequacy of marks" as per art. 4(2)(o).

[47] See for example arts. 4(2)(i), 4(5) fourth para. and 4(6) of the Hague Rules.

[48] See, for example, *Ocean Steamship Co.* v. *Anderson* (1883) 13 Q.B.D. 651 at p. 662 (C.A. *per* Brett M.R.): "...by the expenditure of which both ship and cargo are saved... whose property has been saved by the voluntary sacrifice...". See also *Columbian Insurance Co.* v. *Ashby and Stribling* 38 U.S. (13 Pet.) 331 at p. 338 (1839) *per* Story J.: "That by that sacrifice the safety of the other property should be presently and successfully attained". See also **Gilmore and Black, 2 Ed., 1975** at p. 245; *The Star of Hope* 76 U.S. (9 Wall.) 203 at p. 228 (1869); *Barnard* v. *Adams* 51 U.S. (10 How.) 270 at p. 303 (1850).

average act as long as it was performed in the common interest.[49] Nevertheless, no general average contributions are payable if both ship and cargo are totally lost before arrival at their destination.[50]

4) Causal connection – Rule C

In order to uphold a claim for general average, there must be a causal connection between the loss and the general average act.

Rule C specifies that "Only such losses, damages or expenses which are the direct consequence of the general average act shall be allowed as general average"[51].

5) Burden of proof – Rule E

Rule E puts the burden of proving that the loss or expense is allowable as general average on the party claiming contribution as follows: "The onus of proof is upon the party claiming in general average to show that the loss or expense claimed is properly allowable as general average."[52]

6) Adjustment and rights of the parties - Rule D

Originally, Rule D of the York/Antwerp Rules 1950 was the source of considerable puzzlement. Rule D seemed to suggest that carriers could enforce

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[49] **Rodière & du Pontavice, 12 Ed., 1997** at para. 490; **Rèmond-Gouilloud, 2 Ed., 1993** at para. 711.

[50] *Chellew* v. *Royal Commission on the Sugar Supply* [1921] 2 K.B. 627 at p. 639, (1921) 6 Ll. L. Rep. 584 at p. 586, upheld [1922] 1 K.B. 12 at pp. 19-20, (1921) 8 Ll. L. Rep. 308 at p. 309 (C.A.). See also York/Antwerp Rules 1994 Rules G and XVII; **Lowndes & Rudolf, 12 Ed., 1997** at paras. G.04, G.05, 16.07, 17.12, 20.17 and 50.97; **Buglass, 3 Ed., 1991** at p. 285; **Rodière & du Pontavice, 12 Ed., 1997** at para. 490; *Ultramar Canada* v. *Mutual Marine Office* [1995] 1 F.C. 341 at p. 362, 1994 AMC 2409 at p. 2422 (Fed. C. Can.).

[51] *Eisenerz G.m.b.H.* v. *Federal Commerce* (*The Oak Hill*), [1974] S.C.R. 1225 at pp. 1240-1242, (1973) 31 D.L.R. (3d) 209 at pp. 219-220; in first instance, [1970] Ex. C.R. 192, [1970] 2 Lloyd's Rep. 332; *Australian Coastal Shipping Commission* v. *Green* [1971] 1 Q.B. 456 at p. 481, [1971] 1 Lloyd's Rep. 16 at p. 20 (C.A.). See also France: Law no. 67-545 of July 7, 1967, art. 26; *Cour d'appel d'Aix*, December 10, 1976, DMF 1978, 207 at p. 209.

[52] *Damodar Bulk Carriers* v. *People's Ins.* 903 F.2d 675 at p. 689, 1990 AMC 1544 at pp. 1565-1566 (9 Cir. 1990). Re burden of proof where cargo owner alleges unseaworthiness of vessel as defence to shipowner's claim for general average contribution, see *Deutsche Shell* v. *Placid Refining Co.* 993 F.2d 466 at p. 468, 1993 AMC 2141 at p. 2143 (5 Cir. 1993). See also Chinese Maritime Code 1993, art. 196.

contribution in general average although they were liable under the law or the Hague Rules for loss or damage to cargo. Rather Rule "D" had two distinct parts:[53]

a) the purpose of the first part of Rule D is to ensure that the adjustment of general average is carried out as quickly as possible without regard to fault and enforcement. (That "fault", which has never been defined in the York/Antwerp Rules, must be determined elsewhere);

b) The second part of Rule D is to the effect that despite the carrying out of a general average adjustment, the party claimed upon retains all his rights, remedies and defences under law. (Rule D cannot overcome the carrier's obligations under the Hague Rules, because of the conjunction of arts. 5 and 3(8) of the Hague Rules.)

This was confirmed by new Rule D, as amended in 1974,[54] which now reads as follows:

> "Rights to contribution in general average shall not be affected, though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure, but this shall not prejudice any remedies or defences which may be open against or to that party in respect of such fault." (emphasis given to the words added in 1974)

7) Application of the Rules

Prior to 1994, Rule B provided that general average sacrifices and expenditures would be borne by the different contributing interests "on the basis hereinafter provided".

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[53] *Goulandris Brothers Ltd*. v. *B. Goldman & Sons Ltd.* [1957] 2 Lloyd's Rep. 207 at p. 214, [1958] 1 Q.B. 74 at pp. 92-93; *Federal Commerce* v. *Eisenerz G.m.b.H.* (*The Oak Hill*) [1974] S.C.R. 1225 at p. 1239, (1973) 31 D.L.R. (3d) 209 at pp. 217-218, [1975] 1 Lloyd's Rep. 105 at p. 111, affirming Noël J. in first instance, [1970] Ex. C.R. 192, [1970] 2 Lloyd's Rep. 332 (Exch. C. Can.).

[54] See *The Jute Express* [1991] 2 Lloyd's Rep. 55 at p. 61; *Waterman S.S. Corp.* v. *Virginia Chemicals, Inc.*, 651 F. Supp. 452 at p. 456, 1988 AMC 2681 at p. 2687 (S.D. Ala. 1987). See also Chinese Maritime Code 1993, art. 197. Note, however, the French Law no. 67-545 of July 7, 1967, art. 27, which reproduces Rule D as it read before being modified in 1974, although in slightly better wording.

In the 1994 revision, Rule B was transferred to become the second paragraph of Rule A, in order to permit a new Rule B to be inserted, dealing with towage.

III. Specific Matters Addressed by the Lettered Rules

1) Five general principles

The five basic principles of general average are found in Rule A. There must be an extraordinary sacrifice or expenditure, which is intentionally and reasonably made against a peril in order to benefit the common venture.[55]

Apart from the foregoing principles, the lettered rules also address a number of issues of a more particular nature, which might more logically have been the object of numbered rules. Because these questions are covered by lettered rules, the Interpretation Rule makes the provisions concerned subject to the numbered rules.

2) Delay

Loss or damage sustained by the ship or cargo through delay, whether on the voyage or subsequently, such as demurrage and any indirect loss whatsoever, such as loss of market, is not admitted in general average.[56]

3) Pollution

By an amendment to Rule C made at Sydney in 1994,[57] no general average allowance is made for losses, damages or expenses incurred in respect of damage to the environment or in consequence of the escape or release of pollutant substances from the

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[55] See section I(1), and the discussion surrounding notes 6 and 7, *supra*.
[56] Rule C, third para. See also Chinese Maritime Code 1993, art. 193, second para. See generally **Lowndes & Rudolf, 12 Ed., 1997** at paras. C.12-C.14.
[57] On the new Rule C, regarding pollution, see **Lowndes & Rudolf, 12 Ed., 1997** at paras. C.29-C.33.

property involved in the common adventure.[58] This provision is, however, subject to several overriding numbered rules.[59]

4) Towage

Rule B of the York/Antwerp Rules 1994[60] provides that there is a common maritime adventure when one or more vessels are towing or pushing another vessel or vessels, provided that they are all involved in commercial activities and not in a salvage operation (first para.). The Rules apply to measures taken to preserve the vessels and cargoes, if any, from a "common peril" (second para.).

The third paragraph of the new Rule B adds an important qualification:

> "A vessel is not in common peril with another vessel or vessels if by simply disconnecting from the other vessel or vessels she is in safety; but if the disconnection is itself a general average act the common maritime adventure continues."

5) Substituted expenses – Rule F

A general average situation may be addressed, in some cases, by methods looked upon as an alternative to the course of action usually followed in similar situations. For example, a damaged vessel may be towed to its destination with its cargo aboard, which avoids incurring, at the port of refuge, the costs of discharge, storage, permanent repairs and reloading (all of which expenditures would be allowed in general average if the usual course of action were followed). Recourse to the alternative method therefore benefits all

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[58] Rule C, second para. See also P. Latron, "Révision des règles d'York et d'Anvers" DMF 1990, 231-234, addendum R. Achard.

[59] Rule VI(a) and (b) on salvage remuneration, as amended in Paris in 1990, allows in general average, salvage remuneration paid under art. 13(1)(b) of the Salvage Convention 1989 in respect of the skill and efforts of salvors in preventing or minimizing environmental damage, although not the "special compensation" exceeding such rewards which is payable under art. 14 of the Convention. Furthermore, Rule XI(d), as amended in 1994, allows certain environmental protection expenses for operations performed by the crew and in ports of refuge.

[60] On the new Rule B generally, see **Lowndes& Rudolf, 12 Ed., 1997** at paras. B.08-B.17.

parties to the common venture, while entailing some extra, "substituted expenses". Rule F provides for the allowance in general average of "substituted expenses" as follows:[61]

> "Any additional expense incurred in place of another expense which would have been allowable as general average shall be deemed to be general average and so allowed without regard to the saving, if any, to other interests, but only up to the amount of the general average expense avoided."

IV. "Artificial" General Average

1) Definition of artificial general average

Artificial general average is the granting of a claim for general average even when one of the five basic principles of general average found in Rule A of the York/Antwerp Rules of 1994 is not present.[62]

2) The evolution of general average

Claims for general average were originally for jettison of cargo,[63] cutting away of the mast or cutting of anchor cables[64] or any acts carried out for the common safety in order to avoid imminent shipwreck caused by a peril of the sea.[65] The need for an

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[61] See also Chinese Maritime Code 1993, art. 195; France: Law no. 67-545 of July 7, 1967, art. 28.
[62] Section I(1) and notes 6 and 7, *supra*.
[63] The Rhodian Law referred to jettison. See Digest of Justinian XIV.2.1. See also the *Rôles of Oléron* art. VIII and XXXII (Twiss, *Black Book of the Admiralty*, vol. 1, 1871 at pp. 96-97, 126-127); *Ordonnance de la Marine* 1681, Book III, Title VII, art. 6, and Book III, Title VIII, art. 1; French Commercial Code 1807, arts. 400(2) and 410 (repealed); Abbott, *supra*, note 8 at pp. 275-276; Browne, *supra*, note 45 at pp. 198-199.
[64] The Rôles of Oléron at art. IX. See Twiss, *ibid*. at pp. 99-101. See also the *Ordonnance de la Marine* 1681 Book III, Title VII art. 6; French Com. C 1807 art. 400 par. 3 and 4 (repealed). See also Abbott, *supra*, note 8 at p. 281; Browne, *supra*, note 45 at p. 199.
[65] See, for example, the French Commercial Code 1807, art. 400, last para. (repealed), which, after listing various specific cases of general average, included a final, omnibus category:

> "*Et en général, les dommages soufferts volontairement et les dépenses faites d'après délibérations motivées pour le bien et le salut commun du navire et des marchandises, depuis leur chargement et départ jusqu'à leur retour et déchargement*."
> (translation:)
> "And in general, damages sustained intentionally and expenditures incurred after reasoned deliberations for the welfare and the common safety of the ship and the goods, from the time of their loading and departure until their return and discharge.")

imminent peril was stressed in many early American decisions on general average.[66] Even today in France, the sacrifice or expenditure, to be allowed in general average, must be made or incurred "*pour le salut commun et pressant des intérêts engagés dans une expédition maritime*" (for the common and urgent safety of the interests involved in a maritime adventure) (emphasis added).[67]

The first general average rules were agreed upon in 1860 as the Glasgow Rules. These were followed by the York Rules of 1864 and the York/Antwerp Rules of 1877, subsequently revised in 1890, 1924, 1950 and 1974.

3) Expansion of general average since 1890

In 1890, the expenses for which the carrier could claim were expanded by Rule X(b) to include the cost of discharging cargo, at a port of loading, call or refuge, when the discharge was "necessary for the common safety" or to permit repairs "necessary for the safe prosecution of the voyage". In 1924, Rule X(b) was expanded to include costs of "handling on board", as well as actual discharge, and the rule was made applicable to fuel and stores, as well as cargo.[68] Expenses of entering a port of refuge, where "necessary for the common safety", as well as charges for leaving such a port, were also allowed in 1890 by Rule X(a).[69] Under Rule XI(b), as drafted in 1950, where the ship's detention in

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[66] See, for example, *Columbian Insurance Co.* v. *Ashby and Stribling* 38 U.S. (13 Pet.) 331 at p. 338 (1839) ("imminent peril"); *Barnard* v. *Adams* 51 U.S. (10 How.) 270 at p. 303 (1850) ("imminent peril which threatened their common destruction"); *The Star of Hope* 76 U.S. (9 Wall.) 203 at p. 229 (1869) ("danger... imminent and apparently inevitable"); *Fowler* v. *Rathbones* 79 U.S. (12 Wall.) 102 at p. 114 (1870) ("imminent peril... to avoid the impending danger"); *The Alcona* 9 Fed. 172 at p. 174 (E.D. Ill.1881) ("imminent danger"); *Bowring v. Thebaud* 42 Fed. 794 at p. 797 (S.D. N.Y. 1890) ("impending danger of physical injury"); *Ralli* v. *Troop* 157 U.S. 386 at p. 419 (1895) ("imminent peril impending over the whole"). See also **Buglass, 3 Ed., 1991** at p. 205.

[67] Law no. 67-545 of July 7, 1967, art. 24. The requirement of urgency was deliberately enacted in this provision, in an effort to restrict the scope of general average. See **Rèmond-Gouilloud, 2 Ed., 1993** at paras. 705 and 706; **Rodière & du Pontavice, 12 Ed., 1997** at para. 483.

[68] **Lowndes & Rudolf, 12 Ed., 1997** at para. 10.42.

[69] *Ibid*. at para. 10.29.

a port of refuge was "necessary for the common safety" or to permit repairs "necessary for the safe prosecution of the voyage", wages and maintenance of the crew during that "extra period of detention" were eligible general average expenditures as well.[70]

The expansion of general average is also reflected in Rule XII, which, for the first time in 1890, permitted in general average, loss of or damage to cargo incurred in the act of discharging, storing, reloading and stowing, where the cost of those measures respectively was admitted as general average.[71] Previously, the rule had been that no allowance for cargo loss or damage during discharge at a port of refuge was permitted, where such discharge was done "in the manner customary at that port".[72] In 1924, the allowance was extended to include damage to or loss of fuel or stores, as well as damage or loss sustained in "handling".[73] Under the York/Antwerp Rules 1994, the words "caused in the act of" have been replaced by "sustained in consequence of", a further, albeit slight, widening of the provision's scope.[74] Significantly, "peril" is not a requirement of the application of Rule XII.

4) The creation of "artificial" general average

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[70] *Ibid*. at paras. 11.17 and 11.18. Although port charges include a wide variety of expenses, they do not include charges such as towage incurred as a result of a fire during discharge at the port of destination, after the common maritime adventure has ended and where they do not inure to the common benefit. See *The Trade Green* [2000] 2 Lloyd's Rep. 451.

[71] *Ibid*. at para. 12.05.

[72] See York/Antwerp Rules 1877 at Rule IX. **Lowndes & Rudolf, 12 Ed., 1997** at para. 12.05, note that the enactment of Rule XII in 1890 resulted from a Rule of Practice introduced by the British Association of Average Adjusters in 1883 and from the difficult-to-reconcile decisions in *Atwood* v. *Sellar* (1880) 5 Q.B.D. 286 (C.A.) and *Svendsen* v. *Wallace* (1885) 10 App. Cas. 404 (H.L.), concerning whether port of refuge expenses should be allowed in general average.

[73] These amendments were made so that Rule XII would correspond with the alterations made simultaneously to Rule X(b). See **Lowndes & Rudolf, 12 Ed., 1997** at para. 12.06.

[74] **Lowndes & Rudolf, 12 Ed., 1997** at para. 12.08, indicate that "in consequence of" would cover the case of refrigerated cargo being discharged at a port of refuge at which no refrigerated storage facilities exist. The damage sustained, although not done "in the act of" its discharge, would nevertheless arise "in consequence of" that operation.

The creation of artificial general average[75] was part of the slow evolution favouring shipowners.

If "peril" was an essential ingredient of general average, it was reduced in importance in 1890 and 1950 by the "safe prosecution" rule of Rules X(b) and XI(b) and the absence as well of the "peril" requirement in these two rules[76] and in Rules X(a) and XII.

In 1924, the York/Antwerp Rules for the first time included lettered Rules A, B, C, D, E and F (which enunciated general principles) as well as the numbered Rules (which referred to particular cases and circumstances).[77]

For the purposes of Rule A, as drafted in 1924, peril did not have to be "immediate", provided that it was "real and not imaginary", "substantial and not merely slight or nugatory".[78] Potential, as opposed to only imminent, danger therefore qualified.[79]

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[75] Described by **Buglass, 2 Ed., 1981** at p. 182 as "'artificial' general average." See also **Buglass, 3 Ed., 1991** at p. 198.

[76] *Eagle Terminal* v. *Ins. Co. of U.S.S.R.* (*Eagle Courier*) 637 F.2d 890 at p. 896, 1981 AMC 137 at p. 146 (2 Cir. 1981); **Buglass, 2 Ed., 1981** at p. 181 *et* seq., **3 Ed., 1991** at p. 198 *et seq*. See also *Ellerman Lines* v. *Gibbs* (*City of Colombo*)[1986] 2 F.C. 463 at pp. 477-478, 1986 AMC 2217 at pp. 2229-2230 (Fed. C.A.). Rules X(b) and XI(b) were amended in 1974, purportedly to restrict "artificial general average". The amendment precludes any allowance in general average for port of refuge expenses (even where necessary for the safe prosecution of the voyage) where the damage to the ship is merely *discovered* at the port or place of loading or call, without any "accident or other extraordinary circumstance connected with such damage having taken place during the voyage" (i.e. subsequent to the loading of cargo). Such post-loading "accidents" may, however, "relate back" to mere "wear and tear" on a previous voyage, without any peril being necessary. See **Buglass, 3 Ed., 1991** at pp. 249, 251 and 255-256.

[77] **Buglass, 3 Ed., 1991** at p. 197.

[78] *Vlassopoulos* v. *The British & Foreign Marine Ins. Co. Ltd* (*The Makis*) [1929] 1 K.B. 187 at p. 200, (1928) 31 Ll. L. Rep. 313 at p. 317, 1928 AMC 1737 at p. 1749; **Lowndes & Rudolf, 12 Ed., 1997** at paras. A.24-A.25, A.91 and A-97; **Rodière & du Pontavice, 12 Ed., 1997** at para. 483. See also *Navigazione Generale Italiana* v. *Spencer Kellogg & Sons* 92 F.2d 41 at p. 43, 1937 AMC 1506 at p. 1509 (2 Cir. 1937), cert. denied 302 U.S. 751 (1937); **Buglass, 3 Ed., 1991** at pp. 205-206. See also *Deutsche Shell* v. *Placid Refining Co.* 993 F.2d 466 at p. 469, note 15, 1993 AMC 2141 at p. 2145, note 15 (5 Cir. 1993).

[79] **Lowndes & Rudolf, 12 Ed., 1997** at para. A.91 notes that several representatives at the 1924 Stockholm Conference emphasized that the definition of general average in Rule A was intended to imply that although the danger must be such as to threaten the common safety, it did not have to be immediately

The next step was the adoption in 1950[80] of the Interpretation Rule, giving the numbered rules precedence over the lettered rules. The lettered rules were to be applied only where the numbered rules did not fully cover a particular case.[81] The Interpretation Rule of 1950 read:

> "In the adjustment of general average the following lettered and numbered Rules shall apply to the exclusion of any Law and Practice inconsistent therewith."
> "Except as provided by the numbered rules, general average shall be adjusted according to the lettered Rules."

The Interpretation Rule has been amended by the York/Antwerp Rules 1994, to provide that the Rule Paramount (requiring any sacrifice or expenditure to be reasonably made or incurred), as well as the numbered rules, take precedence over the lettered rules in cases of conflict between them. In general, however, the numbered rules continue to override the lettered rules to the extent of any inconsistency between them.[82] The words "lettered and numbered" after "following" in the first paragraph have also been deleted, although their deletion does not affect the meaning of the Rule.[83]

Thus, detail was placed before principle. In consequence, general average may now be declared whether or not, as normally required under Rule A, there is a) an extraordinary sacrifice or expenditure made for the common safety or b) a peril, unless

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pending. See also *Eagle Terminal Tankers* v. *Ins. Co. of U.S.S.R.* (*Eagle Courier*) 637 F.2d 890 at pp. 893-894, 1981 AMC 137 at pp. 142-143 (2 Cir. 1981): "The critical issue, then, in the modern law of general average is the seriousness of the danger created by an accident or peril at sea rather than its immediacy". See also *Royal Ins. Co. of America* v. *Cineraria Shipping Co.* 894 F.Supp. 1557 at p. 1561, 1996 AMC 2051 at p. 2057 (M.D. Fla. 1995).

[80] To settle disputes and litigation as seen principally in *Vlassopoulos* v. *British & Foreign Marine Insurance Co.* (*The Makis*) [1929] 1 K.B. 187 at pp. 196-197, (1928) 31 L1. L. Rep. 313 at pp. 316-317, 1928 AMC 1737 at pp. 1746-1748, where the lettered rules were held to be general principles.

[81] **Buglass, 3 Ed., 1991** at p. 199.

[82] **Lowndes & Rudolf, 12 Ed., 1997** at paras. PRE.06 and PRE.07; **Tetley**, ***M.L.C.*, 2 Ed., 1998** at p. 442.

[83] **Lowndes & Rudolf, 12 Ed., 1997** at para. PRE.04 indicate that the omission of the reference to "lettered and numbered" Rules in 1994 was intended to ensure that the Rule Paramount (which is neither lettered nor numbered) fell within the first para. of the Rule of Interpretation.

the numbered rule under which the claim is made so stipulates. The element of reasonableness is the only Rule A requirement which overrides the numbered rules, thanks to the enactment of the Rule Paramount, and the concordance amendment made to the Interpretation Rule, in 1994.[84]

Because there is no specific "peril" requirement in Rules X(b) and XI(b), claims may be made for general average expenses at the port of discharge, even when there is no peril.[85] This is general average "by agreement", or "artificial general average".[86] Non-separation agreements, whereby cargo owners are permitted to have their cargoes forwarded from the port of refuge to the original port of destination aboard other vessels while the original vessel is undergoing repairs at the port of refuge, in return for agreeing to pay their respective general average contributions as if the cargoes had remained aboard,[87] are an attempt to alleviate the difficulties which cargo owners frequently suffer as a result of the delays in delivery and their liability in G.A. for port of refuge expenses, including those which are incurred after the peril has ended.

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[84] *Ibid*., para. PRE.11.

[85] **Buglass, 2 Ed., 1981** at pp. 183-184; **3 Ed., 1991** at p. 199 *et seq*. See also *Eagle Terminal* v. *Ins. Co. of U.S.S.R.* (*Eagle Courier*) 637 F.2d 890 at p. 896, 1981 AMC 137 at p. 147 (2 Cir. 1981), where the Court indulges in sophistry: "In effect, then, the safe prosecution clause is to be read not as eliminating the requirement of peril but as presuming its presence in cases where, because of accident or sacrifice, a voyage cannot safely be resumed without repairs." But the "presumption" is not a presumption that can be over-turned where it is proven there is no peril. Thus "safe prosecution" has replaced "peril." See also *Ellerman Lines* v. *Gibbs* (*City of Colombo*)[1986] 2 F.C. 463 at pp. 475-477, 1986 AMC 2217 at pp. 2227-2229 (Fed. C.A.), citing *Eagle Terminal*, *supra*. The view that it is not the **actual**, but rather the **eventual**, danger that might arise during the subsequent stage of the voyage which gives rise to the general average claim, is a position "rationalized" by the Norwegian author Selmer. See **Buglass, 3 Ed., 1991** at p. 206. See also Chinese Maritime Code 1993, art. 194, which combines the quite similar Chinese versions of Rules X(a), X(b) and XI(b).

[86] **Buglass, 3 Ed., 1991** at pp. 198, 206 and 255.

[87] Non-separation agreements, and their frequent companion, the Bigham clause, which limits the amount charged to cargo under the non-separation agreement to what it would have cost the cargo owners if cargo was delivered to them at the port of refuge and forwarded by them to destination, at their expense, have been termed "reasonable" by the Court of Appeal in *The Abt Rasha* [2000] 2 Lloyd's Rep. 575 at p. 581 (C.A.). On non-separation agreements and the Bigham clause generally, see **Lowndes & Rudolf, 12 Ed., 1997** at paras. G.10-G.17.

V. The Numbered Rules

The numbered York/Antwerp rules provide the specifics of general average losses, damages and expenditures. They include detailed norms on the allowances for jettison (Rule I); loss or damage by sacrifices for the common safety (Rule II); extinguishing shipboard fires (Rule III); cutting away wreck (Rule IV); voluntary stranding (Rule V); salvage (Rule VI), machinery and boiler damage (Rule VII); lightening a ship ashore and consequential damage (Rule VIII), use of cargo, ship's materials and stores for fuel (Rule IX); port of refuge expenses (Rule X); wages and maintenance of crew and other port of refuge expenses (Rule XI); damage to cargo in discharging, etc. (Rule XII); deductions from repair costs (Rule XIII) and temporary repairs (Rule XIV). The remaining numbered rules deal with different aspects of general average adjustments (Rules XV to XXII).

VI. General Average Adjustment

1) Declaration, claims and security

The process of adjusting a general average sacrifice or expenditure begins with the "declaration" of general average, which is ordinarily made by the shipowner through his underwriters.[88]

General average claims must be submitted in writing to the average adjuster within 12 months of the date of termination of the common maritime adventure.[89]

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[88] **Schoenbaum, 3 Ed., 2001**, vol. 2 at p. 394; *St. Paul Fire & Marine* v. *Motormar* 1953 AMC 175 at p. 179 (S.D. N.Y. 1952), aff'd 211 F.2d 679, 1954 AMC 870 (2 Cir. 1954). See also **Lowndes & Rudolf, 12 Ed., 1997** at paras. E.15 and 30.46, stressing that the shipowner has the duty of procuring the general average adjustment. See also J. Hare, *Shipping Law & Admiralty Jurisdiction in South Africa*, Juta & Co., Ltd., Kenwyn, S. Africa, 1999 at para. 21-7.

[89] Rule E, second para.

Failing such notification, the average adjuster may estimate the allowance or the contributory value on the basis of information available to him. He may do the same where no evidence is provided in support of a claim or no particulars are given in respect of a contributory interest within 12 months of a request for such material.[90]

Where cargo has been sacrificed, the shipowner must obtain security from other cargo before delivering it.[91] Such security normally takes the form of a "general average bond" (often a Lloyd's Average Bond[92]) or an undertaking from a cargo underwriter.[93]

2) The adjustment process

Absent any clause on general average in the contract of carriage, general average is ordinarily adjusted at the place where the voyage terminates, according to the law

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[90] Rule E, third para. The Swedish Maritime Code 1994, c. 17, sect. 4, second para., requires any person affected by a general average to deliver without delay to the average adjuster any documents which the latter deems necessary for the examination and apportionment, as well as to supply the adjuster with information. The adjuster demands the parties to submit their claims, arguments and documents, and a public notice of the demand is given in the Official Gazette. See *ibid*., sect. 7, first para.

[91] *American Tobacco Co.* v. *Goulandris* (*Ioannis P. Goulandris*) 173 F. Supp. 140 at p. 182, 1959 AMC 1462 at p. 1525 (S.D. N.Y. 1959), aff'd 281 F.2d 179, 1962 AMC 2655 (2 Cir. 1960); *Crooks* v. *Allan* [1879] 5 Q.B.D. 38 at pp. 41-42 (shipowner liable for failing to collect general average contributions from cargo), cited in *Strang, Steel & Co.* v. *A. Scott & Co.* (1889) 14 App. Cas. 601 at p. 607 (P.C.); **Tetley**, ***M.L.C.*, 2 Ed., 1998** at pp. 447 and 450-451; **Lowndes & Rudolf, 12 Ed., 1997** at paras. 30.43 and 30.44 and case law cited there; Swedish Maritime Code 1994, c. 17, sect. 5, second para., second sentence. See also **Schoenbaum, 3 Ed., 2001**, vol. 2 at p. 394, note 1 and jurisprudence cited there. Such security must be "reasonable". See **Lowndes & Rudolf, 12 Ed., 1997** at paras. 30.48 and 30.49; **Buglass, 3 Ed., 1991** at p. 300; **Rodière & du Pontavice, 12 Ed., 1997** at para. 518; **Rèmond-Gouilloud, 2 Ed., 1993** at para. 724. See also Chinese Maritime Code 1993, art. 202, first para., requiring each contributing party to provide security on request. Cargo is not liable in general average beyond its contributory value, however. See *Ultramar Canada* v. *Mutual Marine Office* [1995] 1 F.C. 341 at pp. 361-362, 1994 AMC 2409 at pp. 2421-2422 (Fed. C. Can.). The shipowner must act equitably in administering the G.A. fund which he collects as trustee of the damaged cargo. See *Zim Israel Navigation Co., Ltd.* v. *3-D Imports, Inc.* 29 F.Supp.2d 186 at p. 191, 1999 AMC 1145 at p. 1148 (S.D. N.Y. 1998).

[92] For the text of the Lloyd's Average Bond (LAB 77), see **Lowndes & Rudolf, 12 Ed., 1997,** Appx. 4 at para. 80.02. See also *The Jute Express* [1991] 2 Lloyd's Rep. 55 at p. 61.

[93] *Castle Insurance. Co.* v. *Hong Kong Islands Shipping Co.* [1984] A.C. 226 at p. 234, [1983] 2 Lloyd's Rep. 376 at p. 379 (P.C.); **Lowndes & Rudolf, 12 Ed., 1997** at paras. 30.50-30.51; **Buglass, 3 Ed., 1991** at p. 301; **Schoenbaum, 3 Ed., 2001,** vol. 2 at p. 394. Where the cargo is uninsured or underinsured, a cash deposit or letter of guarantee from an insurer, or even a bank guarantee, may be required. The York/Antwerp Rules 1994 (Rule XXII) have special provisions on the treatment of cash deposits. For a form of guarantee from the Corporation of Lloyd's, see **Lowndes & Rudolf, 12 Ed., 1997,** Appx. 4 at para. 80.04. For the combined Lloyd's General Average Bond and Guarantee (Form Y), see *ibid*. at para. 80.05.

applicable there.[94] The contract, however, usually provides that the adjustment is conducted according to the York/Antwerp Rules, unless the parties choose another mode of adjustment.[95] Rule G of the York/Antwerp Rules 1994 provides in part:

> "General average shall be adjusted as regards both loss and contribution upon the basis of values at the time and place when and where the adventure ends."
> "This rule shall not affect the determination of the place at which the average statement is to be made up."

The value of property sacrificed for the common safety and the corresponding contributory values of the ship and remaining cargo are measured as at the date of discharge at the port of destination or as of the date on which the voyage was broken up.[96] The same rule applies to expenditures.[97] More detailed provisions on computing

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[94] **Rèmond-Gouilloud, 2 Ed., 1993** at para. 723 notes that the contribution to general average is an autonomous institution from the contract of carriage into which the York/Antwerp Rules are incorporated, so that matters of adjustment not governed by the Rules are governed by the law of the port where the common maritime adventure ends. In the United Kingdom, the law of the place of termination of the voyage also applies to the adjustment of general average, unless the contract specifies otherwise. See **Lowndes & Rudolf, 12 Ed., 1997** at para. 30.08, indicating that it is "unlikely" that this traditional rule has been changed by the U.K.'s *Contracts* (*Applicable* Law) *Act 1990*, U.K. 1990, c. 36, giving effect to the Rome Convention on the Law Applicable to Contractual Obligations (80/934 EEC), adopted at Rome, June 19, 1980 and in force April 1, 1991, O.J.E.C. No. L266/1, October 9, 1980. For the English text of the Rome Convention 1980 and a "Brief Commentary", see W. Tetley, *International Conflict of Laws – Common, Civil and Maritime*, Les Éditions Yvon Blais, Inc., Montreal, 1994, Appendix "F" at pp. 1032-1048.

[95] See **Lowndes & Rudolf, 12 Ed.,** 1997 at para. 30.19. The Chinese Maritime Code 1993, art. 203, permits the parties to agree by contract to the average adjustment rules, failing which the provisions of c. 10 of the Code (the York/Antwerp Rules somewhat modified) apply. The Swedish Maritime Code 1994, c. 17, sect. 1, first para., provides for the "apportionment" (adjustment) of general average according to the York/Antwerp Rules 1974, "unless otherwise agreed". See also French Law no. 67-545 of July 7, 1967, art. 22, second para.

[96] *Fletcher* v. *Alexander* (1868) L.R. 3 C.P. 375 at p. 382 (C.P.); *Mavro* v. *Ocean Marine Insurance. Co.* (1874) L.R. 9 C.P. 595 at pp. 604-605 (C.P.); *Hill* v. *Wilson* (1879) 4 C.P.D. 329. See also **Lowndes & Rudolf, 12 Ed., 1997** at paras. G.04, G.32-G.45 and 30.16-30.18; **Buglass, 3 Ed., 1991** at pp. 282-283; France: Law no. 67-545 of July 7, 1967, art. 32.

[97] *Chellew* v. *Royal Commission on the Sugar Supply* [1921] 2 K.B. 627 at pp. 634 and 639, (1921) 6 Ll. L. Rep. 584 at p. 586, upheld [1922] 1 K.B. 12 at p. 19, (1921) 8 Ll. L. Rep. 308 at p. 309 (C.A.). See also **Lowndes & Rudolf, 12 Ed., 1997** at para. G.05, who point out that this decision put an end to a controversy which had existed previously as to whether expenditures were to be assessed, like sacrifices, as at the end of the adventure, or rather as at the date they were incurred. See also France: Law no. 67-545 of July 7, 1967, arts. 30 and 32; Chinese Maritime Code 1993, art. 199(1), (2) and (3).

the value of cargo lost or damaged by sacrifice are given at Rule XVI,[98] on the loss of freight at Rule XV[99] and on the assessment of damage to the ship, at Rule XVIII.[100] Contributory values are calculated according to Rule XVII.[101] Special rules also deal with undeclared or wrongfully declared cargo (Rule XIX)[102] and with mails, passengers' luggage, personal effects and accompanied private motor vehicles (Rule XVII, last para.),[103] as well as with commissions and interest (Rules XX and XXI).[104]

3) The G.A. statement

The actual adjustment is usually carried out by a professional average adjuster,[105] usually at the shipowner's request.[106] The general average is apportioned by multiplying the value of each contributory interest by a fraction, composed of the value of all the general average expenses, divided by the sum of the contributory values[107]. These calculations can become very complex, with the result that it can take years, in some

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[98] See generally **Lowndes & Rudolf, 12 Ed., 1997** at paras. 16.01-16.34. See also Chinese Maritime Code 1993, art. 198(2); French Law no. 67-545 of July 7, 1967, art. 33.
[99] See generally **Lowndes & Rudolf, 12 Ed., 1997** at paras. 15.01-15.18. See also Chinese Maritime Code 1993, art. 198(3).
[100] See generally **Lowndes & Rudolf, 12 Ed., 1997** at paras. 18.01-18.21. See also Chinese Maritime Code 1993, art. 198(1); French Law no. 67-545 of July 7, 1967, art. 32.
[101] See generally **Lowndes & Rudolf, 12 Ed., 1997** at paras. 17.01-17.98. See also Chinese Maritime Code 1993, art. 199; French Law no. 67-545 of July 7, 1967, arts. 30 and 31.
[102] See generally **Lowndes & Rudolf, 12 Ed., 1997** at paras. 19.01-19.03. See also Chinese Maritime Code 1993, art. 200; French Law no. 67-545 of July 7, 1967, arts. 34 and 35.
[103] Rule XVII, fifth para. See generally **Lowndes & Rudolf, 12 Ed., 1997** at paras. 17.58-17.60. See also Chinese Maritime Code 1993, art. 199(2); French Law no. 67-545 of July 7, 1967, art. 37.
[104] See generally **Lowndes & Rudolf, 12 Ed., 1997** at paras. 20.01-21.13. Re interest payable *after* the issuance of the general average statement, see *Damodar Bulk Carriers* v. *People's Ins*. 903 F.2d 675 at p. 689, 1990 AMC 1544 at pp. 1566-1567 (9 Cir. 1990). See also Chinese Maritime Code 1993, art. 201.
[105] **Lowndes & Rudolf, 12 Ed., 1997** at para. E.14. See, e.g., *The Jute Express* [1991] 2 Lloyd's Rep. 55 at p. 61. In France, where the parties cannot agree on the appointment of an average adjusted, the court may intervene. See Decree no. 68-65 of January 19, 1968, art. 5. See also **Rodière & du Pontavice, 12 Ed., 1997** at para. 502. In Sweden, the average adjuster is appointed by the Swedish Government and must be "learned in law". See Swedish Maritime Code 1994, c. 17, sect. 2, second para. The adjustment is made at a place nominated by the vessel owner or, failing such nomination, at a place in the vessel owner's district where adjustments are usually carried out (*ibid*., sect. 2, first para.).
[106] **Lowndes & Rudolf, 12 Ed., 1997** at para. E.14. The Swedish Maritime Code 1994, c. 17, sect. 4, first para., requires that an average adjustment be requested "without delay" by the vessel owner or operator or any other party to the average.
[107] **Schoenbaum, 3 Ed., 2001**, vol. 2 at p. 395.

cases, for the adjustment to be completed and a final "general average statement" to be issued by the average adjuster.[108]

The issuance of the general average statement does not, in itself, give rise to a cause of action, however. The statement is merely: "...an expression of opinion by a professional man as to what are the appropriate sums payable to one another by the various parties interested in ship and cargo."[109] In consequence, unless the parties have agreed on the quantum owing, the contributions must be quantified by a court judgement or arbitral award.[110]

4) General average liens

True maritime liens for general average contributions owed by the ship exist under international conventions and national laws,[111] especially in civilian countries and

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[108] See, for example, *Pacific Employers Ins. Co.* v. *M/V Capt. W.D. Cargill* 751 F.2d 801, 1986 AMC 1058 (5 Cir. 1985) (general average statement issued six years after casualty); **Schoenbaum, 3 Ed., 2001**, vol. 2 at p. 395.

[109] *Castle Insurance Co.* v. *Hong Kong Islands Shipping Co.,* [1984] A.C. 226 at p. 237, [1983] 2 Lloyd's Rep. 376 at p. 381 (P.C.); See also *Wavertree Sailing* Ship v. *Love* [1897] A.C. 373 at p. 381 (P.C.); *Chandris* v. *Argo Insurance Co. Ltd.* [1963] 2 Lloyd's Rep. 65 at p. 76; *The Zeus* [1993] 2 Lloyd's Rep. 497 at p. 502; **Lowndes & Rudolf, 12 Ed., 1997** at para. 30.04. See also *Empire Stevedoring Co. Ltd.* v. *Oceanic Adjusters* 315 F. Supp. 921 at p. 927, 1971 AMC 795 at p. 802 (S.D. N.Y. 1970); **Buglass, 3 Ed., 1991** at p. 305. The average adjuster's statement is "a provisional estimate and calculation which his [the average adjuster's] principal, the owner, [is] free to adopt or to put aside." See *United States* v. *Atlantic Mutual Ins. Co.* 298 U.S. 483 at p. 491, 1936 AMC 993 at p. 997 (1936).

[110] *Cia Atlantica Pacifica, S.A.* v. *Humble Oil & Refining Co.* 274 F. Supp. 884 at p. 893, 1967 AMC 1474 at pp. 1481-1483 (D. Md. 1967); *Pacific Employers Ins. Co.* v. *M/V Capt. W.D. Cargill* 751 F.2d 801 at p. 803, note 4, 1986 AMC 1058 at p. 1060, note 4 (5 Cir. 1985), cert. denied 474 U.S. 909 (1985); *The Jute Express* [1991] 2 Lloyd's Rep. 55 at pp. 61-62.

[111] International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages, adopted at Brussels, April 10, 1926 and in force June 2, 1931 (120 LNTS 187), art. 2(3) (for English text, see **Tetley, *M.L.C.*, 2 Ed.,** 1998, Appendix "A" at p. 1413 *et seq.*); International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, adopted at Brussels, May 27, 1967 but not in force, at art. 4(1)(v) (for English text, see **Tetley, *M.L.C.*, 2 Ed., 1998**, Appendix "B" at p. 1421 *et seq.*); France: *Loi no. 67-5 du 3 janvier 1967 portant statut des navires et autres bâtiments de mer*, J.O. January 4, 1967, p. 106, art. 31(4) (for text, see **Tetley, *M.L.C.*, 2 Ed., 1998**, Appendix "G" at p. 1479 *et seq.*); United States: *Maritime Commercial Instruments and Liens Act*, 46 U.S.C. 31301(5)(E) (for text, see **Tetley, *M.L.C.*, 2 Ed., 1998**, Appendix "E" at p. 1449 *et seq.*); Swedish Maritime Code 1994, c. 3, sect. 36(5) para. 5. In France, the action for general average contributions is prescribed by five years. See Law no. 67-545 of 7 July 1967, art. 40. See also the Italian Navigation Code 1942, arts. 552(4) and 558(1); Swedish Maritime Code 1994, c. 3 s. 36(5). See generally **Tetley**, ***M.L.C.*, 2 Ed., 1998** at p. 444 (liens and mortgages conventions), pp. 448-449 (U.S.), p. 452 (France). It is noteworthy, however, that the

in the United States. In the United Kingdom and British Commonwealth, however, there is only a statutory right *in rem* against the ship for general average.[112] The ship has a possessory lien for the general average contribution payable by cargo in most jurisdictions.[113]

VII. Contestation of General Average

The principle of general average has been the subject of considerable dissatisfaction in recent years[114] for six main reasons.

1) Exoneration of carriers for faults of the crew

First, shipowners not only claim when perils of the sea and the forces of nature justify the general average act, but also when the act is caused by their own negligence or that of their employees, as long as they are not responsible for that negligence under the

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International Convention on Maritime Liens and Mortgages, 1993, adopted at Geneva, May 6, 1993, but not in force (for English text, see **Tetley, *M.L.C.*, 2 Ed., 1998,** Appendix "C" at p. 1429 *et seq.*) does not provide a maritime lien for general average.

[112] United Kingdom: *Supreme Court Act 1981*, U.K. 1981, c. 54, sects. 20(2)(q) and 21(4); Australia: *Admiralty Act 1988* (Cth), No. 34 of 1988, sects. 4(3)(h) and 17; New Zealand: *Admiralty Act 1973*, No. 119 of 1973, sects. 4(1)(q) and 5(2)(b)(i); South Africa: *Admiralty Jurisdiction Regulation Act 1983*, No. 105 of 1983, sects. 1(1)(t), 11(4)(c)(vi), 11(5)(b) and 11(6). See also **Tetley**, ***M.L.C.*, 2 Ed., 1998** at pp. 445-446; **Lowndes & Rudolf, 12 Ed., 1997** at para. 30.64. Canada, however, has a quasi-maritime lien for general average contributions owing by the ship, which follows the vessel like a true maritime lien, but which ranks after ship mortgages, like a statutory right *in rem*. See **Tetley *M.L.C.*, 2 Ed., 1998** at pp. 451-452. Of course, there is also a right to sue the cargo owner or their insurers *in personam*. See **Lowndes & Rudolf, 12 Ed., 1997** at paras. 30.54-30.56; **Buglass, 3 Ed., 1991** at p. 300.

[113] France: Law no. 67-545 of July 7, 1967, arts. 41 and 42; United States: *Cutler* v. *Rae* 48 U.S. (7 How.) 728 at p. 731 (1849); United Kingdom: *Cargo ex "Galam"* (1863) 2 Moo. P.C. (N.S) 216 at p. 235, 15 E.R. 883 at p. 890 (P.C.), *Castle Insurance Co.* v. *Hong Kong Islands Shipping Co.,* [1984] A.C. 226 at p. 234, [1983] 2 Lloyd's Rep. 376 at p. 378 (P.C.); *Gil & Duffus S.A.* v. *Rionda Futures Ltd.* [1994] 2 Lloyd's Rep. 67; **Tetley**, ***M.L.C.*, 2 Ed., 1998** at p. 446 (U.K.), pp. 449-450 (Canada), p. 452 (France); **Lowndes & Rudolf, 12 Ed., 1997** at paras. 30.36-30.41. See also Swedish Maritime Code 1994, c. 17, sect. 5, second para., referring to c. 13, sect. 20, and c. 14, sect. 25. Note that in Sweden, the cargo owner is not liable personally for average contributions, but only *in rem* with the ship. See *ibid*., c. 17, sect. 5, first para.

[114] For a list of writings critical of general average published since 1864 when the York Rules were adopted, see **Lowndes & Rudolf, 12 Ed., 1997,** Appx. 5 at para. 90.02, note 1. For the six main grounds of dissatisfaction with general average today, see **Tetley, *M.L.C.*, 2 Ed., 1998** at pp. 441-443.

applicable law. Under the Hague Rules and the Hague/Visby Rules,[115] carriers are exempted from liability for their own negligence and for that of their employees, in the navigation and management of the ship. Consignees usually find this odious, given modern regimes of civil liability, where almost all carriers, if not all employers, are directly responsible for their own fault and the fault of their employees.[116]

Indeed, under the same Hague Rules and Hague/Visby Rules, the cargo owner/shipper is absolutely responsible for its own fault and for the fault of its employees for defective goods,[117] insufficient packing,[118] defective marking,[119] etc. (art. 3(5)). That carriers should be exempted from liability for their own negligence by the conjunction of Rule D of the York/Antwerp Rules and art. 4(2)(a) of the Hague Rules and the Hague/Visby Rules[120] therefore causes considerable ill-feeling.

Moreover, cargoes today are often more valuable than the ship, with the result that the contribution of cargo at times seems very high, although this complies with the principle of general average.[121]

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[115] Art. 4(2)(a).

[116] The Hamburg Rules 1978 do not grant immunity to shipowners for the fault of their employees and therefore the Hamburg Rules have been opposed by many segments of maritime commerce, especially general average adjusters. The adoption of the Hamburg Rules would probably result in fewer general average adjustments.

[117] Art. 4(2)(m).

[118] Art. 4(2)(n).

[119] Art. 4(2)(o).

[120] Re Rule D, see *Goulandris Brothers. Ltd.* v. *B. Goldman & Sons Ltd.* [1957] 2 Lloyd's Rep. 207 at p. 214, [1958] 1 Q.B. 74 at pp. 92-93; *Federal Commerce* v. *Eisenerz G.m.b.H.* (*The Oak Hill*) [1974] S.C.R. 1225 at pp. 1238-1239; [1975] 1 Lloyd's Rep. 105 at p. 111, (1973) 31 D.R.R. 3d 209 at pp. 217-218. Re art. 4(2)(a) of the Hague and Hague/Visby Rules and general average liability, see *Drew Brown* v. *The Orient Trader* [1974] S.C.R. 1286 at pp. 1330-1331, [1973] 2 Lloyd's Rep. 174 at p. 183; *Isbrandsten Co. Inc.* v. *Federal Ins. Co*. 113 F. Supp. 357 at p. 358, 1952 AMC 1945 at p. 1946 (S.D. N.Y. 1952), aff'd 205 F.2d 679, 1953 AMC 1033 and 1770 (2 Cir. 1953), cert. denied 346 U.S. 866, 1954 AMC 181 (1953); **Lowndes & Rudolf, 12 Ed., 1997** at para. 00.44.

[121] **Buglass, 3 Ed.,** 1991 at p. 300 notes that where cargo interests are net creditors of general average, they may even request the shipowner to put up security for the payment of his general average contribution owing to them.

2) The Interpretation Rule

The second complaint regarding general average arises from the Interpretation Rule, which gives the numbered rules precedence over the lettered rules. The result is that four of the five basic principles of general average enunciated in Rule A[122] have no effect if a lettered rule contradicts any one of them. Thus, a ship need not be in "peril" if claims are made under Rules X(b) and XI(b), for example.[123] Similarly, in *The Bijela*,[124] the House of Lords allowed "substituted expenses", relying on numbered Rule XIV alone, and reversing the majority in the Court of Appeal,[125] who had relied on Rule F (as well as Rule XIV).

Reasonableness of the general average act is the only sacrosanct Rule A principle. In *The Alpha*,[126], the Court noted that Rule VII overcame the "reasonably" principle of Rule A. This defect was properly corrected in the York/Antwerp Rules 1994 by the insertion of the Rule Paramount: "In no case shall there be any allowances for sacrifice or expenditure unless *reasonably made or incurred*" (emphasis added). The Interpretation Rule was amended simultaneously, so as to ensure the primacy of the Rule Paramount, as well as the numbered rules, over the lettered rules. The other four basic principles of Rule A, however, are without effect, if contradicted by a numbered rule. Nor are the basic principles of the lettered Rules B to G of first importance. They are all secondary to the numbered rules.

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[122] See section I(1) and note 7, *supra*. See the criticism of the Interpretation Rule in **Rodière & du Pontavice, 12 Ed., 1997** at para. 479.
[123] *Eagle Terminal* v. *Ins. Co. of U.S.S.R.* (*Eagle Courier*) 637 F. 2d 890 at p. 896, 1981 AMC 137 at pp. 146-148 (2 Cir. 1981) and *Ellerman Lines* v. *Gibbs* (*City of Colombo*) [1986] 2 F.C. 463 at pp. 474-478, 1986 AMC 2217 at pp. 2226-2230 (Fed. C.A.).
[124] [1994] 2 Lloyd's Rep. 1 at p. 5 (H.L.).
[125] [1993] 1 Lloyd's Rep. 411 at pp. 417 and 419 (C.A.).
[126] [1991] 2 Lloyd's Rep. 515 at p. 521 (Q.B.).

3) Emergence of marine insurance

The third complaint regarding general average has arisen because of the emergence of insurance and marine insurance, particularly in the last three hundred years, which has made general average redundant. In fact, because of the risk involved in general average, all parties now insure against responsibility for general average contribution.[127]

4) Expense and delay in general average adjustments

A fourth complaint arises from the fact that the general average adjustment is expensive and is often so time-consuming that it must be commenced before the right in law to contribution has been decided. Considerable expense can be wasted during this period, while cargo, for its part, is obliged to file a bond or undertaking, during the adjustment.[128]

5) Contribution collection problems

A fifth problem arises from the fact that in general average the monies are collected after the event, as opposed to insurance, where the premiums are paid in advance. Many difficulties are encountered in obtaining general average bonds, while the collecting of contributions from cargo interests is often made difficult in certain

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[127] **Buglass, 3 Ed., 1991** at p**.** 321. See, for example, Institute Time Clauses, cl. 8; Institute Cargo Clauses, cl. 2; Institute War Clauses (Cargo), cl. 2; American Institute Hull Clauses (2 June 1977), lines 120-133; American Institute Increased Value and Liabilities Clauses (3 Nov. 1977), lines 96-100; American Institute Great Lakes Hull Clauses (9 March 1978), lines 141-154. On general average and marine insurance generally, see **Buglass, 3 Ed., 1991** at pp. 321-328; **Lowndes & Rudolf, 12 Ed., 1997** at paras. 50.051-50.129.

[128] See the criticisms of the General Average Committee of the International Union of Marine Insurers (I.U.M.I.), in its 1948 Report, cited by **Lowndes & Rudolf, 12 Ed., 1997,** Appx. 5 at para. 90.30, particularly at par. (a) (increased ship sizes complicating adjustments); (b) (extension of scope of general average increasing complexity of adjustments); (c) (allowance in general average of unnecessary and sometimes excessive expenses); (d) (general average deposits causing excessive clerical work); (h) (general average deposits sometimes grossly over-estimated); (i) (frequent delays in winding up general averages, issuing adjustments, collecting contributions or distributing refunds). See also section VI(3) and note 108, *supra*.

countries, due to exchange control regulations or dishonoured guarantees from state insurance companies.[129]

6) Small general averages

Lastly, unless the general average claim is very large (e.g. adjustments in the bulk and tanker trades), general average adjusters find adjustments quite unremunerative. As a result, there has been considerable recent criticism of small general average claims by adjusters themselves.

One response to some of the above difficulties has been for underwriters to include general average "absorption clauses" in their marine policies, whereby small general average losses are absorbed by the insurer, without the insurer or assured exercising any subsequent recourse against any other party for contribution.[130]

Such "tinkering" with the general average system, however helpful in mitigating some of its practical difficulties, nevertheless does not, in the long run, resolve the fundamental structural problems inherent in the system itself.

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[129] *Ibid*., par. (e) (currency problems where deposits collected in different currencies or general average adjustments drawn up in a currency different to that of the country from or to which the goods are shipped or to that of the ship's home port); (f) (risk of exchange rate fluctuations against which those financing general average deposits have difficulty protecting themselves); (j) (high costs of commission and interest). On exchange fluctuation difficulties affecting general average adjustments, see **Buglass, 3 Ed., 1991** at pp. 292-293.

[130] **Buglass, 3 Ed., 1991** at pp. 325-326; **Lowndes & Rudolf, 12 Ed., 1997** Appx. 5 at paras. 90.26-90.27. Such absorption clauses are quite often found in hull policies, but may also be a feature of cargo policies. A typical wording is that of the American Hull Insurance Syndicate (January 1, 1979), cited by Buglass**, 3 Ed., 1991** at pp. 325-326, reading:

> "In consideration of additional premium paid it is understood and agreed that, subject to the terms and conditions of this Policy, cargo's proportion of General Average (including Salvage, if any) not exceeding $_____ shall be recoverable hereunder, provided claim for contribution from all cargo has been waived by the Assured. It is also agreed that in these circumstances no collecting and settling commission will be recoverable hereunder in respect of either Vessel's or cargo's proportion of General Average."

No complete legal and economic study of the benefits and defects of general average has been done, so that general average continues to exist and function, however questioned it may be.[131]

VIII. The 1994 York/Antwerp Rules

An attempt was made to reform the York/Antwerp Rules at Sydney, Australia, in 1994, but there was considerable opposition, resulting in some cosmetic changes, but very little real attempt to reform either the procedure of adjustment or the substantive meaning and balance of the Rules.

IX. The Nordic and Chinese Maritime Codes

1) Statutory general average

The maritime codes of the four Nordic countries (1994)[132] and of the People's Republic of China (1993)[133] include specific references to general average, and the Nordic Code even refers to the 1974 York/Antwerp Rules. This gives general average some statutory authority, as opposed to its authority derived from convention and

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[131] For partial studies see, however, "Study of the Law of General Average and the York-Antwerp Rules of 1974 (As Amended 1990)", CMI Document: GENAV-1, October 7, 1991, David Taylor, Chairman.

[132] The four countries are Denmark, Finland, Norway and Sweden. They adopted a common maritime code, which came into force on October 1, 1994. One such code is the *Sjölagen* (Swedish Maritime Code) of June 9, 1994, SFS 1994, no. 1009, to which all subsequent references will be made. For the text of the Swedish Maritime Code in Swedish and English, see *The Swedish Maritime Code/Sjölagen*, 2 Ed., *Skrifter utgivna av Axel Ax:son Johnsons Institut för Sjörätt och Annan Transporträtt nr 22*, Jure AB Bokhandel, Stockholm, 2001, being the Swedish Maritime Code 1994, updated to June 30, 2000. In this article, this Code is referred to as the "Swedish Maritime Code 1994".

[133] The "Maritime Code of the People's Republic of China", adopted at the 28th Meeting of the Standing Committee of the Seventh National People's Congress of the People's Republic of China on November 7, 1992, was promulgated on that date by Order No. 64 of the President of the People's Republic of China, and came into force on July 1, 1993. An English translation of the Code has been published by the Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China, Beijing, 1993. In this article, the Code is referred to as the "Chinese Maritime Code 1993".

agreement. Unfortunately as well, very particular language is used in each case, which detracts from international uniformity.

2) The Nordic Codes

The Swedish Maritime Code 1994, at chapter 17, section 1, adopts the "York/Antwerp Rules of 1974 unless otherwise agreed". Thus the York/Antwerp Rules are suppletive and can be opted out of by agreement, as can general average itself.[134]

Sections 2 to 9 of chapter 17 are particular rules of adjustment of a general average loss, which rules do not modify the York/Antwerp Rules.

3) The Chinese Maritime Code

The rules at chapter 10 of the Chinese Maritime Code 1993 can lead to difficulties in the adjustment of general average because they are in particular language, they retain the basic principles of Rule A of the York/Antwerp Rules (art. 193) but also have provisions corresponding to some numbered rules, in particular X(b) and XI(b) (the main source of artificial general average), and they do not retain the Interpretation Rule or the Rule Paramount.

Thus it is not clear whether the principles in art. 193 (including "reasonableness" and "peril") have precedence[135] over the "port of refuge" or "safe prosecution" rule of art. 194 or vice versa.[136]

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[134] By choosing the 1974 Rules, the Swedish Maritime Code 1994 gives priority to the specific cases in the Numbered Rules over the general principles in Rule A. As a result, general average can exist without "peril", and more importantly, "reasonableness" may not be a factor in determining general average because the Rule Paramount was only added to the York/Antwerp Rules in 1994.

[135] In the *Makis* case, *Vlassopoulos v. British & Foreign Marine Insurance Co.* [1929] 1 K.B. 187 at pp. 196-202, it was held that the York/Antwerp Rules are a "self-contained code" and that the specific cases in the numbered rules "are dealt with not by way of mere illustration, but in order to make definite and certain what the Rules decide about certain cases which are on the border line" drawn under the general rules and it was not intended "to contradict the provisions of the general Rules". As a result of the decision in the *Makis*, the Interpretation Rule was added in 1950 to the York/Antwerp Rules. See **Buglass, 2 Ed., 1981** at p. 182.

Article 203 allows parties to opt out of chapter 10 by agreeing to a different set of rules. It is questionable, however, whether or not parties can opt out of general average *altogether*.

X. Conclusion

General average was a useful concept before the advent of marine insurance. It has grown far beyond its original parameters and has become more and more oriented in favour of shipowners and the average adjusting profession.[137] It serves little beneficial use, while it is a complicated, expensive, often unfair and time-consuming mechanism, and out of step with contemporary thinking and practice in other fields of transportation law.

It has been said that general average is necessary so that the captain at sea will take necessary acts to save ship and cargo (such as flooding holds of a ship on fire) which he might not do if the principle of general average did not exist. Most captains do not have the law on their minds when they are saving a ship, and certainly the argument cannot be used in cases of artificial general average.

The refusal to reform the York/Antwerp Rules, along with their innate redundancy, leads to the inevitable conclusion that they should be contracted out of in

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[136] It can also be strongly argued, however, that since the P.R.C. Code does not have numbered and lettered rules, the specific rule in art. 194 would derogate from the general in art. 193 and therefore have precedence in case of conflict.

[137] Douglas Owen, writing as long ago as 1894, referring to the 1877 Report of the Committee of Lloyd's, expressed the following views on the expansion of general average:

> "The forebodings of the Committee [of Lloyd's] have been more than fulfilled. The preposterous and overgrown snowball of abuses has rolled itself bigger and bigger, and still those irresponsible persons who have the rolling of it, but over whom it does not roll, exclaim enthusiastically that it must be rolled bigger yet... Average adjusters and legal faddists vie with one another at the snowball rolling, and happy and distinguished is he who can succeed in sticking a fresh lump upon it."

See **Lowndes & Rudolf, 12 Ed., 1997** Appx. 5 at para. 90.04, note 3.

bills of lading, charterparties and other contracts, or at the very least a clause should be added to the above contracts giving the lettered rules precedence over the numbered rules in every case. Alternatively, parties should include a clause totally excluding the application of general average.

The *abolition*[138] in law of general average itself could only be brought about by an international convention, supplemented (at least in the case of common law countries) by mandatory national statutes, because general average is found internationally in conventional law, i.e. "the general maritime law".[139]

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[138] **Tetley**, ***M.L.C.*, 2 Ed., 1998** at p. 443. The abolition of general average would conform to the wish expressed in the conclusion of **Lowndes & Rudolf, 12 Ed., 1997** Appx. 5 ("The Future of General Average", at para. 90.25):

> "No longer would the carriage of goods by sea be subject to the anachronistic trappings of a bygone age; the costly distribution of losses and 'salvage' expenses could be dispensed with, and the system brought up to date and in line with the similar carriage by road, rail or air, where losses lie where they fall and the carrier endeavours to complete the transit without the need to 'pass round the hat.'"

For other points of view see: V.-E. Bokalli, «L'avarie commune: réflexion critique sur une institution traditionnelle du droit maritime» DMF 1996, 355-368. Bokalli believes that general average is outdated and unnecessary. See also: H.L. Myerson, "General Average - A Working Adjuster's View" (1995) 26 JMLC 465-474, who discusses the abolition of general average but finally concludes that it should be maintained. See also: J. Macdonald, "General Average Ancient and Modern" [1995] LMCLQ 480-493.

[139] W. Tetley, "Maritime Law as a Mixed Legal System (with Particular Reference to the Distinctive Nature of American Maritime Law, Which Benefits from Both Its Civil and Common Law Heritages)" (1999) 23 Tul. Mar. L.J. 317-350 at pp. 337 and 349-350 and at http://tetley.law.mcgill.ca/maritime/marlawmix.htm; W. Tetley, "Justice is Fairness – Is General Average Fair?", Fairplay Magazine, October 14, 1999 at p. 27 and at http://tetley.law.mcgill.ca/publicatons/fairplay.htm#GENERALC.