

# The road to Vancouver - the development of the York-Antwerp Rules

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*General Average is a concept that is peculiar to maritime transport and has its origin in the earliest days of sea-borne trade in the Mediterranean. The basic principle was recognised by sea-faring nations in similar terms: any sacrifice of property, such as jettison, or any extraordinary expenditure that is made for the common safety of ship and cargo is contributed to by the surviving property on the basis of arrived values. In the eighteenth century divergence between English and European/US law and practice in the application of this principle became a serious inconvenience to commercial interests and from 1860 onwards there was a concerted international effort towards greater uniformity, culminating in the York-Antwerp Rules of 1890, which became operative by insertion into contracts of affreightment. This article traces that initial movement for uniformity and outlines subsequent reforms and new controversies that have emerged as the Rules have been revised periodically, including proposals to be considered by the Comité Maritime International in Vancouver between 31 May and 4 June 2004.*

## Introduction

Since 1890 the practical application of the principles of General Average has been governed by the incorporation of the York-Antwerp Rules into contracts of affreightment. After the 1924 revision of the Rules, their custodian has been the Comité Maritime International ([www.comitemaritime.org](http://www.comitemaritime.org)). The Comité Maritime International (CMI) is a non-governmental international organisation dedicated to the unification of maritime law in all aspects, and is made up from National Maritime Law Associations.

The International Union of Marine Insurers (IUMI) expressed dissatisfaction with the last revision of the Rules in 1994 and in their 1998 conference in Berlin, a working group submitted a paper entitled '*General Average – How should it be changed?*'. This resulted in a formal request to CMI the following year for further reform of the York-Antwerp Rules to be given urgent consideration. IUMI felt that the concept of General Average reflected in the current York-Antwerp Rules was outdated. The increasing complexity of modern commerce made General Average costly and time consuming, and created an unnecessary burden for property insurers and unnecessary trouble for commercial interests. Their proposed solution (recognizing the difficulties of completely abolishing a concept embedded in the law of most maritime nations) was to restrict the categories of loss or expense that would be made good by General Average contributions between the parties; more losses would be allowed to lie where they fell.

For reasons that are more fully explained below, the York-Antwerp Rules recognize two main types of allowance:

- i) 'Common safety' allowances: sacrifices of property (such as flooding a cargo hold to fight a fire) or expenditure (such as salvage or lightening a vessel) that were made or incurred while the ship and cargo were in the grip of peril. Since the early nineteenth century, English law and practice largely recognized only this category of General Average.

- ii) 'Common benefit' allowances: once a vessel was at a port of refuge, European countries and the United States generally viewed expenses necessary to enable the ship to resume the voyage safely (but not the cost of repairing accidental damage to the ship) as also being General Average, for example the cost of discharging, storing and reloading cargo as necessary to do repairs, port charges, and wages etc during detention for repairs and outward port charges.

In addition to addressing various minor differences in practice, the main thrust of the York-Antwerp Rules has been to unite these two strands.

IUMI's solution to the problems they perceived was to reduce the number of General Averages by restricting General Average to 'common safety' situations by making it a prerequisite for all allowances that they should relate strictly to sacrifices and expenditure in time of actual peril. Arguments for and against this radical proposal (and other incremental changes proposed by IUMI) were aired at subsequent CMI meetings in Toledo (2000), and Singapore (2001) and a working group was set up to give the matter more detailed consideration. Their report dated 7 March 2003 was progressed further by an International Sub-Committee meeting at Bordeaux in June 2003 and a final version has been made ready to present to the 38<sup>th</sup> CMI Conference which sets out both sides of the debate as evenhandedly as possible.

The purpose of this paper is not to duplicate that report, but rather to provide a context for it. In setting out the historical background, I must fully acknowledge the use made of the work of the past and present editions of '*Lowndes and Rudolf on General Average and the York-Antwerp Rules*' and the writings of Fellows of the Association of Average Adjusters. Any inaccuracies come not from the originals but from my attempt to compress a complex story into a manageable compass.

### **The parting of the ways**

Whilst the concept of General Average is of ancient origin, it was the Ordinance of Louis XIV in 1681 that provided a framework regarding General Average that influenced the rest of Europe to set down maritime law in this important area. By 1750, Codes had been published in Hamburg, Prussia, Denmark, Sweden and Spain together with ordinances in Amsterdam, Rotterdam and Middleburg. The definition found in the French code was followed elsewhere in similar terms:

*'Every extraordinary expense, which is made for the ship and merchandize conjointly or separately, and every damage that shall occur to them from their loading and departure until their return and discharge, shall be reputed average. Extraordinary expenses for the ship alone, or for the merchandize alone, and damage which occurs to them in particular, are simple and particular average; and extraordinary expenses incurred, and damage suffered, for the common good and safety of the merchandize and the vessel, are gross and common average.'*

Although the introduction of Napoleon's 'Code de Commerce' resulted in a partial change in France, the pattern throughout Europe had been set, as was the general practice of allowing all or most expenses while at a port of refuge as General Average. In many countries this latter practice was implied rather than set out in detail, although there were some exceptions, for example the Prussian Code:

*'If a vessel, having sprung a leak or sustained any other damage, be forced to go into a port, all the charges inwards and outwards, and the charges of unloading and re-loading, if the cargo has to be discharged in port in order to repair the vessel, or for other sufficient reasons, and, also, the maintenance of the crew in port and their wages during the delay, shall be general average.'*

Some minor distinctions were also made; for example the Spanish code allowed wages while detained at a port of refuge if the vessel was under time charter, but not if engaged on a voyage freight basis. The Napoleonic Code changed French law to the extent that if resort to a port of refuge was due to Particular Average (accidental) damage, no General Average allowances were permitted. Otherwise, the European practice remained that costs at a port of refuge would be General Average whether the damage in question was due to a General Average act or an accident in the voyage.

The law and practice of the United States developed along similar lines. The Supreme Court defined General Average in the following terms, in *The Star of Hope* [1869]:

*'General average contribution is defined to be a contribution by all parties in a sea adventure to make good the loss sustained by one of their number on account of sacrifices voluntarily made of part of the ship or cargo to save the residue and the lives of those on board from an impending peril, or for extraordinary expenses necessarily incurred by one or more of the parties for the general benefit of all the interests embarked in the enterprise. Losses which give a claim to general average are usually divided into two great classes: (1) Those which arise from sacrifices of part of the ship or part of the cargo, purposely made in order to save the whole adventure from perishing. (2) Those which arise out of extraordinary expenses incurred for the joint benefit of ship and cargo.'*

Writing in 1923 (with reference to American law rather than the York-Antwerp Rules) the American Adjuster Ernest Longdown noted, on the basis of authorities going back as far as 1808, that the following expenses might be allowed at a port of refuge:

*'Pilotage and towage into port, extra men hired to assist in pumping, wharfage on vessel, quarantine dues, discharging cargo, storing and reloading cargo, consular fees, fees of diver, pilotage and towage out of port, surveyor's fees, Bill of Health, restowing cargo, Agency fees, wages and provisions, fuel and engine stores.'*

He continued with regard to ports of call:

*'A port of call, at which the vessel intends to stop for orders, or for coal, or other purpose, in the ordinary course of the voyage, may become a port of refuge, if because of damage sustained, she is so disabled either before reaching such port, or while there, as to be prevented from continuing the voyage until repairs are made, and the cost of wages and provisions, and other expenses common to vessel and cargo, during the extra detention for that purpose, are contributed for. The Supreme Court, in a case of this kind, held that the expense of the wages and provisions during the extra detention caused by the voluntary act of the master was incurred 'to promote the general safety of the associated interests' and that such expense was a proper subject of general average contribution.'* (*Hobson v Lord* [1875])

It is difficult to pinpoint the stage at which English practice began to diverge from other trading nations, but it appears to be around the beginning of the nineteenth century. References can be found in contemporary books by Benecke and Robert Stevens, the earliest professional average adjusters who practiced in the City of London from about 1800 onwards. Stevens was originally an insurance broker whose advice on settling averages was much sought after. Reportedly his life in his new profession was interrupted when he killed a man in a duel and had to flee to France, leaving the business in the hands of his clerk William Richards. It is not recorded whether the cause of the duel was an affair of the heart or a dispute over expenses at a port of refuge.

### **Private Battles**

In a pamphlet published in 1844, the Liverpool based adjuster, Richard Lowndes, outlined the injustice that was already being felt by commercial interests because of variations in the treatment of General Average allowances.

*'It is not often, therefore, that an average is adjusted at any other place than the port of destination. And the law which prevails at that port is binding upon the merchants and the shipowner, however widely it may differ from the law of England, and although all the parties interested may be British subjects. In a case where a British shipowner had recovered from a British merchant, the proprietor of goods on board, a larger sum, as his proportion of a general average, than he would have been entitled to if the average had been adjusted in England, it was decided, in the Court of King's Bench, that he had a right to retain it. It was due according to the laws of the country where the voyage ended, and those laws must be submitted to.'*

*'But the duty of submission to foreign laws does not extend to an English underwriter. His liability is confined to general average as it is understood and practised in England. Such, at least, is the received opinion, and it is constantly acted upon. The question has not yet been expressly determined at law; but the language of the judges, on several occasions, has been such as to favour that view; and, no doubt, any attempt to render an English underwriter liable for foreign average adjustments would incur a formidable opposition. Hence, a merchant may be a loser from the differences between the English and foreign laws of average. In one case of the kind, some little time ago, the loss to the owner amounted to £200 on a shipment of goods, the whole value of which did not exceed £1,200. His share of the average, as adjusted at New York, was about £282, which, of course, he was obliged to pay to the shipowner. His underwriters in London caused a fresh adjustment to be drawn out at Lloyd's, by which it appeared, that his proportion should be only £82; and that sum was all he received from them.'*

He goes on to note that "the English laws are more unfavourable to General Average than those of almost any other country". With regard to what he termed "intermediate" (i.e. common benefit) charges he noted the widespread practice elsewhere of allowing such costs as General Average before continuing:

*'In this country it has, for some years, been customary to apportion such charges in a peculiar manner. The inward port charges and the expense of unloading the cargo are allowed in general average, whether the damage was occasioned by an accident or a sacrifice. The warehouse rent of the cargo is charged specifically to its owners. The outward port charges, as well as the cost of re-shipping the cargo, fall exclusively upon the shipowner, as do the wages and maintenance of the crew during the stay.'*

His distaste for the practice was made clear: *'the English practice is not very strongly supported by authority of any sort. It is of modern origin and adopted by no other country'*. In particular, *'the practice as to outward port charges and the warehousing and reloading of cargo is still more destitute of legal precedents in its favour'*, and he continued with a withering analysis of the arguments put forward by Stevens. However, Lowndes recognised that he was in a minority; the practice of most adjusters and of Lloyd's was against him and he felt this would probably be sufficient to persuade a Court of Law in favour of the status quo.

The date of 1844 puts the pamphlet at the very beginning of his career as an average adjuster; like many other adjusters he would have started as an insurance broker, working in the flourishing Liverpool Insurance Market, whose Underwriters' Association was founded in 1802. As he grew to eminence in the profession his views appear to have changed and the first two editions of the General Average "bible", (*Lowndes on the Law of General Average*) support the English Practice which he had also advocated at the conference leading to the York Rules of 1864. However, by the time of the third edition the youthful iconoclast began to re-appear and from 1876 onwards he ignored English practice in cases where a vessel resorted to a port of refuge due to sacrifice damage, and allowed all costs to General Average. He records that his adjustments were *'after more or less discussion, passed by Underwriters'*, but eventually one such adjustment came before the Courts. In *Atwood v Sellar* [1880] he had the satisfaction of receiving the unanimous support of the Court of Appeal. His youthful fears that a Court would feel constrained by the weight of customs of Lloyd's and the practice of London Adjusters proved to be unfounded. Thesiger L.J. found that the practice of adjusters was not founded upon true principles, nor was it in accordance with authority. The Judge also welcomed the fact that the effect of the Court of Appeal judgement would be to put English law on *'a footing which more nearly assimilates it, in matters in which assimilation is desirable, to the law obtaining in other mercantile communities'*.

Suitably fortified, Lowndes began to follow the practice, now espoused in the third edition of the 'bible', of allowing as General Average the costs of warehousing and reloading cargo, even when the vessel went in to a port of refuge on account of Particular Average (accidental) damage. Although generally approved by the Liverpool insurance market, London was less impressed and the supporters of the existing Custom of Lloyd's resisted one such General Average claim, which then came before the Courts in *Svensen v Wallace* [1883].

The case involved a vessel, carrying a cargo of rice from Rangoon to Liverpool, which sprang a leak in a storm and had to put back to Rangoon for repair. The cargo was landed in order to repair the

ship, stored and later reloaded. The weight of custom was not found to be convincing and in the Queen's Bench Division, Lopes J. felt himself bound by *Atwood v Sellar* on the point of principle, as he concluded:

*'The putting into a port of refuge, if necessary, is an act of voluntary sacrifice, undertaken for the common benefit of the adventure, ship, cargo, and freight, and I think every expense consequent upon it, incurred to enable the ship afterwards to proceed safely on her voyage with her cargo so as to earn the freight, is incurred for the common benefit of the adventure, and is chargeable to general average.'*

However, a majority of the Court of Appeal reversed his decision. Brett M.R. considered that expenses incurred after the vessel was safely in port were unconnected with danger to ship and cargo:

*'Unless, therefore, we are bound by authority to hold otherwise, I am of the opinion that, according to the law of England, when a ship is obliged, for the safety of ship and cargo, to go into and goes into a port of distress in order to repair damage done by sea peril, the expenses of going into the port are general average expenses; that if it is necessary for the safety of both ship and cargo to unload the cargo, or if it is necessary to unload the cargo in order to repair the ship, though it is not necessary for the safety of the cargo, the expense of unloading the cargo is a general average expense; but if the unloading of the cargo is not for either of these causes the expense of unloading is not a general average expense. I am of opinion, in the same way and in the same case, that the expenses of warehousing, guarding, or manipulating the cargo, of repairing the ship, of reloading the cargo, of taking the ship out of port, of the charges of going out of port, are not general average expenses.'*

Unlike Thesiger, he appears to have been unmoved by thoughts of international uniformity as he declared:

*'I should doubt the expediency of making the law of the greatest commercial and maritime country of the world bend to the law of other countries where commercial operations are far less extensive and where commercial adventure is more timid.'*

Whether or not gripped by the same Imperial world view, the House of Lords confirmed that the costs of reloading cargo should not be General Average. Lord Blackburn left the question of the expenses of leaving port undecided and criticised *Atwood v Sellar* in a way that raised doubts about aspects of that case; matters therefore remained in a state of some confusion. Practitioners sought refuge in the Association of Average Adjuster's Rules of Practice which took the judgements of the above cases as a basis for rules which also dealt with some of the open questions. In short, if a vessel entered a port of refuge because of sacrifice damage, all subsequent costs were General Average; if the entry was due to Particular Average damage, General Average finished with the discharge of cargo, storage costs fell on cargo and outward port charges were a charge on freight. Whilst the position in England, and in particular between adjusters in Liverpool and London, had been clarified, there remained the problem that the rest of the world was, however timidly, continuing to march to a different tune.

## **Public Debate**

While Richard Lowndes had been fighting his battles from his office in Liverpool the debate regarding the continuing state of international chaos was very much in evidence on the public stage. In 1860 an appeal was made by the Liverpool Underwriters' Association, Lloyd's and several commercial bodies to the splendidly titled National Association of Social Science. This august body sent a circular letter to all the Maritime countries of Europe and to the United States, signed by the Chairman of Lloyd's, the LUA and a long list of the great and the good in commerce.

*'The system of general average is one which, to prevent confusion and injustice, pre-eminently requires that the same principles should be acknowledged amongst the chief maritime nations. So far is this from being the case, however, that some of the most important rules vary not only in the same country, but in the same port. Uncertainty in law is always an evil; and, in regard to general average, the evil is peculiarly felt. The ship may be owned in one country, insured in*

*another, her cargo owned and insured in several, and the port of destination, where the general average is made up, may be in a country which has different rules to any of the others. What is considered to be particular average on ship in one port is held to be general average in another, so that the owner of an outward-bound ship may find himself unable to recover his loss either from his underwriters at home, or as general average abroad; or, on the other hand, he may be in a position to indemnify himself fraudulently twice over. A similar remark would apply to special charges on freight and on cargo. A very large proportion of the most important questions rests in England nominally upon the decision of that extremely vague authority, 'the custom of Lloyd's,' but really depends upon the idiosyncrasy of the particular adjuster who may be entrusted with the papers. Hence arise many cases where apparently injustice must be done to assurer or assured. Either the assurer finds himself saddled with a loss against which he believed himself insured, or the underwriter pays one which was not considered in the premium...*

*'The evils of such a state of things are notorious and unquestioned, though it may be doubted whether many which are distinctly traceable to it, and are therefore removable, are clearly realised as proceeding from this source. Probably the chief reason which has hitherto prevented any general movement in favour of this reform, is an exaggerated estimate of the difficulties in the way of carrying it out. The difficulties are, no doubt, considerable, but they are far from being insuperable, and the importance of the end amply justifies an attempt to grapple with them.'*

The subsequent conference on 25 September 1860 was attended by all the interested parties and, after three days of discussion, they issued a joint resolution. They resolved that the Council of the Association should work to draw up a Bill which would be enacted by the legislatures of the leading maritime nations, after a six-month period for discussion of the draft. The Bill was to embody the consensus reached about General Average that was reflected in 11 separate resolutions, of which the following two are the most relevant here:

6. *The expense of warehouse rent at a port of refuge on cargo necessarily landed there, the expense of re-shipping it, and the outward port charges at that port, ought to be allowed in general average.*
8. *The wages and provisions for the ship's crew ought to be allowed to the shipowners in general average, from the date the ship reaches a port of refuge until the date on which she leaves it.*

The decision to proceed on the basis of legislation may seem unrealistic to those familiar with the time required for modern conventions to come into effect, but it was clearly considered to be feasible at the time. However, the idea of legislation was to prove deeply unpopular in some quarters, principally amongst Lloyd's Underwriters. This may have been exacerbated by an unfortunate circumstance relating to the distribution of papers intended for a discussion at the Guildhall on 6 June 1862. The draft Bill was circulated in April, giving rather less than the six-month review period intended, but, to make matters worse, the notice of the meeting reportedly did not reach Lloyd's until a few days before the meeting. Understandably, the Committee of Lloyd's felt it was impossible to deal with the matter in such a short time and wrote to the President of the meeting accordingly. All public discussion of General Average was therefore taken off the Agenda, but private consultations continued to take place. The results of these deliberations were published in January 1864, to be followed by the Third International General Average Congress at York in September of the same year. The representative of Lloyd's made it clear that the Committee objected both to the use of legislation and to the terms of the Bill itself and he was instructed to disassociate Lloyd's from the proceedings. The Congress issued a formal resolution making it clear that their objective went beyond enacting a bill in England and remained the establishment of uniformity throughout the maritime world. The 11 York Rules were agreed upon and, although universal legislation remained the ideal, it was moved that, pending legislation, the Rules should be inserted into bills of lading and charter parties.

Little seems to have happened until 1875, when, at the annual Congress of the Association for the Reform and Codification of the Law of Nations, the topic was raised again as being worthy of attention. A meeting was duly convened in August 1877 at Antwerp, attended by 68 delegates. The two delegates from Lloyd's presented a letter from their Chairman protesting against the York Rules being used as a basis for discussion,

*'...for in the opinion of the committee, these rules extend considerably, both in principle and amount, the area in which general average may be recovered, and the attempt to establish uniformity is carried out solely by introducing into the law of England cases of general average which are allowed abroad, but not in England, and which the committee consider most objectionable.'*

The Lloyd's position was that uniformity could best be achieved by universal and total abolition of General Average, or failing that, any differences should be dealt with by the restriction rather than the enlargement of existing English practice. Having started the 18<sup>th</sup> Century with a restriction in General Average under English practice, the Committee of Lloyd's plainly had no desire to see the situation reversed as the century moved to its close. However, the feeling of the meeting was against the views expressed by the Lloyd's delegates and the York Rules were approved with some minor amendments. A proposal to include a definition of General Average in the Rules was not successful. The emphasis on legislation seems to have diminished and the General Shipowners' Association in 1878 recommended that the *'most effectual mode of procedure'* would be a general agreement by all parties to insert appropriate wording in bills of lading and charter parties.

Despite the continuing opposition from Lloyd's, other underwriters and mutual associations apparently agreed to the inclusion of appropriate General Average clauses without additional premium. In the interim, cases like *Atwood v Sellar* had narrowed the gap between the English law and York Rules versions of General Average. Richard Lowndes was no doubt pleased to note at the 1880 meeting of the Association of Average Adjusters that all but two of the York Rules were now mirrored by English law and practice. By 1881 the York Rules were said to have become 'all but universally adopted', and the revised York-Antwerp Rules agreed in 1890 were equally well received.

Much had been achieved in thirty years, and it is a story of remarkable co-operation between the commercial interests of so many nations, but some luminaries clearly felt there was still unfinished business to attend to. The York-Antwerp Rules of 1890 remained essentially a list of agreed practices on specific points and contained no general statement of principles. As sail gave way to steam, the growth in international trade became ever more rapid and it was felt that the present rules might lose their value as circumstances changed. Constant revision could perhaps be avoided if some overall guiding principles could be identified and allowed to illuminate the practical solutions offered by individual rules.

Articles appeared and papers were presented on various occasions and in 1910 Dowdall K.C., who was a leading figure in the movement, presented a paper on the 'Codification of General Average' to the International Law Association conference in London. He subsequently acted as convener of a working party drawn from the major maritime nations which reported in 1912. A draft code was produced in 1914, to a mixed reception, but further progress was halted by World War I. Eventually, a new version of the York-Antwerp Rules, which updated some individual rules and was prefaced for the first time by seven rules outlining general principles, was presented to the 1924 International Law Association conference in Stockholm. After four days of review the new rules were agreed and adopted by the general conference under six resolutions, including:

*'4. In the opinion of this Conference the draft as so amended will attain the objects to which the International Shipping Conference directed its attention, viz:*

*First Bring the York-Antwerp Rules 1890 into line with modern requirements.*

*Second Establish principles which may be accepted and applied in those cases which are not provided for in such rules.'*

The modern structure was now in place and received the blessings of representatives of Insurers, (including Lloyd's), Shipowners, and several chambers of commerce and other merchants' organisations. No doubt many at the final conference dinner felt a warm glow of satisfaction, helped by the fine wines.

This period of certainty was relatively short lived. Everyone at Stockholm evidently thought they knew what they wanted and had achieved, but Roche J. in *Vlassopoulos v British and Foreign Marine Insurance Co.* [1929] thought otherwise. The foremast of the *Makis* had collapsed at a loading port,

causing damage as a derrick fell into a hold. The vessel was not in immediate peril but repairs were necessary for the safe prosecution of the voyage. Allowances were claimed under Rules X and XI of the 1924 Rules while these repairs were done. The judge held that such allowances were not valid because of the absence of imminent peril and:

*'...a general set of Rules provided laying down the general principles which are to operate, then the Rules go on to deal with certain specific cases, and I am satisfied on the true construction of the Rules that those cases 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 and which might be held to be on one side or the other of the line which is to be drawn under the general Rules ... It is, I think, as if the Rules had provided that Rules A, B, C, and so forth constitute the general rules for general average and then followed the words: 'And in particular 1,2,3,4' and so on 'are cases of general average.'*

Although undoubtedly consistent with his earlier judgement given in 1926 regarding the 1890 Rules, this construction was exactly opposite to the intentions of the Stockholm Conference and international practice. An accord (the *Makis* agreement) was speedily drawn up by the leading British Shipowners and Underwriters to the effect that: *'Except as provided in the numbered Rules 1 to 23 inclusive, the adjustment shall be drawn up in accordance with the lettered Rules A to G inclusive'*. This wording was the basis for the Rule of Interpretation that was introduced in 1950 and is found in all subsequent versions. This basis of interpretation works well in practice, although it has taken two subsequent revisions of the Rules to iron out two unsatisfactory consequences.

In solving the *Makis* problem, the Rule of Interpretation had also let in situations where nothing untoward had happened during the common venture other than the mere discovery of a pre-existing damage. If the damage found required repairs necessary for the safe prosecution of the voyage, then allowances under Rules X and XI could be made. In his AAA Chairman's address in 1969, John Crump called this 'an outstanding candidate for exclusion'. Counsel's opinion confirmed that such allowances were correct according to a proper construction of the Rules but adjusters followed that advice with reluctance. The remedy was provided by the 1974 Rules which excluded such allowances when there had been no accident or extraordinary circumstances connected with the damage during the voyage.

The other anomaly only came to light with the case of *Corfu Navigation Co. v Mobil Shipping* [1991]. The *Alpha* grounded in the mouth of the Zaire river in heavy silt conditions, and damage to the main engine occurred during refloating operations. The Court found that this was partly due to the unskilful way the Master conducted operations but that Rule VII only required an 'actual intention to refloat the ship' with no mention of 'reasonableness'. The requirement for reasonableness in Rule A would not be imported into a numbered Rule so the claim should succeed. It is highly unlikely that any particular rule was intended to escape in this way when the whole thrust of the Rules was towards equity, but the 1994 Rules put the matter beyond doubt by stipulating in a Rule Paramount that 'In no case shall there be any allowance for sacrifice or expenditure unless reasonably made or incurred'.

As maritime commerce changed, new challenges emerged for the international community. During the 1970's and 1980's, a series of notorious tanker casualties focused the world's attention on the catastrophic effects of oil pollution. The importance of the role of the salvor in also saving the environment from damage as he rescued property was widely recognised, as was the fact that the 'no cure, no pay' contracts left the salvor unreasonably exposed.

Although a limited 'safety net' was made available under Lloyd's Open Form it was recognised that this did not go far enough and a new system of special compensation payable to Salvors was introduced by Article 14 of the International Convention on Salvage 1989. Article 14 provided for special compensation to be paid by the Shipowner to the Salvor for preventing or minimising damage to the environment by the ship and/or her cargo, in circumstances where the Salvor had failed to earn a sufficient customary salvage reward under Article 13 (which dealt with the criteria for fixing the reward and included efforts by the salvor to prevent or minimise damage to the environment). It was agreed (the so-called 'Montreal compromise') that Article 13 awards would be payable by property underwriters but that Article 14 'special compensation' would be paid by the vessel's P&I Club. An amendment to Rule VI of the York-Antwerp Rules 1974 was put forward and adopted in 1990, making it clear that only Article 13 awards could be allowed in General Average. However, other problems

relating to pollution liabilities were becoming ever more apparent and began to be addressed seriously in the run up to the next revision of the Rules.

Under the York-Antwerp Rules 1974 there is no explicit reference to pollution-related liabilities and expenditure, but it was well established in practice, and supported by authority, that such liabilities and expenditures can fall within General Average. Assume, for example, a loaded tanker runs aground in the path of an approaching typhoon and with no salvage assistance in the vicinity. The Master decides to jettison part of the cargo of oil rather than risk the Total Loss of ship and cargo and the much larger spillage of oil that would occur if the vessel remains aground and the typhoon strikes. Under the York-Antwerp Rules 1974, not only will the jettison be allowed in General Average, but also the direct consequences of the jettison, e.g. liabilities to nearby fish-farm owners and other environmental damage.

When the 1974 York-Antwerp Rules were under revision, many adjusters expressed concern at the practical problems that were involved in allowing environmental liabilities in General Average. As casualties such as the *Exxon Valdez* had shown, such liabilities could exceed the likely values of ship and cargo by a huge margin; litigation also meant that the extent of these liabilities often could not be determined for many years, delaying the adjustment process. Property insurers felt that they were becoming exposed to pollution liabilities through the 'back door' of General Average, whereas liability insurers (principally the P&I Clubs) felt that if something could be shown to benefit property interests their insurers should pay. Trying to fight this battle on a case-by-case basis was plainly highly undesirable and the York-Antwerp Rules again provided the medium for a workable compromise.

Following discussions at the 1994 Sydney CMI Conference, it was decided to exclude pollution liabilities, and the York-Antwerp Rules 1994 adopted a new exclusion under Rule C, stating that:

*'In no case shall there be any allowance in General Average 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 property involved in the common maritime adventure.'*

However, it was realised that in many cases expenses relating to pollution avoidance (as opposed to liability) had to be incurred for the common safety, and it was felt that these should not be excluded. Rule XI was therefore amended to provide in a new sub-paragraph (d) a list of circumstances in which anti-pollution measures would be allowed, for example in order for a ship to be permitted access to a port of refuge, or to carry out an operation for the common safety, or to enable repairs to be effected. Actual clean-up costs still remain for the account of the Owner or his P&I Club, and it is usually a straightforward matter to divide one category of expense from the other.

### **Future revision**

It is perhaps unsurprising that a unique concept such as General Average has also produced a unique protocol in the York-Antwerp Rules: designed by committee, but governed by practical considerations and ready to respond to changes in maritime trade; not a Convention, but enjoying a universality of application that few Conventions can match.

However successful in the past, General Average and the York-Antwerp Rules must earn their place in the future on the basis of practical merit and relevance to modern trade. The maritime community has already taken action with regard to General Averages where the amounts involved are small in the context of the maritime adventure, by adopting General Average absorption clauses in their hull policies. These clauses provide for hull insurers to pay General Average in full up to a specified limit, thus avoiding the expense and trouble of collecting security and contributions from cargo interests. A straw poll amongst colleagues suggests that over 70 per cent of blue water tonnage has an absorption clause of some kind and that this has helped to reduce the number of cases involving collections from cargo by some 50 per cent over the last five years. The effects of the ISM Code and increasing containerisation have also played a part in this reduction.

Once uneconomic cases are excluded, many feel that General Average still has a vital role to play and most practitioners feel uneasy about losing the common benefit elements that seem to work well in practice. Marine casualties are complex problems that bring together different parties, often in

great number, whose interests sometimes coincide and sometimes conflict. The resolution of the conflicts is made possible by the background of international conventions, case law, established practice, and the frame work of the York-Antwerp Rules – in short, one does not have to negotiate everything from scratch, or reinvent the wheel every time a casualty occurs. The best contemporary analogy is perhaps of the Help menu on a computer screen: click on the York-Antwerp Rules menu and in plain language, in only a few pages, a clear set of guidelines is set out. Complex points of principle do arise, but one should not lose sight of the remarkable simplicity of the basic text, which allows the voyage to continue while rights and liabilities are preserved for future action, if appropriate.

It is not difficult to see the practical attraction of a concept of General Average that includes the common benefit idea. As Willmer J. said in relation to the salvage case *The Glaucus* [1948]:

*'It is no use saying that this valuable property...is safe, if it is safe in circumstances where nobody can use it. For practical purposes, it might just as well be at the bottom of the sea.'*

For commercial men the objective of a voyage is not safety in a port in an obscure location but safe arrival at destination. The fact that there is a seamless transition between common safety and common benefit has a profound effect on the avoidance of disputes, leaving aside the significant implications relating to abandonment of the voyage and the demonstration of a constructive total loss claim on a hull policy if the common benefit expenses were to disappear. The agreed framework for dealing with common benefit expenditure increases the likelihood that the voyage will be prosecuted without lengthy legal wrangling and delay; the ability to allow transshipment costs, for example, as substituted expenses will often bring cargo forward very rapidly.

Such benefits are apparent even to those that have had strong criticisms to make in other areas. Knut Selmer commented in *"The Survival of General Average, a Necessity or an Anachronism?"* in 1958:

*'The distribution of 'common benefit' expenses has psychological implications which should not be overlooked. The sharing of expenses incurred for the continuation of the transport after vessel and cargo have been brought to safety in a port of refuge probably means a great deal for the smooth winding up of complicated averages. It acts as a 'buffer' between the parties in situations where their interests may diverge materially. The equitable distribution makes it easy to arrive at practical arrangements regarding repairs and on-carriage. Regardless of the nature of the arrangement, the parties will to some extent look upon it as a compromise solution, because the costs of the measures chosen are divided proportionately between them. Legal proceedings will consequently be rare, and questions of law will be veiled, particularly when it comes to the shipowner's obligation to fulfil his promise to transport. The writer believes that this function of the 'common benefit' rules is of considerable value.'*

At a time when the virtues of mediation and compromise in commercial life are being re-discovered, this is a part of the York-Antwerp Rules' legacy that seems to be very much in tune with the modern world.

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